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CAUTION! ESTOPPEL AHEAD:

CLEVELAND V. POLICY MANAGEMENT SYSTEMS CORPORATION

*Lawrence B. Solum**

I. INTRODUCTION

*Cleveland v. Policy Management Systems Corporation*¹ will present the United States Supreme Court with the opportunity to make its first modern² pronouncement on the doctrine of judicial estoppel,³

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1. 120 F.3d 513 (5th Cir. 1997), *cert. granted in part*, 119 S. Ct. 39 (1998).

2. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975) (mentioning “judicial estoppel” but not analyzing it in context in which intent of Court to refer to preclusion against inconsistent positions, as opposed to other forms of preclusion law, can be inferred). The Supreme Court addressed principles of law that are akin to judicial estoppel in the nineteenth century. *See Davis v. Wakelee*, 156 U.S. 680, 689 (1895) (“It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”); *Philadelphia, Wilmington, & Baltimore R.R. Co. v. Howard*, 54 U.S. (13 How.) 307, 337 (1851) (affirming exclusion of testimony contrary to position taken in prior litigation and stating “[w]e are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point.”). *Davis v. Wakelee* and *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Howard* addressed legal rules that appear to have operated both as rules of evidence—excluding testimony inconsistent with prior state-

also known as preclusion against the assertion of inconsistent positions.⁴ The Supreme Court will address judicial estoppel in a particularly sensitive and controversial context. The courts below, the Northern District of Texas and the Fifth Circuit, invoked the doctrine of judicial estoppel as the basis for a grant of summary judgment against Carolyn Cleveland.⁵ Ms. Cleveland claimed that Policy Management Systems Corporation terminated her after it refused to grant requested accommodations as required by the Americans with Disabilities Act (ADA).⁶ Ms. Cleveland's claim was judicially estopped based on her prior application for social security disability benefits, in which she had stated that she was unable to work.⁷

The aim of this Commentary is not to argue for a particular resolution of the dispute between Ms. Cleveland and her former employer. Rather, the goal is to address a more general question: Is the *Cleveland* case an appropriate vehicle for the Supreme Court to

ments—and as equitable defenses.

3. See generally Lawrence B. Solum, *Stare Decisis, Law of the Case, and Judicial Estoppel*, in JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 134 (3d ed. 1998) (restating federal law of judicial estoppel); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4477 (1981) (covering preclusion of inconsistent positions); Walter S. Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 BROOK. L. REV. 245 (1940) (comparing equitable estoppel and judicial estoppel); Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244 (1986) (sketching out the general policies behind judicial estoppel); Douglas W. Henkin, Comment, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. PA. L. REV. 1711 (1991) (arguing for the abandonment of the doctrine of judicial estoppel); Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409 (1987) (defending the workability of judicial estoppel); Eric A. Schreiber, Comment, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions*, 30 LOY. L.A. L. REV. 323 (1996) (seeking to reinvigorate the doctrine of judicial estoppel); David M. Woolley, Note, *Procedure—Judicial Estoppel—Sworn Statements*, 11 SW. L.J. 96, 96-97 (1957) (discussing relationship between judicial and equitable estoppel).

4. See Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 HARV. L. REV. 1132 (1946) [hereinafter Harvard Note].

5. See *Cleveland*, 120 F.3d at 513.

6. See 42 U.S.C. §§ 12101-12134 (1994).

7. See *infra* text accompanying notes 13-32.

endorse the seldom invoked and controversial⁸ doctrine of judicial estoppel? That doctrine originated in the needs of a procedural system that was substantially different from the contemporary system, which is shaped by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Contemporary understandings of the respective role of judge and jury and the rules of evidence suggest that a punitive doctrine of judicial estoppel is inconsistent with the search for truth—the hallmark of American civil procedure. Moreover, contemporary understandings of the doctrines of claim and issue preclusion eliminate much of the need for a distinct doctrine of judicial estoppel.

This Commentary will proceed as follows. Part II, “The Context of *Cleveland*,” lays out the facts and procedural history of the Fifth Circuit’s decision and examines the law of judicial estoppel in general and the preclusion of ADA claims in particular.⁹ Part III, “Understanding Judicial Estoppel: History and Function,” takes a larger view of the judicial estoppel doctrine and discusses its history and function.¹⁰ Part IV, “The Case against Supreme Court Endorsement of Judicial Estoppel,” advances the central thesis of this Commentary: *Cleveland* is an inappropriate vehicle for the Supreme Court to endorse the controversial doctrine of judicial estoppel.¹¹ The conclusion of this Commentary is that the Supreme Court should resolve *Cleveland* on grounds other than an application of the doctrine of judicial estoppel, either rejecting the doctrine of judicial estoppel outright or reserving the question of its contemporary viability for another day.¹²

II. THE CONTEXT OF *CLEVELAND*

A. *The Facts and Procedural History*

In August 1993, Carolyn Cleveland took a job with Policy Management Systems Corporation (PMSC). In January 1994, she had a

8. See *infra* notes 33-34 and accompanying text.

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See *infra* Part V.

stroke resulting in the condition of aphasia, affecting her concentration, memory, and ability to speak, read, and spell. Ms. Cleveland's daughter helped her file an application for social security. That application included the statement that she was and continued to be "unable to work because of [her] disabling condition on January 7, 1994."¹³ In April 1994, Ms. Cleveland went back to work with her doctor's approval and so informed the Social Security Administration.¹⁴ Back at work, Ms. Cleveland asked her employer to accommodate her aphasia disability by giving her computer training, permitting her to take work home in the evening, and transferring her to another position. She also asked her employer to permit a Texas Rehabilitation Commission counselor to assist her. PMSC denied all of these requests and terminated Cleveland in July 1994.¹⁵

Ms. Cleveland renewed her disability benefits application in September 1994, and in May 1995, she asked for a hearing before an Administrative Law Judge (ALJ). The ALJ found that Ms. Cleveland had become disabled on January 7, 1994, and granted her request for disability benefits.¹⁶ Before the ALJ decided her claim, however, Ms. Cleveland filed a civil action in the United States District Court for the Northern District of Texas. Her complaint alleged that PMSC's termination of her violated the ADA and the Texas Labor Code.¹⁷ PMSC moved for partial summary judgment on the ground that Ms. Cleveland's representations in her disability benefits application precluded her from claiming that she is a "qualified individual with a disability" under the ADA.¹⁸ The district court granted this motion and thus entered a final judgment against her on her federal claim and dismissed her state law claim without prejudice.¹⁹

Ms. Cleveland appealed to the United States Court of Appeal for the Fifth Circuit. She argued the District Court erred by granting summary judgment against her. As stated by Judge Wiener in his

13. *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 514 (5th Cir. 1997), *cert. granted in part*, 119 S. Ct. 39 (1998).

14. *See id.*

15. *See id.* at 515.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

opinion for the court, Ms. Cleveland advanced four arguments on appeal:

[H]er position in pursuit of social security disability benefits and her instant position under the ADA are not inconsistent, as (1) she was disabled for purposes of social security disability benefits when she filed the initial application; (2) when she returned to work, she notified the SSA and withdrew her claim for benefits; and (3) she became disabled *again* for purposes of social security disability benefits only after and as a result of her termination. . . . [And (4)] from the time she returned to work until she was terminated, she could have performed the essential functions of her job with a reasonable accommodation, i.e., during that period she was a "qualified individual with a disability."²⁰

The Court of Appeals rejected Ms. Cleveland's arguments and affirmed the district court's grant of summary judgment.²¹

Judge Wiener noted that the standard of review for a grant of summary judgment is *de novo*,²² he then observed the surface inconsistency between Ms. Cleveland's assertion that she was able to work with reasonable accommodations for the purpose of her ADA claim and her assertion that she was unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment"²³ for the purposes of her disability benefits claim. Judge Wiener then gave a brief statement of the doctrine of judicial estoppel, or preclusion against inconsistent positions: "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process."²⁴ This statement of the doctrine of judicial estoppel is abstract and incomplete. Judge Wiener's formulation does not provide a rule of law that could be applied to the facts of a particular case.

20. *Id.*

21. *See id.* at 519.

22. *See id.* at 515.

23. *Id.* at 516 (quoting 42 U.S.C. § 423(d)(1)(A) (West Supp. 1997)).

24. *Id.* at 517.

The next step in the opinion was to consider the application of the judicial estoppel doctrine to the facts and procedural history of *Cleveland*. Speaking for the Fifth Circuit, Judge Weiner stated: "We decline, however, to adopt a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA."²⁵ The opinion reasoned that a per se rule of judicial estoppel was inappropriate because "under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive."²⁶ The Fifth Circuit advanced three supporting reasons for this conclusion. First, the legal standards for establishing disability under the ADA and the Social Security Act (SSA) differ with respect to the kind of evidence that is required. The ADA requires individualized fact-finding whereas the SSA allows for generalized presumptions.²⁷ Second, the SSA does not preclude a finding of disability where a claimant might work if given reasonable accommodations by an employer.²⁸ Third, the substantive provisions of the SSA allow persons with disabilities to receive benefits and work under certain circumstances, including trial work periods and for pay that falls below a statutory level.²⁹

Judge Weiner's opinion then set forth a rule governing judicial estoppel in cases involving ADA claims and claims for disability benefits:

We hold therefore that the application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a "qualified individual with a disability." We thus leave open the possibility that there might be instances in which the nature and content of the disability statement submitted to the SSA, in the context of the particular facts of the case, would not absolutely bar a plaintiff from attempting to demonstrate that despite his total disability for Social Security purposes he is

25. *Id.*

26. *Id.*

27. *See id.*

28. *See id.* at 517-18.

