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Litigation Tactics

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Litigation Tactics:
Issue and Claim Preclusion

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I. Introduction

There are three tools that practitioners can employ to avoid re-litigation of certain facts and issues that were established in prior proceedings. The tools for avoiding re-litigation are commonly known as *res judicata*, collateral estoppel, and judicial estoppel. First, *res judicata*, also known as claim preclusion, precludes the subsequent litigation of any claims which could have been raised in the first proceeding. Second, collateral estoppel, also known as issue preclusion, bars the re-litigation of only those issues that were decided in the earlier proceeding. Finally, judicial estoppel is an equitable concept providing that a party who prevails on one ground in a lawsuit may not in another lawsuit repudiate that ground. Each of the doctrines aim to relieve the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudication. More importantly, they can be critical tools in avoiding protracted litigation on facts and issues that have already been established in previous litigation between the parties or their privies.

II. Res Judicata/Claim Preclusion

a. Generally

Under *res judicata*, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Bragg v. Flint Bd of Ed*, 570 F.3d 775, 776 (6th Cir. 2009). In order for *res judicata* to apply, the proponent must prove the following four elements: (1) A final decision on the merits in the first action by a court of competent jurisdiction; (2) The second action involves the same parties, or their privies, as the first action; (3) The second action raises an issue actually litigated or which should have been litigated in the first action; and (4) An identity of the causes of action. *Autumn Wind Lending, LLC v. Est. of Siegel*, 92 F.4th 630, 634

(6th Cir., 2024), quoting *Sanders Confectionery Prod v. Heller Fin., Inc.*, 973 F2d 474, 480 (6th Cir., 1992).

b. The elements

i. A final decision on the merits

In order for a decision to be final, it must be final and appealable. In order for a judgment to be final and appealable, "[t]he order need not dispose of all the issues presented by the pleadings," but "[i]t must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof." *In re Walker*, 232 B.R. 725, 733 (Bankr. N.D. Ill. 1999) (citations and quotations omitted). When a judgment has been vacated, reversed, or set aside on appeal, it is thereby deprived of all conclusive effect, both as *res judicata* and as collateral estoppel. *State v. Baron*, 156 Ohio App. 3d 241, 249, 2004 Ohio 747, 805 N.E.2d 173 (Ohio Ct. App. 2004) Until such time as a decision is made on appeal, however, a final judgment retains its preclusive effect.

ii. The same parties or their privies

Determining whether the same parties are before the court in the second proceeding is normally a simple analysis. However, whether a party is in privity can be more complex. Privity means a successor in interest to the party, one who controlled the earlier action, or one whose interests were adequately represented. *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979 (5th Cir. 1990). In determining whether there is privity or not, the court may examine the following factors: "the extent of control the party in the second lawsuit exerted over the first lawsuit in which he was not a named party; the existence of 'deliberate maneuvering' to avoid the effects of the judgment entered in the first lawsuit; the 'close relationship between the parties;' and 'whether the prior

relationship justifies binding the nonparty to the prior judgment." *In re Kmart Corp*, 362 B.R. 361, 380 (Bankr. N.D. Ill., 2007).

iii. The issue was actually litigated or should have been litigated.

This element requires that "[t]he second action raises an issue actually litigated or which should have been litigated in the first action." *Autumn Wind Lending, LLC v. Est. of Siegel*, 92 F.4th 630, 634-35 (6th Cir., 2024). "An issue is actually litigated when it 'is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.'" *In re Leonard*, 644 F. App'x 612, 616 (6th Cir. 2016) (quoting Restatement (Second) of Judgments § 27 cmt. d (Am. L. Inst. 1982)). A stipulated dismissal will not normally amount to the issue being "actually litigated." *See, e.g. Green v. Nevers*, 111 F.3d 1295, 1301 (6th Cir. 1997)) (highlighting that stipulations of dismissal are "self-executing and do not require judicial approval"); *see also Levi Strauss Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1372-73 (Fed. Cir. 2013) (noting that a stipulated dismissal with prejudice counts as an adjudication on the merits but does not count as the actual litigation of any issue).

iv. Identity of the causes of action

The identity of the causes of action requires that the claims arose out of the same series of transactions or the same core of operative facts. *Browning v. Levy*, 283 F.3d 761, 773-74 (6th Cir. 2002); see also *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316, 131 S. Ct. 1723, 179 L. Ed. 2d 723 (2011) ("The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap, barring claims arising from the same transaction." (quotation marks omitted)). "Where two successive suits seek recovery for the same injury, a judgment on the merits operates as a bar to the later suit, even though a different

legal theory of recovery is advanced in the second suit." *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978).

c. Rational for Doctrine

Courts apply the doctrine of res judicata to promote the finality of judgments, which in turn increases certainty, discourages multiple litigation and conserves judicial resources. See *Federated Department Stores v. Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). Res judicata is a broader in scope than collateral estoppel because *res judicata* forecloses all that might have been previously litigated, whereas collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit. *Montana v. United States*, 440 U.S. 147, 153 (1979).

d. Example Bankruptcy Cases

Vizachero v Brazieka (In re Brazieka), ___BR___, Adv. Pro. No. 16-04839, 2017 Bankr LEXIS 558, at *1 (Bankr. E.D. Mich. Mar. 1, 2017) (finding that the Debtor's admissions were sufficient for the creditor to have obtained summary disposition in state court on her claim that debtor fraudulently obtained money from her. Accordingly, the bankruptcy court could give res judicata effect to the state court consent judgment).

