

New York Law Journal



Web address: <http://www.nylj.com>

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An *incisivemedia* publication

VOLUME 240—NO. 37

THURSDAY, AUGUST 21, 2008

COMMERCIAL DIVISION UPDATE

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Judicial Estoppel Use Freer as Policy Directives Change?

The doctrine of judicial estoppel, also known as estoppel against inconsistent positions, derives from the common sense premise that parties should be barred from taking directly contrary positions in different cases.

The doctrine rests upon the principle that a litigant 'should not be permitted...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.'¹

A recent decision in *GFI Securities LLC v. Tradition Asiel Securities Inc.*² by Justice Richard Lowe of the Commercial Division in New York County contains several separate examples of the application of judicial estoppel and provides fertile ground for analyzing the various nuances of this doctrine.

The Doctrine

Judicial estoppel is a common-law doctrine that precludes a party from inequitably adopting a position that is inconsistent with a position taken in either the same proceeding or a separate action.³ The party is estopped from assuming a contrary position, if he or she secured a judgment in his or her favor, "simply because his or her interests have changed."⁴ "The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts."⁵

Unlike equitable estoppel, which protects fairness in the relationship between the parties, judicial estoppel protects fairness in the relationship between a litigant and the judicial system.⁶ The doctrine seeks to preserve the sanctity of the oath by demanding truth and consistency in sworn positions.⁷ Furthermore, the doctrine seeks to preserve judicial integrity by avoiding the risk of inconsistent results in two proceedings.⁸

Although New York courts have articulated prerequisites for the application of the doctrine,⁹ in practice it is an equitable doctrine that courts are willing to apply more liberally than these prerequisites would otherwise indicate.

'GFI Securities'

In *GFI Securities*, plaintiff GFI alleged that

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corporate raiding by two competing brokerage firms had caused some of its employees to resign and join the competitors in violation of restrictive covenants contained in their employment agreements. The defendants countered that the restrictive covenants had either expired or were otherwise unenforceable. While the underlying claims were arbitrable before the Financial Industry Regulatory Authority, GFI moved the court for a preliminary injunction in aid of arbitration. Specifically, GFI sought to enjoin the former employees from performing services for the competitors, from accepting business from GFI customers, from soliciting GFI employees and related relief.

After the court analyzed the key elements of irreparable harm and probability of success on the merits, it went on to address the defendants' assertion that GFI's motion for a preliminary injunction enforcing the restrictive covenants was barred by the doctrine of judicial estoppel. The defendants asserted three prior episodes allegedly gave rise to judicial estoppel on two of GFI's arguments in the *GFI Securities* case.

First, the defendants pointed out that GFI was a defendant to a litigation in 2004 in which GFI was alleged to have raided a competitor's employees.¹⁰ There, the employment agreement had quantified the amount by which the employer would be damaged if the employee terminated his employment. In opposing a motion for a preliminary injunction in that case, GFI asserted, and the court agreed, that there was no irreparable harm as the contract set forth an adequate remedy for money damages.

In a 2007 case involving similar facts,¹¹ GFI as defendant was again arguing in opposition to a motion for a preliminary injunction that the restrictive covenants that its new employees had with their former employer were not enforceable. The court again found there to be no irreparable harm because of a liquidated damages clause in the

employment contracts. In the *GFI Securities* case, the GFI employment contracts contained similar clauses providing for liquidated damages in the event the noncompetes were violated. Yet, GFI argued that it had no adequate remedy at law.

In that same earlier 2004 case, GFI had argued that the services of a junior inter-dealer broker were not unique or extraordinary and, thus, an injunction was not warranted. In denying the motion for a preliminary injunction against GFI in that case, the court adopted this reasoning. However, when it was seeking a preliminary injunction in the *GFI Securities* case, GFI argued that the departing employees' relationship with GFI's clients was special as the employees had considerable influence over where customers did business.

Based on these three prior instances, Justice Lowe found that GFI was judicially estopped from asserting contrary positions in the present case. The court concluded:

The court notes that with alarming frequency, these competing parties are asserting alternative and contrary positions depending on which side of a particular suit they are on. Their interpretation of the relevant case law seems to depend, not on the individual facts of the matters, but rather whether, in each particular instance, they are the party seeking to prevent the alleged misconduct or whether they are defending against the misconduct. This type of self-serving litigation unfortunately appears to have become routinely practiced.

Is a Judgment Required?