29. *See id.* at 518.

a “qualified individual with a disability.” Conceivably, such a plaintiff might be able to rebut this presumption if he were able to present credible, admissible evidence—such as his social security disability benefits application, other sworn documentation, and his allegations relevant to his ADA claim—sufficient to show that, even though he may be disabled for purposes of social security, he is otherwise qualified to perform the essential functions of his job with a reasonable accommodation and thus not estopped from asserting an ADA claim.³⁰

The court concluded that Ms. Cleveland had not presented evidence raising a genuine issue of material fact that would rebut the presumption that she was judicially estopped from asserting that she was a “qualified individual with a disability” for the purposes of the ADA but unable to work for the purposes of her social security disability claim.³¹ Hence, the Fifth Circuit affirmed the trial court’s grant of summary judgment.

On October 5, 1998, the United States Supreme Court granted Carolyn Cleveland’s petition for a writ of certiorari. The order granting the writ stated:

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to the following two questions: 1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a “qualified individual with a disability” under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. 2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of, disability insurance benefits when a person asserts she is a “qualified individual with a disability” under the ADA?³²

30. *Id.*

31. *See id.*

32. 119 S. Ct. 39 (1998).

The Supreme Court will consider these issues in light of a variety of decisions by the lower federal courts that address the doctrine of judicial estoppel in general and the application of that doctrine to ADA claims similar to that advanced by Ms. Cleveland in particular.

B. *The Current State of the Law*

Our investigation of the context in which the Supreme Court will hear *Cleveland* now turns to the law. Initially, it is useful to look at the current status of the doctrine of judicial estoppel in the lower federal courts. This Commentary will then consider the application of this doctrine to ADA claims.

1. The doctrine of judicial estoppel in the lower federal courts

Invocation of the doctrine of judicial estoppel is actually quite rare,³³ especially when the doctrine is compared to the more traditional forms of preclusion law, claim preclusion—also known as *res judicata*—and issue preclusion—also known as collateral estoppel. Although the doctrine remains controversial³⁴ and the elements of judicial estoppel have never been clearly defined,³⁵ most of the

33. See *Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210, 1212 (8th Cir. 1998) (“Judicial estoppel is a seldom-invoked doctrine . . .”); *Konstantinidis v. Chen*, 626 F.2d 933, 936 (D.C. Cir. 1980) (characterizing judicial estoppel as “obscure”); *In re Westchester Tank Fabricators, Ltd.*, 207 B.R. 391, 400 (E.D.N.Y. 1997) (“Judicial estoppel is rarely invoked . . .”); *Carnero v. Deitert*, 10 F. Supp. 2d 440, 441 (D.N.J. 1996) (“Rarely is a judge confronted with a paradigmatic case for the application of the doctrine of judicial estoppel.”); *Resolution Trust Corp. v. Gregor*, 872 F. Supp. 1140, 1153 (E.D.N.Y. 1994) (stating that judicial estoppel is a “rarely used doctrine”); *Loral Fairchild Corp. v. Matsushita Elec. Indus. Co.*, 840 F. Supp. 211, 219 (E.D.N.Y. 1994) (“Judicial estoppel is a rarely used doctrine . . .”).

34. See *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037 (2d Cir. 1993) (“The doctrine [of judicial estoppel] has not been uniformly adopted by federal courts . . .”); *Konstantinidis*, 626 F.2d at 938 (“Moreover, judicial estoppel has not been followed by anything approaching a majority of jurisdictions, nor is there a discernible modern trend in that direction.”).

35. See *Bates*, 997 F.2d at 1037 (noting that the elements of judicial estoppel “have never been clearly defined in this Circuit”); *Morris v. California*, 966 F.2d 448, 452 (9th Cir. 1991) (“Although this circuit has adopted the doctrine of judicial estoppel, we have not yet determined the circumstances under which it will be applied.”); *Konstantinidis*, 626 F.2d at 937 (“The definitions of ‘equitable estoppel’ and ‘judicial estoppel’ vary considerably throughout the literature of this confused area of the law.”).

United States Courts of Appeal have endorsed the doctrine of judicial estoppel. For example, recent decisions in the First,³⁶ Second,³⁷ Third,³⁸ Fourth,³⁹ Fifth,⁴⁰ Sixth,⁴¹ Seventh,⁴² Eighth,⁴³ Ninth,⁴⁴

36. *See* *Gens v. Resolution Trust Corp.*, 112 F.3d 569, 572-73 (1st Cir.), *cert. denied*, 118 S.Ct. 335 (1997) (“Judicial estoppel is not implicated unless the first forum *accepted* the legal or factual assertion alleged to be at odds with the position advanced in the current forum: [W]here a party assumes a certain position in a legal proceeding, and *succeeds* in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. . . . Judicial estoppel should be employed when a litigant is ‘playing fast and loose with the courts,’ and when ‘intentional self-contradiction is being used as a means of *obtaining* unfair advantage in a forum provided for suitors seeking justice.”) (citations omitted).

37. *See* *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (2d Cir. 1997) (“[J]udicial estoppel may be applied to bar a party from asserting a factual position in a given proceeding only when that party advanced a clearly inconsistent position in a prior proceeding and that inconsistent position was adopted by the court in some manner . . .”).

38. *See* *In re Chambers Dev. Co.*, 148 F.3d 214, 229 (3d Cir. 1998) (“Asserting inconsistent positions does not trigger the application of judicial estoppel unless intentional self-contradiction is used as a means of obtaining unfair advantage. Thus, the doctrine of judicial estoppel does not apply when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court. An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing.”) (citations omitted).

39. *See* *Folio v. City of Clarksburg*, 134 F.3d 1211, 1217-18 (4th Cir. 1998) (“In order for judicial estoppel to apply, (1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position must be one of fact instead of law; (3) the prior position must have been accepted by the court in the first proceeding; and (4) the party to be estopped must have acted intentionally, not inadvertently.”).

40. *See* *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 303 (5th Cir. 1998) (“Judicial estoppel applies to protect the integrity of the courts—preventing a litigant from contradicting its previous, inconsistent position when a court has adopted and relied on it.”).

41. *See* *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998), *petition for cert. filed*, 66 U.S.L.W. 3800 (U.S. June 9, 1998) (No. 97-1991) (“The doctrine applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court.”).

42. *See* *McNamara v. City of Chicago*, 138 F.3d 1219, 1225 (7th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3121 (U.S. Nov. 9, 1998) (No. 98-128) (“A party envisaging a succession of suits in which a change in position would be advantageous would have an incentive to falsify the evidence in one of the

Eleventh,⁴⁵ and Federal Circuits⁴⁶ have apparently endorsed the doctrine of judicial estoppel.

Two circuits have indicated general disapproval of the doctrine. The Tenth Circuit has recently reaffirmed its longstanding rejection of the doctrine.⁴⁷ The D.C. Circuit has also declined to adopt the doctrine.⁴⁸

cases, since it would be difficult otherwise to maintain inconsistent positions. The doctrine of judicial estoppel requires, however, that the party sought to be estopped have obtained a favorable judgment or settlement on the basis of a legal or factual contention that he wants to repudiate in the current litigation. Otherwise it would be inconsistent with the rule that permits inconsistent pleadings.”) (citations omitted).

43. See *Hossaini v. Western Missouri Med. Ctr.*, 140 F.3d 1140, 1143 (8th Cir. 1998) (“We have not heretofore defined with precision the elements of the doctrine. Among the circuits that have recognized judicial estoppel, the apparent majority view is that the doctrine applies only where the allegedly inconsistent prior assertion was accepted or adopted by the court in the earlier litigation. Under the minority approach, on the other hand, judicial estoppel applies even where no court has accepted the prior assertion if the party taking contrary positions demonstrates an intent to play ‘fast and loose’ with the courts.”) (citations omitted).

44. See *Masayeva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1382 (9th Cir. 1997), *cert. denied sub. nom. Hale v. Secakuku*, 118 S.Ct. 1048 (1998) (requiring that earlier court have adopted the prior position and stating that “[t]he doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation”).

45. See *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422 (11th Cir. 1998) (“Judicial estoppel ‘is applied to the calculated assertion of divergent sworn positions . . . [and] is designed to prevent parties from making a mockery of justice by inconsistent pleadings.’”) (citation omitted).

46. See *Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (“The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed. Judicial estoppel is designed to prevent the perversion of the judicial process and, as such, is intended to protect the courts rather than the litigants.”) (citations omitted).

47. See *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230, 1242 (10th Cir. 1998) (“The Tenth Circuit has firmly established that it will not be bound by the doctrine of judicial estoppel.”).

48. See *United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C. Cir.), *cert. denied sub. nom. Rawl Sales & Processing Co. v. United Mine Workers of Am. 1974 Pension Trust*, 509 U.S. 924 (1993) (“[W]e have not previously embraced the doctrine of judicial estoppel in this circuit and we decline to do so in this case. In the circuits that recognize the doctrine, judicial estoppel is used to preclude a party from taking a position

There is abstract agreement in the cases on the proposition that judicial estoppel is a form of preclusion that prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.⁴⁹ Beyond this general formulation, the elements of the doctrine of judicial estoppel are uncertain and a matter of dispute.⁵⁰ Although the doctrine of judicial estoppel is sometimes limited to factual assertions, other courts have held that the doctrine applies to preclude inconsistent legal positions as well.⁵¹ Judicial estoppel is sometimes understood as an absolute bar to a litigant asserting inconsistent positions, but this extreme version of the rule seems not to have been widely adopted.⁵² Some courts hold that for judicial estoppel to preclude an inconsistent assertion in a second proceeding, the assertion must have been made under oath in the first proceeding,⁵³ but other decisions seem to assume that preclusion may be based on positions taken by counsel.⁵⁴ In diversity cases, there is even controversy over the question of whether federal or state law governs the doctrine of judicial estoppel in diversity cases.⁵⁵

that is inconsistent with one successfully asserted by the same party in a prior proceeding.”).