Baermann v Ryan (In re Ryan), 408 B.R. 143, 164 (Bankr. N.D. Ill. 2009) (The court ruled that there was not "an identity of the causes of action," because "[a] claim under § 523(a)(2)(A) of the Bankruptcy Code is not identical to a claim for fraud under Illinois law or a claim under the Illinois Residential Real Property Disclosure Act."

Stoughton Lumber Co v Sveum (In re Sveum), ___BR___, Bankr. No. 12-15483, Adv. No. 13-2, 2013 Bankr. LEXIS 2761, at *12 (Bankr. W.D. Wis. July 8, 2013) (finding that the creditor's claim was not barred by res judicata. "While the state court judgment dismissed the theft by

contractor claims on the merits, the settlement debt may still have arisen out of fraud or defalcation in a fiduciary capacity.").

III. Collateral Estoppel/Issue Preclusion

a. Generally

The doctrine of collateral estoppel precludes re-litigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action. *In re Markowitz*, 190 F.3d at 461 (quoting *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). Collateral estoppel is available whether or not the second action involves a new claim or cause of action. 18 Fed. Prac. & Proc. Juris. § 4416 (3d ed.). The decision of whether to apply collateral estoppel is within the discretion of the court, and application of the doctrine is determined on a case-by-case basis.

For a proponent of collateral estoppel to prevail, the proponent must prove the following elements:

> (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation, (4) the party to be estopped was a party to the prior litigation (or in privity with such a party), and (5) the party to be estopped had a full and fair opportunity to litigate the issue. [*Wolfe v. Perry*, 412 F.3d 707, 716 (6th Cir. 2005) (citing *Santana—Albarran v. Ashcroft*, 393 F.3d 699, 704 (6th Cir. 2005)).]

To determine whether these five elements are met, bankruptcy courts "look at the entire record of the [prior] proceeding, not just the judgment." *Trost v. Trost*, 735 F. App'x 875, 879 (6th Cir. 2018).

b. The Elements

i. The issue is identical.

In order for collateral estoppel to be applicable, the issues in the two proceedings must be identical. Stated differently, there must be a factual finding on the issue involved in the prior proceeding. Where multiple claims possibly form the basis of a judgment and the trial court does not specify the basis for its decision, none of the claims are necessary to the judgment for the purpose of collateral estoppel. *Massengill v. Scott*, 738 S.W.2d 629, 632 (Tenn. 1987) (rejecting the application of collateral estoppel in an action involving multiple claims because the jury returned a general verdict); *see also TruPoint Bank v. Clark (In re Clark)*, No. 08-50899, 2009 Bankr. LEXIS 611, 2009 WL 693164, at *4 (Bankr. E.D. Tenn. Mar. 11, 2009) (rejecting the application of collateral estoppel to a state-court judgment that "d[id] not set forth any findings of fact and conclusions of law and d[id] not otherwise indicate upon which of the various causes of action the [plaintiff] was being granted judgment"). Accordingly, there needs to be some specific findings of facts and conclusions of law before collateral estoppel can be applied.

ii. Actually litigated.

In addition to establishing identical issues, the proponent must demonstrate that the issue was "actually litigated." Whether an issue is "actually litigated" depends upon the parties' participation in the first proceeding. Generally, courts have applied collateral estoppel if a party substantially participated in the litigation prior to the entry of a judgment. For example, a default judgment entered without any participation from a defendant is not sufficient to meet the "actually litigated" standard. *See Vogel v. Kalita (In re Kalita)*, 202 B.R. 889, 913 (Bankr. W.D. Mich. 1996); *but see Davis v. Tuggle's Adm'r*, 297 Ky. 376, 178 S.W.2d 979, 981 (Ky. 1944) ("The fact that no defense was offered in the suit . . . cannot make any difference, for the rule as to the

