

COMMENTARY

# It's Never Over Till It's Over in Baseball and Civil Trials

How do you win a case after your client has already paid damages and attorney fees to the defendant? You make novel use of judicial estoppel. There was no clear precedent for our approach, and there is every reason now that another plaintiff—or a defendant—can also use it.

Board of Contributors

By Alexander A. Salinas | March 01, 2024

---

How do you win a case after your client has already paid damages and attorney fees to the defendant? You make novel use of judicial estoppel. There was no clear precedent for our approach, and there is every reason now that another plaintiff—or a defendant—can also use it.

Our firm represented a client seeking to enforce a promissory note of more than \$1 million that ballooned to \$1.7 million with interest because the borrower failed to repay it. We sued in the Eleventh Judicial Circuit Court of Florida. Before litigation went forward, though, our client decided to withdraw the lawsuit.

When the case was dismissed, the borrower asked the court to grant attorney fees as the prevailing party under the terms of the note. The judge agreed.

While disappointed with that ruling, we saw an opportunity to refile the case and, based on several conditions peculiar to the case, to pursue a “reversal of fortune” of sorts. The borrower had taken the position that

the note was unenforceable because it was the result of gambling debt. My colleagues and I decided that the borrower's position was not relevant to the question at hand and chose instead to focus on arguing the doctrine of judicial estoppel. As every first-year law student learns, judicial estoppel prevents a party from successfully asserting one position and then subsequently taking the opposite position. The doctrine opened the door to a new legal strategy that rendered the case's material facts largely irrelevant.

In *Whittingham v. HSBC Bank USA*, (5th DCA 2019), the court wrote that the doctrine consists of four elements: A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position to the prejudice of the adverse party, where the parties are the same in both actions.

When we refiled the lawsuit, we noted that the borrower had enforced the note in the first action, specifically the attorney fees provision, against our client, thereby conceding, at least implicitly, the note's enforceability. Second, the court had ruled in the first action that the borrower was "entitled to reasonable attorney fees and costs under the promissory note." Third, a final judgment was entered awarding the borrower attorney fees. Fourth, the borrower had accepted payment of those attorney fees under the note and in compliance with the final judgment.

Before moving for summary judgment on the issue of estoppel, we asked ourselves whether the doctrine of judicial estoppel had been successfully applied before in a similar situation. The answer was "not exactly."

Here's what we found in our research. It can be used in similar circumstances.

- *Gabarick v. Laurin Maritime (America)*, (5th Circuit 2014). It held that judicial estoppel precluded the claim seeking a declaratory judgment that agreements were void based on fraud in the inducement because, in a prior action, the plaintiff successfully argued that the defendant owned the tugboats and, thus, implied that the agreements were valid.
- *Haddad v. Randall S. Miller Associates*, (6th Circuit 2014). It held that judicial estoppel precluded claims that a mortgage was void because the mortgagor had previously represented in a separate proceeding indicating that the mortgage was valid.
- *Visual Interactive Phone Concepts, v. Virgin Mobile USA*, a case in New Jersey granting summary judgment based on judicial estoppel against a party that argued that the contract was invalid as a matter of law but had sought to enforce the same contract in another lawsuit.
- *AFN v. Schlott*, a second New Jersey court ruling that judicial estoppel barred the defendant from contending that the contract was illegal where the defendant had previously argued in another forum that the contract was valid.
- Additionally, we found two relevant cases in *New York: Avila Group v. Norma J of California* and *VNB N.Y. v. Maldi*, 74 and one in Hawaii, *Ueoka v. Szymanski*.

Another relevant precedent was a 1995 opinion from the Third District Court of Appeal in *Carnival Leisure Industries v. Arviv*, which held that a trial court cannot award contractual prevailing-party attorney fees if the

underlying contract is an unenforceable gambling debt. Through deductive reasoning we persuaded the court that, since the borrower in our case had sought and been awarded contractual prevailing party attorney fees, the underlying contract could not be an unenforceable gambling debt.

In an 11-page ruling, the judge granted our client summary judgment and ordered the borrower to pay the \$1.7 million debt. And, on the last line of the order, the court said it would entertain attorney fees and costs for our client.

**Alexander A. Salinas** *is a partner at TA PLLC, a business law firm. Salinas leads the firm's litigation practice and may be reached at [asalinas@tapllc.com](mailto:asalinas@tapllc.com).*

Reprinted with permission from the March 1, 2024 edition of the Daily Business Review© 2023 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or [asset-and-logo-licensing@alm.com](mailto:asset-and-logo-licensing@alm.com).