49. See *FDIC v. Duffy*, 47 F.3d 146, 150-51 (5th Cir. 1995); *Bates*, 997 F.2d at 1028, 1037.

50. See *Henkin*, *supra* note 3, at 1713.

51. See, e.g., *Continental Illinois Corp. v. Commissioner*, 998 F.2d 513, 518 (7th Cir. 1993) (holding that the doctrine forbids a litigant from repudiating a legal position on which it has prevailed); *Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991) (stating that the doctrine applies to inconsistent legal assertions as well).

52. See, e.g., *Smith v. Travelers Ins. Co.*, 438 F.2d 373, 377 (6th Cir. 1971), *cert. denied*, 404 U.S. 832 (1971). See generally *Boyers*, *supra* note 3, at 1244, 1246.

53. See *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993).

54. See *Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp.*, No. 96-56252, 1998 WL 734391, at *6-7 (9th Cir. Oct. 22, 1998) (invoking doctrine of judicial estoppel without reference to “oath” and referring to argument during opening or closing as possible basis for estoppel).

55. This controversy derives from the requirement, announced in *Erie Railroad Company v. Tompkins*, that federal courts apply state law to resolve substantive issues in diversity actions. See 304 U.S. 64, 78 (1937). Compare *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167-68 (4th Cir. 1982) (applying federal law to judicial estoppel issue in diversity case), with *Konstantinidis*, 626 F.2d at 938 (*Erie* requires application of the state rule).

As with the related doctrine of issue preclusion, or collateral estoppel, some decisions do not require the party seeking to benefit from judicial estoppel to have been a party to the prior proceeding in order to invoke judicial estoppel.⁵⁶ Other courts, however, have held that a party must have been a party to the prior proceeding to be able to invoke judicial estoppel against the opposing party in the second proceeding.⁵⁷ Judicial estoppel may resemble issue preclusion in another respect: many judicial estoppel opinions state that the assertion in the prior proceeding must have been successful,⁵⁸ which suggests

56. See *Allen*, 667 F.2d at 1166-68.

57. See *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984) ("No case is cited where the doctrine was applied in favor of a total stranger to the first phase of the dispute . . ."); *Reno v. Beckett*, 555 F.2d 757, 770 (10th Cir. 1977) ("Kansas law is clear that a position taken by a party in one suit cannot be claimed as working an estoppel in another suit in favor of a party who was a stranger to the first suit."); *Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541, 550 (5th Cir. 1968) ("[J]udicial estoppel may be invoked only by a party to the prior litigation or someone privy to a party."); *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) ("A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention."); *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 99 F.2d 9, 13 (5th Cir. 1938), *cert. denied*, 305 U.S. 659 (1939) ("The general rule is that one may not to the prejudice of the other party deny any position taken in a prior judicial proceeding between the same parties or their privies involving the same subject matter, if successfully maintained."); *Chemical Bank v. Aetna Ins. Co.*, 417 N.Y.S.2d 382, 384-85 (Sup. Ct. 1979) ("Defendant in this action, being a legal 'stranger' to the prior action, it may not avail itself of the defense of judicial estoppel based upon plaintiff's alleged inconsistent legal position in that action.").

58. See *General Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1505 (9th Cir. 1995) (judicial estoppel invoked if court actually adopted earlier inconsistent statement); *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994); *Bates*, 997 F.2d at 1038; *Levinson v. United States*, 969 F.2d 260, 264-65 (7th Cir. 1992) ("[T]he party to be estopped must have convinced the first court to adopt its position; a litigant is not forever bound to a losing argument."). A further question arises with respect to the definition of success or judicial adoption. Some decisions indicate that settlement of a matter constitutes success. See *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993) (settlement is the same as prevailing, and a judicial decision is not necessary). The Eleventh Circuit has suggested that settlement does not imply judicial endorsement. See *Original Appalachian Artworks, Inc. v. S. Diamond Assocs.*, 44 F.3d 925, 930 (11th Cir. 1995). See generally *Schreiber*, *supra* note 3, at 338-44. Some courts have held that judicial estoppel can apply even if the

that it is the prior adjudication of the issue and not merely the party's assertion of a position that is being given preclusive effect.

2. Preclusion of inconsistent positions in disability cases

The confusion and disagreement that characterize the law of judicial estoppel in general are evident in the particular context of claims arising under the ADA.⁵⁹ The issue of judicial estoppel has arisen most frequently in recent years in the context of ADA cases. Defendant employers may invoke the doctrine against a plaintiff making an ADA claim who has previously applied for disability benefits, such as those provided by the SSA. In an application for disability benefits, plaintiffs attest to their total disability, thereby creating a perceived factual inconsistency with their later claim that they are qualified to work under the ADA.

The courts of appeal are divided on the proper application of the doctrine of judicial estoppel in the context of ADA claims. Judicial estoppel against ADA claims that are inconsistent with the claimant's position in a prior disability benefits claim has been approved in the Second,⁶⁰ Third,⁶¹ and Fifth⁶² Circuits. Theoretical approval of judicial estoppel of ADA claims on possible facts other than those before the court has been expressed in the First,⁶³ Fourth,⁶⁴ Ninth,⁶⁵

party was not successful in the prior proceeding if the court finds that its integrity was undermined by the party engaging in "fast and loose" behavior. *See, e.g., United States v. Garcia*, 37 F.3d 1359, 1367 (9th Cir. 1994) (recognizing that judicial estoppel can apply even if party was previously unsuccessful).

59. *See* 42 U.S.C. §§ 12101-12134.

60. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 73 (2d Cir. 1997) (plaintiff who stated in application for social security disability benefits that he was "unable to work" was judicially estopped from advancing a claim of age discrimination).

61. *Compare McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996) (holding that employee was judicially estopped from denying inability to work), *with Krouse v. American Sterilizer Co.*, 126 F.3d 494, 502 (3d Cir. 1997) (discussing criticism of *McNemar* and denying judicial estoppel effect to prior representations where elements of retaliation claim under ADA did not require showing of ability to work).

62. *See Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 517 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998).

63. *See Thomas v. Contoocook Valley Sch. Dist.*, 150 F.3d 31, 44 n.10 (1st Cir. 1998) (noting but not deciding that judicial estoppel might apply to plaintiff's ADA claim because "the parties have already made various factual and legal assertions on the record in the state administrative proceedings.").

and Eleventh⁶⁶ Circuits. Application of the doctrine of judicial estoppel to ADA claims appears to have been rejected in the Sixth,⁶⁷ Seventh,⁶⁸ Tenth,⁶⁹ and the D.C. Circuits.⁷⁰ The Federal Circuit, which has a specialized subject matter jurisdiction,⁷¹ has not addressed the application of judicial estoppel to ADA claims.

III. UNDERSTANDING JUDICIAL ESTOPPEL: HISTORY AND FUNCTION

Both the doctrine of judicial estoppel in general and its application to ADA claims in particular have generated considerable disagreement and confusion in the lower federal courts. To clarify the development of this discord, this section examines some of the history and context of judicial estoppel.⁷²

64. See *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 WL 390834, at *9 (4th Cir. June 29, 1998) (unpublished opinion) (declining to apply judicial estoppel where plaintiff's disability claim was rejected by Social Security Administration, but noting when doctrine might otherwise apply).

65. See *Johnson v. Oregon Dep't of Human Resources*, 141 F.3d 1361, 1367-69 (9th Cir. 1998) (noting that "neither application for nor receipt of disability benefits *automatically* bars a claimant from establishing that she is a qualified person with a disability under the ADA," but discussing cases in which judicial estoppel might apply).

66. See *Taylor*, 133 F.3d at 1423 (declining to apply per se judicial estoppel rule, but "the determination of whether an individual who has certified total disability to the SSA is judicially estopped from later bringing a claim under the ADA will depend upon the specific statements made in the application and other relevant evidence in the record.").

67. See *Griffith*, 135 F.3d at 383 (holding that receipt of disability benefits does not preclude subsequent ADA relief and rejecting the doctrine of judicial estoppel in that context, but allowing the consideration of prior sworn statements by the parties as a material factor).

68. See *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997) ("[O]n applications for Social Security disability benefits, certification of total disability does not completely bar the argument that one is a qualified individual with a disability.").

69. See *Rascon v. U.S. West Communications*, 143 F.3d 1324, 1330-31 (10th Cir. 1998) (denying judicial estoppel effect to plaintiff's prior application for Social Security disability benefits and stating that ADA, unlike the SSA, does take into consideration whether accommodation would render plaintiff able to perform a job).

70. See *Swanks v. Washington Metro. Area Transit Auth.*, 116 F.3d 582, 586 (D.C. Cir. 1997) (holding that receipt of disability benefits does not automatically preclude subsequent ADA relief).

71. See 28 U.S.C. § 1295(a) (1994).

72. Even a cursory history of the doctrine of judicial estoppel is beyond the

A. Some Notes on the History of Judicial Estoppel

Some early references to “judicial estoppel” do not actually discuss a form of preclusion against inconsistent positions but instead refer to related doctrines such as issue preclusion,⁷³ claim

scope of this brief Commentary. Instead, this Commentary investigates the development of the doctrine in the federal courts with a particular emphasis on its relationship to the related doctrines of issue and claim preclusion.