The *GFI* decision raises the issue of whether, for judicial estoppel to apply, the prior inconsistent position must have led to a judgment being entered in the prior case. Historically, the doctrine has been found applicable only where a prior judgment was obtained.¹²

In *GFI Securities*, the court found judicial estoppel not based on judgments obtained in the prior cases, but on determinations on motions for preliminary injunctions. In so doing, the court cited the First Department's holding in *D&L Holdings LLC v. RCG Goldman Co. LLC*¹³ for the proposition that judicial estoppel can be applied to court determinations that were not denominated as judgments.

In *D&L*, the First Department was faced with a claim of judicial estoppel based on a representation by plaintiff's counsel in a prior bankruptcy proceeding that the plaintiff would

have no further right to claim an interest in certain property after the expiration of a certain date. In determining that the doctrine did apply notwithstanding the fact that a judgment was not entered in the plaintiff's favor in that bankruptcy proceeding, the court noted that limiting its application to cases where a judgment was obtained would not advance the policy behind the doctrine "to prevent abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position."¹⁴

As the doctrine has evolved, it may be more accurate to state that judicial estoppel applies where the party, based on a prior inconsistent position, prevailed in a final judicial determination, regardless of whether that determination is embodied in a judgment. However, even as reformulated, the *GFI Securities* court's application of the doctrine based on earlier preliminary injunction determinations does not cleanly fit. Decisions on motions for preliminary injunctions are, by definition, not final determinations.

Perhaps the *GFI Securities* approach can be rationalized based on the reality that restrictive covenant cases are largely won or lost at the preliminary injunction stage: if the motion is denied, the case is dropped and, if it is granted, the case is settled. In *D&L Holdings*, the First Department applied judicial estoppel to a bankruptcy court ruling, even though not embodied in a judgment, because the ruling constituted the full grant of the relief that D&L had sought from that court.¹⁵ This reasoning perhaps can be applied to a preliminary injunction determination in a restrictive covenant case.

Identities of the Parties

Another issue raised by the *GFI* decision is what relationship the parties in the current case must have to the earlier case in which the inconsistent position was taken. New York courts have repeatedly held that for the doctrine to apply, the parties to the current case must be the same, or in privity with, the parties to the earlier case.¹⁶ In *GFI Securities*, by contrast, the only common party was *GFI* itself; none of the defendants in the *GFI Securities* case were parties to the earlier cases.

Although the rule requiring mutuality of parties is also applied in the majority of other states, there are at least a handful of courts that have been willing to find that a party is judicially estopped from taking an inconsistent position even when the parties of the previous and current litigation are "legal strangers."¹⁷ At least one court has done so under the principle of "quasi-estoppel" where the inconsistency is significant enough to make the present assertion unconscionable and where the first assertion was based on full knowledge of the facts.¹⁸

The court in *GFI Securities* did not address the fact that, aside from *GFI*, the parties from the current proceeding were "legal strangers" from those in the earlier proceedings. However, in applying judicial estoppel in such a liberal manner, the court may have feared that a rigid application of the doctrine would have interfered with the underlying principle of protection of

the judicial process. Justice Lowe noted that the parties were attempting to argue inconsistent positions "with alarming frequency" and that "this type of self-serving litigation unfortunately appears to have become routinely practiced." The court's admonishment to the litigants appears to demonstrate a frustration with the parties' repeated abuse of the judicial proceedings, which is exactly what judicial estoppel seeks to prevent. The use of judicial estoppel where there is no mutuality of the parties can be reconciled easily with the underlying policy because, as stated previously herein, the principle has nothing to do with the relationship of the parties to one another but the relationship of the litigants to the court.¹⁹

The Earlier Court

• And Reliance on the Inconsistent Position.

A third issue raised by *GFI Securities* is the extent to which the prior court's determination must have relied on the inconsistent statement. For judicial estoppel to apply, "the prior inconsistent position must have been adopted by the court in some manner."²⁰ In interpreting New York law, the Second Circuit has stated that by requiring "acceptance by the earlier tribunal of the litigant's statements" the doctrine is limited "to situations where the risk of inconsistent results with its impact on judicial integrity is certain."²¹

Although New York courts have not articulated the exact extent upon which the earlier position must have been relied, the language "in some manner" and the absence in the jurisprudence of any substantive discussion of a standard seems to indicate this is a fairly low threshold to meet. In *GFI Securities*, it seems fairly clear that *GFI* prevailed on the preliminary injunction motions in the prior cases on multiple grounds, including those that are inconsistent with the current positions that *GFI* has taken. This can be taken as an indication that courts are willing to apply the doctrine of judicial estoppel freely when policy directives indicate that it would be appropriate.