73. See *Aycock v. O'Brien*, 28 F.2d 817, 819 (9th Cir. 1928) (using the phrase “judicial estoppel” to refer to issue preclusion in the following passage: “By both sides cases are cited upon the general subject of the effect by way of judicial estoppel of a judgment in a criminal case when invoked in a subsequent civil action between the same parties.”); *Fung Yun Ham v. Nagle*, 22 F.2d 600, 602-03 (9th Cir. 1927) (using the phrase “judicial estoppel” to refer to issue preclusion in the following passage: “The suggestions that petitioner is entitled to a judicial hearing, and that the former administrative action in landing the father as a native-born citizen constitutes a judicial estoppel, are thought to be ruled adversely by prior decisions of this court. The fact that the father, who resides in, and claims to be a citizen of, the United States, joins in the petition with the nonresident applicant, in no wise affects the latter’s status, or enlarges his rights.”) (citations omitted); *Ex Parte Mock Kee Song*, 19 F. Supp. 743, 745 (N.D. Cal. 1937) (using the phrase “judicial estoppel” to refer to issue preclusion in the following passage: “While the fact of applicant’s unchallenged trips to China and return, between 1909 and 1930, and the admissions of his alleged sons, may be considered with other evidence by the Board of Special Inquiry in determining applicant’s right of entry, such former administrative action does not constitute a judicial estoppel.”); *Boise Title & Trust Co. v. Evans*, 295 F. 223, 224 (D. Id. 1924) (using the phrase “judicial estoppel” to refer to issue preclusion in the following passage: “In a mandamus proceeding brought by the plaintiff against the sheriff, the Supreme Court of this state adopted the plaintiff’s view, and held that stamps were not required. The defendant here was not a party to that proceeding, and accordingly it is conceded that the judgment therein does not constitute a judicial estoppel.”) (citation omitted); *Illinois Cent. R.R. Co. v. Sheegog*, 177 F. 756, 759-60 (C.C.W.D. Ky. 1910) (using the phrase “judicial estoppel” to refer to issue preclusion in the following passage: “This holding is inconsistent with a holding that this court acquired jurisdiction by the attempted removal. The judgment of the Supreme Court was rendered in a case where the parties were the same, and the questions for decision were substantially the same, as here, and it would seem to me that the principle of judicial estoppel applies; and, if so, the complainant here cannot allege a matter which is inconsistent with the ruling of the Supreme Court in the other case. That court is the final arbiter in a controversy of this sort; and it would seem that when it has once determined the question on a contest made by one of the parties, and by a recognized procedure, adequate for the purpose, such determination should conclude it, as between the parties.”).

preclusion,⁷⁴ both issue and claim preclusion,⁷⁵ an election of remedies doctrine,⁷⁶ or some other rule of law.⁷⁷ The first clear reference by a federal court to preclusion against inconsistent positions under

74. See *Van Norden v. Charles R. McCormick Lumber Co.*, 27 F.2d 881, 881 (9th Cir. 1928) (using the phrase "judicial estoppel" to refer to claim preclusion in the following passage: "This is an action for the identical personal injury for which damages were sought in [a prior adjudication]. The parties also are the same, and the negligence alleged is that specified . . . in the former opinion. Correctly, we think, the court below held that the judgment in that case operates as a judicial estoppel.") (citation omitted); *United States Fidelity & Guar. Co. v. Blankenhorn*, 25 F.2d 866, 867 (9th Cir. 1928) (using the phrase "judicial estoppel" to refer to claim preclusion in the following passage: "We do not inquire into the grounds of such contention, for, having been duly submitted to the state courts, the question is thought to be *res adjudicata*. To hold otherwise would be to scuttle the whole doctrine of judicial estoppel."); *In re Lyders*, 16 F. Supp. 213, 215 (N.D. Cal. 1936) (using the phrase "judicial estoppel" to refer to claim preclusion in the following passage: "[The bankruptcy referee's] order, made after hearing and not challenged by any proceedings for review, became a judicial determination of the issues then before him, and, like any other final judgment or order, is binding upon the parties thereto. It constitutes a judicial estoppel.") (citation omitted).

75. See *United States Fidelity & Guar. Co. v. Porter*, 3 F.2d 57, 59 (D. Id. 1924) (using the phrase "judicial estoppel" to refer to claim and issue preclusion in the following passage: "The decided cases involving the doctrine of judicial estoppel are numerous, and in some respects are difficult to reconcile. Generally speaking, the scope of the estoppel is broader in a case where the former judgment was upon the same cause of action than where the causes of action are different; in the former, the judgment is conclusive, not only of the questions actually adjudicated, but also of those which might properly have been submitted, while in the latter the estoppel extends only to such issues as were actually determined.")

76. See *Parkerson v. Borst*, 264 F. 761, 766-67 (5th Cir. 1920) (using the phrase "judicial estoppel" to refer to an election of remedies doctrine in the following passage: "We thus reach the assignment on which counsel seems mainly to rely, that the action of Mrs. Borst in proving her claim in bankruptcy constituted a judicial estoppel, or estoppel of record, against her to further prosecute this suit, in that, as they claim, that action was an affirmation of her title to the notes, and necessarily a disaffirmance of her action for conversion. . . . [S]he would not have been estopped to proceed with her suit for conversion, since her action, by any process of reasoning, could not have been construed as the election by her of an inconsistent remedy, but merely a following of some of the proceeds of a conversion, for the purpose of application and credit pro tanto on her claim.")

77. See *Hurd v. Moiles*, 28 F. 897, 899 (C.C.D. Mich. 1886) (using the phrase "judicial estoppel" to refer to the possibility of enjoining litigation that concerns the same subject matter as pending action).

the rubric of "judicial estoppel" appears to have been made by the Third Circuit in 1929.⁷⁸ Aside from this single instance, the phrase "judicial estoppel" appears not to have been used again by the federal courts to refer to preclusion against inconsistent positions until the 1950s, when the Fifth Circuit mentioned the doctrine in passing.⁷⁹ During the 1950s, however, the courts continued to use the phrase to refer to other doctrines.⁸⁰ With the exception of the Fifth Circuit's apparent endorsement of judicial estoppel in dicta, reaction

78. See *Emlenton Ref. Co. v. Chambers*, 35 F.2d 273, 276 (3d Cir. 1929) ("The next equitable defenses disposed of by the court adversely to the defendant preliminary to trial are that both the legal plaintiff and use plaintiff are precluded by equitable estoppel and judicial estoppel from maintaining the instant action. These defenses of estoppel are based on the uncertain conduct of Chambers and Adams in instituting and prosecuting successive litigation in different names thereby causing the defendant considerable expense and very great annoyance, and with respect to that of judicial estoppel based also on the inconsistent positions taken by Chambers and Adams in the series of suits and their inconsistent statements made and sworn to in the progress of the litigation.").

79. See *Livesay Indus. v. Livesay Window Co.*, 202 F.2d 378, 382 (5th Cir. 1953) (referring to "every principle of judicial estoppel, including the estoppel arising out of inconsistent positions in legal proceedings"). Without using the phrase "judicial estoppel," the Third Circuit discussed a limited form of the doctrine in the 1953 decision *Scarano v. Central Railroad Co.*, 203 F.2d 510, 513 (3d Cir. 1953), stating that a "plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention." *Scarano* cited a treatise and New Jersey authority for the doctrine and cited no federal authority, but did not explicitly state whether the court considered New Jersey law to be binding. See *id.*

80. See *American Auto. Ins. Co. v. Fulcher*, 201 F.2d 751, 754 (4th Cir. 1953) ("Judicial estoppel and *res judicata* are frequently used interchangeably and have the same significance.") (quoting *Gilmer v. Brown*, 44 S.E.2d 16, 18 (Va. 1947); *Northern Trust Co. v. Essaness Theatres Corp.*, 103 F. Supp. 954, 958 (N.D. Ill. 1952) (using the phrase "judicial estoppel" to refer to issue preclusion in the following passage: "In order to apply the principle of judicial estoppel two requisites must be present, (1) identity of parties, that is, the party sought to be bound should be a party to both actions, and must have appeared in both in the same character or capacity; and (2) identity of issues, that is, a fact or question which was in issue in a former suit and was there judicially passed on and determined is conclusively settled by the judgment therein and it is immaterial that the question alleged to have been settled by such former adjudication was determined in a different kind of proceeding or a different form of action or for different purposes.").

to the doctrine in the 1950s was generally unfavorable.⁸¹ Assertions of the doctrine drew the scorn of Judges Moore⁸² and Learned Hand⁸³ of the Second Circuit and a strong rejection of the doctrine from the Tenth Circuit.⁸⁴

Judicial estoppel as preclusion against inconsistent positions appeared again in a 1964 diversity case, when the Middle District of Tennessee declined to extend Tennessee's version of judicial estoppel⁸⁵ to a prior statement made in a legislative hearing.⁸⁶ In

81. *See, e.g.,* Lawrence v. Vail, 166 F. Supp. 777, 784 (D.S.D. 1958) (denying judicial estoppel in a context that is ambiguous as to whether issue preclusion or preclusion against inconsistent positions is intended: "Plaintiff contends that because Nelson signed the stipulation settling the death claim of the widow of Philip L. Wineman, deceased, before the Iowa Industrial Commission and admitted therein that Wineman was his employee and was, at the time of the accident, acting in the course of his employment, Nelson was therefore judicially estopped in this case to deny the relationship of master-servant. While there seems to be some split of authority, the general rule as to judicial estoppel appears to be that the parties in the two proceedings must be the same, and that actions in former proceedings which might be a basis for an estoppel will not operate for the benefit of persons who were not parties to the former proceedings.").

82. *See* Stella v. Graham-Paige Motors Corp., 259 F.2d 476, 481 (2d Cir. 1958) ("The doctrine of judicial estoppel, as urged here, would extend estoppel beyond all reasonable bounds.").

83. *See* Bertha Bldg. Corp. v. National Theatres Corp., 248 F.2d 833, 837 (2d Cir. 1957) (Hand, J., dissenting on grounds other than judicial estoppel) ("I can find no warrant for the theory that they created a 'judicial estoppel,' except suggestions in one or two law reviews.").

84. *See* Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956) ("[W]e must reject the theory that the pleading of a claim under oath . . . irrevocably freezes the contentions of the pleader so that under no circumstances may he alter his view in that, or another, case, or assert an inconsistent position. This would . . . discourage the determination of cases on the basis of the true facts as they might be established ultimately.").

85. Tennessee's version of judicial estoppel was limited to inconsistent statements made under oath. The strict doctrine of judicial estoppel is frequently said to find its origin in *Hamilton v. Zimmerman*, 37 Tenn. 38, 48 (1857). *See* Boyers, *supra* note 3, at 1245 & n.10.

86. *See* United States v. Certain Land and Interests in Property, 225 F. Supp. 338, 342 (M.D. Tenn. 1964) ("It is thus apparent that the doctrine of 'judicial estoppel' has not been extended beyond statements made under oath in judicial proceedings, that the doctrine is not strictly speaking an 'estoppel by oath', and that one will not be estopped to deny the truth of all statements made under oath, whether in the course of litigation or not. It is believed that the Supreme Court of Tennessee would not, if faced with this issue, extend the

subsequent cases during the 1960s, judicial estoppel was applied in diversity cases,⁸⁷ likely on the theory that the *Erie* doctrine required its application;⁸⁸ other cases mentioned the doctrine but declined to apply it on the facts before the court.⁸⁹ In the 1970s, the doctrine was invoked more frequently. Most cases invoking the doctrine rejected its application on the facts before the court,⁹⁰ but the doctrine was

doctrine to legislative hearings.”).

87. See *Smith v. Montgomery Ward & Co.*, 388 F.2d 291, 292 (6th Cir. 1968) (applying judicial estoppel where plaintiff in personal injury action made statements inconsistent with those made previously during a workmen’s compensation proceeding); *Holt v. Southern Ry. Co.*, 51 F.R.D. 296, 298 (E.D. Tenn. 1969) (applying Tennessee doctrine of judicial estoppel in diversity case to bar claims that were inconsistent with factual positions taken in deposition under oath in prior litigation).

88. See *supra* note 55 and accompanying text.

89. See *Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541, 550 (5th Cir. 1968) (declining to apply judicial estoppel, apparently under Texas law, because parties in prior action were different); *Markow v. Alcock*, 356 F.2d 194, 198 (5th Cir. 1966) (“Turning now to appellant’s contention that a judicial estoppel is applicable by reason of the stipulation in settlement of the McClellan matter as against the defendant banks, it does appear as a general rule that parties entering into stipulations during the course of a judicial proceeding are estopped to take positions inconsistent therewith. But this rule does not apply if the estoppel is urged in a subsequent proceeding where the parties are different.”) (citations omitted).

90. See *Himel v. Continental Ill. Nat’l Bank and Trust Co.*, 596 F.2d 205, 211 (7th Cir. 1979) (declining to apply judicial estoppel and stating that “[t]he doctrine is not applicable here because, as discussed above, the facts here are not ‘the same facts’ in the first suit.”); *Reno v. Beckett*, 555 F.2d 757, 770 (10th Cir. 1977) (declining judicial estoppel in diversity on the basis of Kansas law requirement that party asserting judicial estoppel must have been a party to the prior action); *City of Miami Beach v. Smith*, 551 F.2d 1370, 1377 (5th Cir. 1977) (declining judicial estoppel effect in diversity case on the basis of “the lack of any apparent prejudice resulting from this representation” as required by Florida law); *Walker v. American Motorists Ins. Co.*, 529 F.2d 1163, 1164 (5th Cir. 1976) (declining application of the doctrine of judicial estoppel and stating that “the doctrine of judicial estoppel is inapplicable in this case, in that plaintiffs assumed the [prior inconsistent] position . . . based on the representations of the defendant”); *In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975) (declining application of doctrine of judicial estoppel on ground that issue in prior case was “essentially dissimilar” from issue with respect to which estoppel was sought); *In re Yarn Processing Patent Validity Litig.*, 498 F.2d 271, 279 (5th Cir. 1974) (declining application of judicial estoppel and stating: “Our holding that the issue here differs from the issue before the Exchequer Court precludes the application of any type of estoppel.”); *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973) (declining to apply

Texas doctrine of judicial estoppel in diversity case on ground that prior inconsistent statements were not pleadings made under oath); *Gleason v. United States*, 458 F.2d 171, 175-76 (3d Cir. 1972) (declining to apply judicial estoppel to personal injury action on ground that party seeking estoppel had not been prejudiced by defendants' prior assertion of inconsistent workers compensation claim); *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 130 (6th Cir. 1971) (declining to apply judicial estoppel to claim of racial discrimination in termination on the basis of prior claim that discharge resulted from union activity and stating, "Despite the seeming inconsistency in appellee's positions, a consideration of the context of the union activities indicates that the inconsistency is of form rather than substance."); *Smith v. Travelers Ins. Co.*, 438 F.2d 373, 377 (6th Cir. 1971) (declining to apply the doctrine of judicial estoppel and stating, "Despite the seeming conflict in the positions of the company in its income tax forms and the witnesses in the instant action, we find no cases where the Tennessee doctrine of judicial estoppel was extended to inconsistencies between judicial and non-judicial statements."); *United States v. Siegel*, 472 F. Supp. 440, 442 n.4 (N.D. Ill. 1979) (declining to apply doctrine of judicial estoppel and stating that "[t]he scope of that doctrine is narrow, particularly when applied to the government. Generally, it pertains to statements made under oath in judicial proceedings, and does not apply where the prior statement is merely an expression of opinion or legal conclusion.") (citations omitted); *Brown v. Board of Educ.*, 84 F.R.D. 383, 397 n.9 (D. Kan. 1979) ("Several factors make such an application of the judicial estoppel doctrine inappropriate in this situation. For example, a normal prerequisite to application of the doctrine is identity of parties, an element not present here. Also, the doctrine normally applies only to statements of fact, not legal conclusions.") (citation omitted); *Ivor B. Clark Co. v. Southern Bus. & Indus. Dev. Co.*, 399 F. Supp. 824, 837 (S.D. Miss. 1974) (declining application of doctrine of judicial estoppel on ground that the prior inconsistent statement "in question was not made during the course of a judicial proceeding" but was instead made in connection with the filing of a lien); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1179 (D.S.C. 1974) (recognizing doctrine of judicial estoppel but declining its application on ground that prior position was on different issue than that with respect to which estoppel was sought); *Johnson Services Co. v. Transamerica Ins. Co.*, 349 F. Supp. 1220, 1226 (S.D. Tex. 1972) (declining to apply doctrine of judicial estoppel in diversity case governed by Texas law and stating: "First, the state court action involved different defendants from those at bar. Secondly, the recovery granted the Plaintiff in the state court action is consistent with that sought here, since Plaintiff has reduced its allegation of damages here by that amount already obtained in the state court action . . .") (citation omitted); *Maddox v. Bradley*, 345 F. Supp. 1255, 1258 (N.D. Tex. 1972) (declining to apply doctrine of judicial estoppel against the United States and stating that "[a]lthough generally the doctrine of preclusion can be asserted against the United States of America, it is not applicable if the use of the doctrine would be against public policy, or if those taking the prior inconsistent position exceeded their authority in doing so").

actually applied as the basis for decision in a few cases.⁹¹ Similarly, during the early 1980s, a large number of courts refused to apply the doctrine on the facts before them,⁹² although there are several cases in which the doctrine was applied.⁹³

91. *See Selected Risks Ins. Co. v. Kobelinski*, 421 F. Supp. 431, 435 (E.D. Pa. 1976) (applying judicial estoppel against Small Business Administration and stating that “[t]he SBA has procured a dismissal in the prior action by contending that the Court lacked jurisdiction and now wishes to effect a removal by asserting that the Court has jurisdiction.”); *Gravitt v. Southwestern Bell Tel. Co.*, 416 F. Supp. 830, 831 (W.D. Tex. 1976) (applying Texas doctrine of judicial estoppel as basis for remand of diversity action to inconsistent allegations regarding citizenship of defendant); *cf. Wade v. Woodings-Verona Tool Works, Inc.*, 469 F. Supp. 465, 467 (W.D. Pa. 1979) (not presented with judicial estoppel issue in action before the court but relying on the future applicability of the doctrine of judicial estoppel based on sworn statement in that action as basis for rejection of summary judgment motion).

92. *See American Methyl Corp. v. EPA*, 749 F.2d 826, 833 n.44 (D.C. Cir. 1984) (declining to reach question whether judicial estoppel is recognized under Circuit’s interpretation of federal law by stating that “[n]either initial success before a prior court nor deliberate manipulation are evident on this record”); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984) (denying judicial estoppel on ground that there was no necessary conflict between current and prior positions); *DeShong v. Seaboard Coast Line R.R. Co.*, 737 F.2d 1520, 1523 (11th Cir. 1984) (“Because inconsistency is the crucial element of the doctrine of estoppel, there is no basis for applying estoppel in this case.”); *American Nat’l Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983) (declining application of judicial estoppel where record did not support finding of bad faith and inconsistency had been cured by prior action of court); *Garcia v. Andrus*, 692 F.2d 89, 94 (9th Cir. 1982) (stating that “judicial estoppel bars only inconsistent positions”); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (declining to apply judicial estoppel on ground that party “did not successfully assert an inconsistent position in the previous proceeding”); *Altman v. Altman*, 653 F.2d 755, 758 (3d Cir. 1981) (“We find no exceptional circumstances in this case that would allow Ashley to raise judicial estoppel on appeal.”); *Bates v. Cook, Inc.*, 615 F. Supp. 662, 673 (M.D. Fla. 1984) (declining judicial estoppel on grounds that it does not apply to legal conclusions and that it requires success in prior proceeding); *Oneida Indian Nation v. New York*, 102 F.R.D. 450, 453 (N.D.N.Y. 1984) (declining judicial estoppel on ground that doctrine is appropriate “where a litigant would reap a double benefit from switching claims”); *Latino Political Action Comm., Inc. v. City of Boston*, 581 F. Supp. 478, 480 (D. Mass. 1984) (declining judicial estoppel on ground that party “took no stand at all on the question . . . in the earlier litigation”); *Brownko Int’l, Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432, 1438 (S.D.N.Y. 1983) (stating that court is “unpersuaded” by judicial estoppel argument); *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911, 920-21 (S.D.N.Y. 1983) (“Leaving aside the