Conclusion

As the holding in *GFI Securities* demonstrates, judicial estoppel is an equitable doctrine. The U.S. Supreme Court has gone so far as to say that it is a doctrine that can be "invoked by a court at its discretion."²² As such, the common law rules for its application appear to bear some flexibility in their application.²³ One judge in the Commercial Division recently demonstrated a willingness to apply judicial estoppel where the facts do not precisely conform with the articulated standard. Practitioners should thus always be aware of the possible application of the doctrine before advancing positions that are inconsistent with

those the client took in an earlier case or earlier in the proceedings.

1. *Envtl. Concern Inc. v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593, 476 N.Y.S.2d 175, 177 (2d Dept. 1984) (quoting Note, "The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings," 59 Harv. L. Rev. 1132, 1132 (1946)).

2. No. 0601183, NYLJ, Aug. 8, 2008, at 26, col. 1., 2008 WL 2958271 (Sup. Ct. N.Y. Co. July 28, 2008).

3. See *Clifton Country Rd. Assocs. v. Vinciguerra*, 252 AD2d 792, 793, 675 NYS2d 680, 682 (3d Dept. 1998) (citation omitted).

4. *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 436, 626 N.Y.S.2d 527, 529 (2d Dept. 1995).

5. *Id.* (citation omitted).

6. *City of New York v. Black Garter*, 179 Misc. 2d 597, 599, 685 N.Y.S.2d 606, 607 (Sup. Ct. Richmond Co. 1999).

7. *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999).

8. *Id.*

9. See, e.g., *Ford Motor Credit Co.*, 215 A.D.2d at 436, 626 N.Y.S.2d at 529.

10. *Tullett Liberty Securities Inc. v. Smith*, No. 601858/04 (Sup. Ct. N.Y. Co. 2004) (Lowe, J.).

11. *Prehon Fin. Prods. Inc. v. GFI Group Inc.*, Nos. 603085/2000, 115749/2000 (Sup. Ct. N.Y. Co. June 7, 2007) (Ramos, J.).

12. See *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 176, 674 N.Y.S.2d 280, 286 (1st Dept.) leave to appeal dismissed, 92 N.Y.2d 962, 683 N.Y.S.2d 172 (1998).

13. 287 AD2d 65, 71, 734 NYS2d 25, 30 (1st Dept. 2001).

14. *Id.* at 71, 734 N.Y.S.2d at 30.

15. 287 A.D.2d at 72, 734 N.Y.S.2d at 30.

16. *Abramovich*, 227 A.D.2d at 1001, 643 N.Y.S.2d at 812; *American Motorists Ins. Co. v. O'Brien-Kreitzberg & Assos Inc.*, 234 A.D.2d 30, 30, 650 N.Y.S.2d 171, 171 (1st Dept. 1996); *Kalikow 78/79 Co. v. State*, 174 A.D.2d 7, 11, 577 N.Y.S.2d 624, 627 (1st Dept. 1992).

17. See, e.g., *Whitacre P'ship v. Biosignia Inc.*, 591 S.E.2d 870, 881 (N.C. 2004) ("unlike collateral estoppel, judicial estoppel has no requirement of 'mutuality' of the parties in either its offensive or defensive applications"); *Wabash Grain Inc. v. Smith*, 700 N.E.2d 234, 237-38 (Ind. Ct. App. 1998); *Bellinger v. Boatmen's Nat'l Bank of St. Louis*, 779 S.W.2d 647, 650 (Mo. Ct. App. 1989); *Aetna Life Ins. Co. v. Wells*, 557 S.W.2d 144, 147 (Tex. Civ. App. 1977).

18. *Travelers Prop. Cas. Corp. v. Jim Walter Homes Inc.*, 966 P.2d 1190, 1191 n.1 (Okla. Civ. App. 1998); see also *Willard v. Ward*, 875 P.2d 441, 444 (Okla. Ct. App. 1994). We know of no New York case that has applied the doctrine of quasi-estoppel in this context, that is, to an issue of unconscionability. However, the term "quasi-estoppel" has been used in New York to apply judicial estoppel to "quasi-judicial" or administrative proceedings. *PL Diamond LLC v. Becker-Paramount LLC*, 16 Misc. 3d 1105(A), 841 N.Y.S.2d 828 (Table), 2007 N.Y. Slip Op. 51298(U) at *9 (Sup. Ct. N.Y. Co. 2007).

19. See *Whitacre P'ship*, 591 S.E.2d at 881 (citing *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 317 (Tenn. 1924)).

20. *67 Vestry Tenants Ass'n v. Raab*, 172 Misc. 2d 214, 219, 658 N.Y.S.2d 804, 808 (Sup. Ct. N.Y. Co. 1997).

21. *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2d Cir. 1997).

22. *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1814 (2001) (citation omitted).

23. See *id.* at 751 ("the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle...we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel") (citations omitted).

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