A review of the cases suggests that the doctrine of judicial estoppel developed without substantial judicial attention to either the history or function of the doctrine. Many of the federal judicial estoppel cases pay lip service to the doctrine but reject its application

question of the vitality of this doctrine in this Circuit or elsewhere, the doctrine would not apply here in any case because the courts that have applied the doctrine have required that 'success in the prior proceeding is clearly an essential element of judicial estoppel,' and a 'settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.'" (citations and footnote omitted); *USLIFE Corp. v. U.S. Life Ins. Co.*, 560 F. Supp. 1302, 1306 (N.D. Tex. 1983) (declining application of judicial estoppel because litigant was not successful on prior inconsistent claim); *Atlanta Shipping Corp. v. International Modular Hous., Inc.*, 547 F. Supp. 1356, 1367 (S.D.N.Y. 1982) (declining application of judicial estoppel on basis that change of positions was not in "bad faith"); *Byrne v. Buffalo Creek R.R. Co.*, 536 F. Supp. 1301, 1303 (W.D.N.Y. 1982) (stating that "it would be inappropriate at this time, after the trial of this case, to afford defendants the advantage of the affirmative defense of estoppel, which was not pleaded as such in their answers"); *Toman v. Underwriters Lab., Inc.*, 532 F. Supp. 1017, 1019 (D. Mass. 1982) ("Absent the existence of a dispute between the same parties, or reliance or change of position by the party seeking to invoke judicial estoppel, the doctrine will not be applied.") *rev'd on other grounds*, 707 F.2d 620 (1st Cir. 1983); *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 498 F. Supp. 991, 1012 (E.D. Pa. 1980) ("Neither do we regard NUE's failure to take exception to the appraiser's report or the stance it assumed in the Delaware proceeding as being inconsistent with the position it here espouses, and thus we do not find this to be an instance where the doctrine of judicial estoppel has application."); *In re Lincoln Plaza Towers Assocs.*, 6 B.R. 808, 811 n.9 (Bankr. S.D.N.Y. 1980) ("The doctrine of judicial estoppel precludes a party from assuming inconsistent positions with respect to the same matter. But we find nothing inconsistent in the legal or factual postures assumed by this debtor.") (citation omitted).

93. *See Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 & n.3 (4th Cir. 1982) (applying judicial estoppel on basis of prior inconsistent assertion that plaintiff was an employee of defendant's insured); *United Va. Bank/Seaboard Nat'l v. B.F. Saul Real Estate Inv. Trust*, 641 F.2d 185, 189-90 (4th Cir. 1981) (applying judicial estoppel on the basis of prior inconsistent assertion in bankruptcy proceeding); *Van Gaalen v. Sparks*, 555 F. Supp. 325, 329 (E.D. Va. 1983) (applying Virginia doctrine of judicial estoppel to bar claims); *United States v. Bedford Assocs.*, 548 F. Supp. 732, 740 (S.D.N.Y. 1982) (applying judicial estoppel to change in position by United States), *aff'd on other grounds*, 713 F.2d 895, 904 (2d Cir. 1983); *Donovan v. United States Postal Serv.*, 530 F. Supp. 894, 902 (D.D.C. 1981) (applying judicial estoppel in federal question case); *In re VVF Communications Corp.*, 41 B.R. 546, 553 (Bankr. D.D.C. 1984) (applying judicial estoppel to prior inconsistent positions in earlier stage of bankruptcy action); *In re Holiday Isles, Ltd.*, 29 B.R. 827, 831 (Bankr. S.D. Fla. 1983) (applying judicial estoppel in bankruptcy case).

on the ground that some requirement was not satisfied. Many of the decisions were diversity cases in which the federal court assumed that it was bound by state law formulations of the judicial estoppel doctrine. Most of the cases that did apply the doctrine rely on formulaic recitations, often citing a legal encyclopedia as authority. Almost none of the reported decisions address a crucial question: What function does the doctrine of judicial estoppel serve in the context of a modern procedural system that has adopted the Federal Rules of Civil Procedure and the Federal Rules of Evidence and that has adopted the contemporary doctrines of issue and claim preclusion? It is to that question that this Commentary now turns.

B. Judicial Estoppel in the Context of Modern Preclusion Law

The doctrine that is now known as judicial estoppel has its roots in nineteenth century American law. During this period, the modern doctrines of claim and issue preclusion had not clearly emerged. The term "judicial estoppel" was frequently used as a synonym for res judicata or collateral estoppel. Modern claim and issue preclusion law provides a powerful array of tools for preventing the relitigation of claims and issues that have been decided in a prior adjudication. The modern doctrine of claim preclusion would preclude a party who prevails on a claim and then seeks additional relief based on an inconsistent position, so long as the claims are based on the same transaction or the same factual allegations.⁹⁴ The modern doctrine of issue preclusion would preclude a party who prevails on an issue and then seeks to take an inconsistent position against the same opponent in a subsequent action, so long as the issues are identical and were actually litigated and necessarily decided in the prior action.⁹⁵ Depending on the circumstances, issue preclusion may also be available to a stranger to the prior action under the rules governing "nonmutual collateral estoppel."⁹⁶

These modern rules are quite different from the inconsistent patchwork of nineteenth century preclusion law. This proposition is

94. See *Solum*, *supra* note 3, ¶ 131.

95. See *id.* ¶ 132.

96. See *United States v. Mendoza*, 464 U.S. 154, 158 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313, 324-26 (1971).

illustrated by the traditional mutuality rule for issue preclusion. In some cases, judicial estoppel in the form of preclusion against inconsistent positions may have been the only form of preclusion available to a party in a subsequent action who wished to bind an opponent to the determination of an issue in a prior litigation in which the party seeking the estoppel was not joined.

Indeed, the influential *Harvard Law Review* Note, *The Doctrine of Preclusion against Inconsistent Positions*,⁹⁷ focused on exactly this role for the doctrine of judicial estoppel. The following quotation illustrates how the availability of other preclusion doctrines shaped scholarly and judicial opinion about the doctrine of judicial estoppel:

Text writers commonly say that a personal judgment or a position taken in a previous judicial proceeding has no effect in a suit between different parties unless there is a relationship of privity between each new party and one of the original parties. Thus, a stranger to a judgment cannot take advantage of the prior proceeding. There are, however, a series of cases in which the courts have precluded a person from framing his testimony or pleadings in a manner inconsistent with a position taken in a prior proceeding even though one or both parties were different and no relationship of privity existed. These cases are based upon the principle that a litigant should not be permitted, either by passive consent or by affirmative action, to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.⁹⁸

The student author of the Harvard Note concluded that:

[t]he primary distinction in practice between the principle of preclusion [against inconsistent positions] on the one hand and res judicata and collateral estoppel on the other is that, while the latter doctrines require identity of parties, the former may be invoked by a person not a party to the first

97. Harvard Note, *supra* note 4.

98. *Id.* at 1132.

suit against one who was either a witness or a party in that suit.⁹⁹

Of course, if the primary difference between judicial estoppel and issue preclusion was the traditional mutuality rule, the relationship between the two doctrines needs to be reexamined in light of modern cases authorizing both defensive and offensive nonmutual collateral estoppel.¹⁰⁰ Illustrative of the modern approach is the view of the *Restatement (Second) of Judgments*:

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he [or she] lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him [or her] an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

- (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself [or herself] and his [or her] present adversary;
- (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

99. *Id.* at 1134. Not all of the judicial estoppel cases agree with the Harvard Note with respect to the question of whether mutuality is required in judicial estoppel cases. See *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953) (formulating doctrine with mutuality rule).

100. See *Mendoza*, 464 U.S. at 158; *Parklane Hosiery*, 439 U.S. at 326; *Blonder-Tongue*, 402 U.S. at 324-26.

- (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently were based on a compromise verdict or finding;
- (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
- (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
- (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.¹⁰¹

To the extent that the doctrine of judicial estoppel has been formulated to allow nonmutual collateral estoppel without reference to these factors, the question arises as to why this is so. Although the assertion of an inconsistent position in a prior litigation might be a factor favoring the application of issue preclusion, it is not apparent why it should be a decisive factor that trumps all of the other considerations used in making the decision to grant nonmutual collateral estoppel. Although the aim of this Commentary is not to resolve the *Cleveland* case on its facts, we should note that *Cleveland* is itself a case involving nonmutual application of the doctrine of judicial estoppel. PMSC was not a party to Ms. Cleveland's application for disability benefits.

It has been argued that judicial estoppel avoids other requirements of issue preclusion—in particular, the requirement that the issue with respect to which preclusion is sought have been actually litigated and necessarily decided in the prior action.¹⁰² According to this argument, courts can “impose judicial estoppel in situations where [they] would otherwise be forced to allow repetitious and illegitimate litigation to proceed.”¹⁰³ In other words, judicial estoppel “enables courts to provide relief in cases where collateral estoppel

101. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

102. See Plumer, *supra* note 3, at 415-16.

103. *Id.* at 416.

cannot.”¹⁰⁴ But this argument proves too much. If the doctrine of issue preclusion has been formulated too narrowly to serve the twin goals of achieving judicial economy while preserving accuracy, the proper response would be to craft a more liberal doctrine of issue preclusion. Judicial estoppel provides only an ad hoc remedy that would address the problem only where there is the fortuity of a prior inconsistent position.

The point of this discussion is to frame the following question: Should the Supreme Court recognize judicial estoppel as a distinct preclusion doctrine, governed by a unique set of rules that differ from those applicable to claim and issue preclusion? Framing the question in this way juxtaposes judicial estoppel with the other preclusion doctrines in their modern form. Judicial estoppel does not stand in isolation from the general fabric of American law. If the Supreme Court considers adopting the doctrine of judicial estoppel in the *Cleveland* case, it should pay close attention to the role that this doctrine will play in light of the principles and policies that animate the American system of procedure.

In this regard, we should recall Judge Learned Hand’s observation of the relationship between the doctrine of judicial estoppel and preclusion law in general. Writing in dissent on another issue, Judge Hand was required to deal with a judicial estoppel claim avoided by the majority’s disposition of the case. He stated:

It will be necessary as a preliminary [sic] to deal with the plaintiffs’ agreement that, regardless of whether the defendant had in fact been “transacting business,” its denials that it had been in at least ten actions brought against it in both state and federal courts constituted a “judicial estoppel” against its present contradictory position. It is of course true that upon the trial in the actions at bar any statements made by the defendant in its pleadings and affidavits in other actions were competent evidence in favor of the plaintiffs; but I can find no warrant for the theory that they created a “judicial estoppel,” except suggestions in one or two law reviews. Moreover, since such a doctrine is plainly contrary to the underlying basis of the whole doctrine of

104. *Id.*

estoppel by judgment it is plainly without foundation. Judgment by estoppel is not designed as a moral sanction against inconsistency: it does not visit penalties upon those who take one position today and deny it tomorrow; it is designed only to prevent a party who has, or has not, prevailed upon an issue in an earlier action to vex the same antagonist with the same dispute in a later one.¹⁰⁵

Since Judge Hand's day, our view of the role of issue preclusion, or collateral estoppel, has been enlarged, but his essential point remains relevant. Preclusion law strikes a balance between the search for truth on the one hand and the conservation of judicial resources and fairness to opposing parties on the other. "Playing fast and loose with the truth" is not admirable, but preclusion law is a tool ill suited to the task of punishing perjury or insuring truthful allegations in pleadings.

IV. THE CASE AGAINST SUPREME COURT ENDORSEMENT OF JUDICIAL ESTOPPEL

Although a number of arguments have been advanced in favor of the doctrine of judicial estoppel, a close examination reveals that there is no compelling justification for a separate doctrine of judicial estoppel. A general rule of preclusion against inconsistent positions is incompatible with the search for truth and commitment of fact-finding to the jury.

A. The Purported Rationale for Judicial Estoppel

What is the purpose of the doctrine of judicial estoppel? The Third Circuit's opinion in *Scarano v. Central Railroad Company*¹⁰⁶ provided one of the clearest statements:

Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate. . . . And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a

105. *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833, 837 (2d Cir. 1957) (L. Hand, J., dissenting).

106. 203 F.2d 510 (3d Cir. 1953).

means of obtaining unfair advantage in a forum provided for suitors seeking justice.¹⁰⁷

Two functions are suggested here for the doctrine of judicial estoppel. The first purpose of the doctrine is to guard against deception; or in other words, to protect the accuracy of judicial proceedings against litigants who might engage in deceptive behavior. The second purpose is to prevent a litigant from taking unfair advantage of an opponent, presumably by prevailing in two different actions on the basis of inconsistent positions. Both of these purposes require further analysis.

B. Judicial Estoppel Does Not Advance the Search for Truth

Is the doctrine of judicial estoppel justified by its contribution to the accuracy of judicial proceedings? Initially, it should be observed that the search for truth is surely one of the cardinal measures of procedural fairness.¹⁰⁸ As one court has recognized, "the ultimate aim of the judicial system is to ascertain the real truth."¹⁰⁹ But does judicial estoppel serve this end? In an obvious sense, the answer is no. Judicial estoppel operates to prevent the finder of fact or judge of law in a subsequent litigation from determining whether the position being asserted in that case is factually true or legally correct. Consequently, the effect of the estoppel is to bind the judge or jury in the subsequent action to the position asserted in the prior action, even if that position was incorrect as a matter of law or fact. As the Tenth Circuit put it, judicial estoppel "would discourage the determination of cases on the basis of the true facts that they might be established ultimately."¹¹⁰ This effect is a truism with respect to all of the prior

107. *Id.* at 513.

108. *See, e.g.*, *Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 294 (5th Cir. 1997) (stating "the search for truth . . . is at the heart of the litigation process"); *Millen v. Mayo Found.*, 170 F.R.D. 462, 464 (D. Minn. 1996) ("Justice is the search for truth in an effort to resolve conflict.").

109. *Headley v. Chrysler Motor Corp.*, 141 F.R.D. 362, 366 n.21 (D. Mass. 1991).

110. *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956); *accord Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980) ("we agree with the Tenth Circuit that utilization of the judicial estoppel theory 'would be out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.'").

adjudication doctrines: as it is frequently put, they render "black white and crooked straight."¹¹¹ The goal of accuracy would be better served by assessing the factual or legal contention in the subsequent action on its merits, and sustaining the position only if it is true or legally correct. If the issue is a factual one, the prior inconsistent statement of a party is admissible as evidence, and it can and should be weighed against other evidence and any explanation for the inconsistency.¹¹²

111. *Velasquez v. Franz*, 589 A.2d 143, 165 (N.J. 1991) (Stein, J., dissenting); *see also* *United States v. LaFatch*, 565 F.2d 81, 84 (6th Cir. 1977); *Miller v. National City Bank*, 166 F.2d 723, 726 (2d Cir. 1948); *In re H.S. Dorf & Co.*, 274 F. Supp. 739, 750 (S.D.N.Y. 1967); *Campbell v. Gullo*, 78 So. 124, 125 (La. 1918); *Pryor v. Gions*, 188 So. 2d 739, 741 (La. Ct. App. 1966); *Scruggs v. Butler Furniture Co.*, 104 So. 2d 178, 180 (La. Ct. App. 1958); *Winston Bros. Co. v. Galloway*, 121 P.2d 457, 458 (Or. 1942).

The most prominent expression of the idea is from the United States Supreme Court's decision in *Jeter v. Hewitt*, 63 U.S. (22 How.) 352 (1859):

Under the system of that State, the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the *res judicata* renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum*. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy.

Id. at 363-64; *see also* *Commissioner of the Taxing Dist. v. Loague*, 129 U.S. 493, 505 (1889); *Bergeron v. Estate of Loeb*, 777 F.2d 792, 795 (1st Cir. 1985); *In re Giorgio*, 81 B.R. 766, 772 (Bankr. D.R.I. 1988); *In re Giorgio*, 62 B.R. 853, 862 (Bankr. D.R.I. 1986); *In re Scientific Control Corp.*, 80 F.R.D. 237, 243 (S.D.N.Y. 1978); *Batey v. D.H. Overmyer Warehouse Co.*, 446 S.W.2d 686, 690 (Tenn. Ct. App. 1969); *Ely v. Moore*, 11 S.W.2d 294, 297 (Tex. Comm'n App. 1928).

The full Latin maxim is: "[R]es judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum (a decision makes white black; black, white; the crooked, straight; the straight crooked)." *Moorer v. South Carolina*, 240 F. Supp. 531, 534 (E.D.S.C. 1965); *see also* *In re Amica Mut. Ins. Co.*, 85 A.D.2d 727, 730 (N.Y. App. Div. 1981); *People ex rel. Watchtower Bible & Tract Soc. v. Haring*, 146 N.Y.S.2d 151, 159 (1955); *Watson v. Goldsmith*, 31 S.E.2d 317, 319 (S.C. 1944).

112. *See* *Parkinson*, 233 F.2d at 437-38. The court in *Parkinson* reasoned that the "spirit" of the Federal Rules of Civil Procedure "must reject the theory that the pleading of a claim under oath . . . irrevocably freezes the contentions of the pleader so that under no circumstances may he alter his view in that, or another, case, or assert an inconsistent position." *Id.* at 438 (citing FED. R.

It might be argued that the doctrine of judicial estoppel deters the assertion of false positions by imposing a sanction. If a party asserts a false or legally incorrect position in a prior action, the party will be deprived of any benefit it might receive from asserting the true facts or correct law in a subsequent action. But it is far from obvious that the net effect of the judicial estoppel doctrine improves systemic accuracy by deterring misrepresentations. Unlike the criminal law, which is codified and publicized, judicial estoppel is an obscure legal doctrine. Moreover, far from being swift and certain, the imposition of judicial estoppel as a punishment for misrepresentation in a prior action will likely be delayed and haphazard. Finally, the question arises as to the proportionality of judicial estoppel as a punishment for misrepresentation. Although the stakes in the prior and subsequent actions might, as a matter of coincidence, be roughly proportional, they might just as well be wildly disproportionate. The effect of the sanction might be so small as to be wholly ineffective, or it might be so large as to be grossly unjust.

One final point should be made about the effect of judicial estoppel on accuracy. Many courts hold that a party cannot be judicially estopped if the party did not prevail in the prior action or if the court did not adopt the party's position.¹¹³ If an identical issue was actually litigated and necessarily decided in a prior litigation, then the doctrine of judicial estoppel is unnecessary since the case can be handled by the principles of issue preclusion. If one of the requirements for issue preclusion is not met, if for example the issues are

Civ. P. 8(e)(2)).

113. See *General Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1505 (9th Cir. 1995) (judicial estoppel is properly invoked if court actually adopted earlier inconsistent statement); *Bogle v. Phillips Petroleum Co.*, 24 F.3d 758, 762 (5th Cir. 1994); *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1038 (2d Cir.), *cert. denied*, 510 U.S. 992 (1993); *Levinson v. United States*, 969 F.2d 260, 264-65 (7th Cir. 1992) (“[T]he party to be estopped must have convinced the first court to adopt its position; a litigant is not forever bound to a losing argument.”).

Some courts have held that judicial estoppel can apply even if the party was not successful in the prior proceeding if the court finds that its integrity was undermined by the party engaging in “fast and loose” behavior. See, e.g., *United States v. Garcia*, 37 F.3d 1359, 1367 (9th Cir. 1994) (judicial estoppel can apply even if party was previously unsuccessful).

not truly identical, then the concerns of policy and principle that argue against granting issue preclusive effect would also seem to argue against judicial estoppel.

Some courts, however, have suggested that judicial estoppel differs from issue preclusion in that judicial estoppel allows preclusion on the basis of a prior inconsistent position that was not actually litigated and decided in the prior adjudication.¹¹⁴ If there has been no actual litigation and decision, then the policy of judicial efficiency and economy that supports the application of issue preclusion and overrides the concern for accuracy in the subsequent litigation is not present—resources have not been invested in the determination of the issue in the prior action. Moreover, a substantial question of fairness arises in connection with the application of judicial estoppel to a party who has not prevailed on the basis of his prior inconsistent position. It is surely easy to imagine that a litigant might take a position in good faith in the prior litigation and lose. If the rules of claim preclusion do not bar the subsequent action, then it seems perverse to preclude the litigant from adjusting to the judicial determination that his position was incorrect and from seeking another remedy. For example, consider a variation on the facts of *Cleveland*. Suppose that Ms. Cleveland were denied disability benefits on the ground that she could work with a reasonable accommodation. Surely, she should not then be precluded from bringing a lawsuit if her employer fails to provide such an accommodation. Yet it is precisely this perverse result that strict application of the doctrine of judicial estoppel would require.

If Ms. Cleveland brought her social security disability claims with her ADA claims in federal court, then Federal Rule of Civil Procedure 8(e)(2) would have permitted her to assert both claims in the alternative.¹¹⁵ But because the disability claim could only be as-

114. See *Scarano v. Central R.R. Co.*, 203 F.2d 510, 512 (3d Cir. 1953) (“Nor is the estoppel relied on here equivalent to ‘collateral estoppel’ as that term is used in the Restatement of Judgments. That concept gives to the determination of actually litigated issues by valid and final judgment conclusiveness in all further litigation between the same parties. Since, on the present record, there is a substantial dispute as to what the former judgment decided about plaintiff’s physical condition, collateral estoppel cannot be employed at this stage.”) (citations omitted).

115. See FED. R. CIV. P. 8(e)(2). Rule 8(e)(2) of the Federal Rules of Civil

served in an administrative tribunal with limited subject matter jurisdiction, this option was not available to Ms. Cleveland.¹¹⁶ In these circumstances, the policies that support pleading in the alternative would also support actions in the alternative.¹¹⁷

Judge Moore provided an eloquent summary of the relationship between the doctrine of judicial estoppel and the search for truth in an opinion for the Second Circuit:

The doctrine of judicial estoppel, as urged here, would extend estoppel beyond all reasonable bounds. In finding facts in a law suit the business of the court is to determine the truth or falsity of the controverted propositions of fact. Collateral estoppel, or estoppel by judgment, was not developed to render immutable all statements or pronouncements of litigants but to protect the parties from the expense, delay, and harassment attendant upon having to prove *de novo* a fact already established in an action between the same parties or their privies.¹¹⁸

Judge Moore's point is simple and compelling: If the doctrine of judicial estoppel extends beyond the reach of the doctrines of claim and issue preclusion, it will distort the search for truth without compelling justification.

C. Judicial Estoppel Does Not Cure Unfairness to the Opponent in the Subsequent Action

The second rationale for judicial estoppel advanced by the Third Circuit in *Scarano v. Central Railroad Company*¹¹⁹ was based on the premise that the assertion of inconsistent positions may result in substantive unfairness to the opponent in the subsequent action. Surely this would be the case if plaintiffs were permitted to bring actions based on inconsistent legal theories and obtain a double recovery

Procedure provides in part: "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." *Id.*

116. See 42 U.S.C. § 405(b) (1994).

117. On this point, see the excellent discussion in Henkin, *supra* note 3, at 1730-36.

118. *Stella v. Graham-Paige Motors Corp.*, 259 F.2d 476, 481-82 (2d Cir. 1958).

119. 203 F.2d 510 (3d Cir. 1953).

from the same defendant. Such a scenario would be presented by a hypothetical variation on the facts of *Cleveland*. Suppose Ms. Cleveland brought a prior action against PMSC for disability benefits under an employee benefits plan and obtained a money judgment for her expected lifetime earnings on the basis of her assertion that she was permanently and totally disabled. Assume further that she then brought a subsequent action on the basis that she was a qualified person with a disability under the Americans with Disabilities Act, once again seeking her expected lifetime earnings. In other words, suppose that she had sought the same damages twice. Under these circumstances, a good case can be made that her second claim should be precluded. But it is not necessary to invoke the doctrine of judicial estoppel to obtain this result, because preclusion would obviously be available under conventional principles of claim preclusion or *res judicata*. As we have already noted, under the Federal Rules of Civil Procedure, Ms. Cleveland would have been allowed to assert both claims simultaneously, by pleading in the alternative.¹²⁰

The rationale for judicial estoppel based on unfairness to defendants applies only if a mutuality rule is applied. If mutuality is not required, then the stranger to the prior action against whom an inconsistent position is asserted in a subsequent action is not prejudiced. Rather, the assertion of judicial estoppel in these circumstances is just as likely to result in an unfair advantage to the party in the second action.

This point can be illustrated by the facts of *Cleveland*. If the Court applies the judicial estoppel doctrine against Ms. Cleveland, then there are two possibilities with respect to the merits of her action. If Ms. Cleveland's action against PMSC is not meritorious, then the application of the doctrine of judicial estoppel should make no difference to the outcome of the dispute. PMSC should prevail, either on summary judgment or at trial. Ms. Cleveland's prior inconsistent statements might play a role in the fact-finding process, but they would simply be evidence to be given its due weight in light of any explanation Ms. Cleveland offers and all of the other evidence. If Ms. Cleveland's action against PMSC were meritorious, then the application of the doctrine of judicial estoppel would create a

120. See *supra* text accompanying note 112.

windfall for PMSC. PMSC would avoid liability, even though it actually had violated the Americans with Disabilities Act. In neither case would the doctrine of judicial estoppel operate to avoid substantive unfairness to PMSC.

V. CONCLUSION

This brief Commentary on *Cleveland v. Policy Management Systems Corporation* raises the question of whether the Supreme Court should endorse the doctrine of judicial estoppel in its decision. The answer to that question is "no." What are the implications of this answer for the disposition of *Cleveland*? Several options are available to the Court. One option would be for the Court to reject the doctrine of judicial estoppel, and then consider whether the Fifth Circuit could be affirmed on other grounds. A slight variation of this option would involve a remand to the Fifth Circuit, for consideration of the question whether summary judgment is appropriate on the basis of Ms. Cleveland's prior inconsistent statements or whether the doctrine of issue preclusion applies to the question whether she is a qualified individual with a disability. Yet another option would be for the Court to affirm the Fifth Circuit on grounds other than judicial estoppel, and explicitly disclaim either approval or disapproval of an independent doctrine of judicial estoppel.

The Supreme Court may disagree with the analysis presented in this Commentary and decide to endorse the doctrine of judicial estoppel. This might or might not result in a decision to affirm the Fifth Circuit. The Court might conclude that the requirements for judicial estoppel were not met on a number of grounds. For example, the Court might conclude that judicial estoppel requires mutuality and prejudice to the party seeking to assert the estoppel defense. Accordingly, because PMSC was not a party to the social security disability application, it could not assert judicial estoppel if mutuality is required. Alternatively, the Supreme Court might endorse the doctrine of judicial estoppel but conclude that Ms. Cleveland's positions were not inconsistent. Indeed, under the substantive law governing the relationship between the ADA and the Social Security Act, Ms. Cleveland may be entitled to receive disability benefits while pursuing a claim that she is entitled to a reasonable accommodation from her employer. Finally, the Court might endorse the

doctrine of judicial estoppel, but conclude that it does not apply when the prior proceeding was an administrative procedure that differs fundamentally from “judicial” proceedings between adversary parties. If the Court chooses any of these options, it should precisely formulate the doctrine of judicial estoppel. The relationship between that doctrine and the related doctrines of claim and issue preclusion should be stated clearly, and the requirements of judicial estoppel should be formulated with care.

Yet another option exists. The Court might take the position that it does not need to endorse the doctrine of judicial estoppel because the requirements for judicial estoppel have not been met on the facts before it. This option has the consequence that the Supreme Court will have defined at least some of the elements of a form of preclusion whose very existence will be cast into doubt by the Court. This would, I think, be the most unfortunate choice the Court could make. Even within the scope of this brief Commentary, the uncertainty and confusion engendered by the doctrine of judicial estoppel has become apparent. Because judicial estoppel is a form of preclusion, there is a special need for clarity and certainty in the law that governs the doctrine. Parties need the ability to gauge the effect that assertions made in one lawsuit will have in future litigation. A decision that puts the doctrine of judicial estoppel in limbo would undermine the law developed in the various circuits without putting anything in its place, thus worsening an already bad situation.

The doctrine of judicial estoppel may once have had a role to play in American procedure. Judicial estoppel may have filled the gaps in the emerging doctrines of res judicata and collateral estoppel. Before the adoption of the Federal Rules of Evidence, judicial estoppel may have been part of a system that gave judges substantial discretion to withhold relevant facts from the jury. Before the Federal Rules of Civil Procedure, the doctrine of judicial estoppel may have been consistent with a system of pleading that did not allow allegations in the alternative. All of this may once have been true. But the procedural landscape has changed, and with it, the rationale for an independent doctrine of judicial estoppel has eroded. The costs of that doctrine are now substantial, and its benefits are dubious. *Cleveland v. Policy Management Systems Corporation* should not be

the occasion for the Supreme Court to endorse the doctrine of judicial estoppel.