conclusiveness of judgments applies to a judgment by default . . . ."). On the other hand, a default judgment entered as part of a discovery sanction or after a party has responded to a complaint will likely meet the "actually litigated" standard. See *Leonard v. RDLG*, LLC, 529 B.R. 239, 247 (E.D. Tenn, 2015); see also *Phillips v. Weissert (In re Phillips),* 434 B.R. 475, 486 (BAP 6th Cir, 2010). Additionally, disposition of a case on summary judgment grounds meets the "actually litigated" requirement of the issue preclusion test. *Nat'l Acceptance Co v Bathalter*, ___BR___, No. 91-3128 1991 U.S. App. LEXIS 29787, at *7 (CA 6, Dec. 9, 1991). To meet this element, the party must have participated in some meaningful way in the first proceeding for a proponent to establish that the issue was "actually litigated." In *Fliss v. Generation Capital I, LLC*, the Seventh Circuit affirmed the bankruptcy court's sustaining of the debtor's claim objection where a state court consent judgment and order stating that the debt was still owed had limited preclusive effect. 87 F.4th 348, 355 (7th Cir. 2023).

iii. The issue must be necessarily decided.

Issue preclusion attaches only to determinations that were necessary to support the judgment entered in the first action. All alternative, independent grounds upon which a court may base its decision qualify as "necessary" to the court's judgment. *Winters v. Lavine*, 574 F.2d 46, 66-69 (2d Cir. 1978); *Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir. 1977); *General Dynamics Corp. v. AT&T*, 650 F. Supp. 1274, 1285 (N.D. Ill. 1986). An exception to this rule occurs when a court's judgment order could be based upon one of several alternative grounds that are not expressly relied upon or enumerated in the court's opinion. *Gilldorn Savings Asso v Commerce Savings Asso*, 804 F.2d 390, 395 (7th Cir. 1986). In order to meet this element, the issue must be necessary and essential to a judgment on the merits in the prior litigation.

iv. The same party or in privity

In addition to the elements discussed *supra*, the proponent must demonstrate that the same party is involved in the second litigation or privity exists. "The term 'privity' signifies that the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon the others, although those others were not party to the lawsuit." *Gill and Duffus Servs., Inc. v. A.M. Nural Islam*, 675 F.2d 404, 405, 218 U.S. App. D.C. 385 (D.C. Cir. 1982). As such, "'[a] privy is one [who is] so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case.'" *Herrion v. Children's Hosp. Nat'l Med. Ctr.*, 786 F. Supp. 2d 359, 371 (D.D.C. 2011). This element is generally easy to demonstrate if the same parties are involved in the second action.

v. Full and fair opportunity to litigate.

The fifth element requires that the party in the prior proceeding had a full and fair opportunity to litigate. "[A] full and fair opportunity to litigate entails . . . the procedure requirements of due process." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 n. 24, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982). "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Id.* at 481. "In the end, [the] decision will necessarily rest on the trial court's sense of justice and equity." *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 334, 91 S. Ct. 1434, 28 L. Ed. 2d 788, (1971). Normally, if the Court finds that the issue was "actually litigated", the Court will also find that the party had a full and fair opportunity to litigate.

c. Rationale for Doctrine

The doctrine of collateral estoppel is a judicially created doctrine that serves the dual purpose of protecting parties from relitigating identical issues with the same party or a person in

privity and promoting judicial economy by preventing needless litigation. The doctrine prevents legal harassment and the overuse or abuse of judicial resources.

d. Example Bankruptcy Cases

In re Phillips, 500 B.R. 570 (B.A.P. 8th Cir. 2013) (confirming bankruptcy court's grant of preclusive effect to Minnesota state court's order regarding ownership of assets and issue under collateral estoppel).

In re Bullard, 449 B.R. 379 (B.A.P. 8th Cir. 2011) (finding collateral estoppel did not apply due to lack of record on adjudication of underlying civil battery claim in state court).

IV. Judicial Estoppel

a. General

The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir., 2002) (citations and quotations omitted). The doctrine of judicial estoppel is utilized in order to preserve "the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." *Id.* at 726. Judicial estoppel is strong medicine, however, and it should not be used where it would "work an injustice, such as where the former position was the product of inadvertence or mistake." *Fairchild v. Touchtunes Music Corp.*, ___F. Supp. 2d___; 2002 U.S. Dist. LEXIS 24139, at *5 (N.D. Ill. Dec. 12, 2002). "Judicial estoppel is a matter of equitable judgment and discretion." *In re Knight-Celotex, LLC*, 695 F.3d 714, 721 (7th Cir. 2012). "Doctrines such as law of the case or judicial estoppel, *see* In re Hovis, 356 F.3d 820 (7th Cir. 2004), may be waived or forfeited, as may rules such as claim or issue preclusion." *Matter of Terrell*, 39 F.4th 888, 891 (7th Cir. 2022).

b. Elements

i. Prior inconsistent statement

The doctrine "only applies when the positions at issue are clearly contradictory and the estopped party's conduct involves more than mistake or inadvertence." *Audio Technica US, Inc. v. United States*, 963 F.3d 569, 575 (6th Cir. 2020). Additionally, the statements must be made "under oath." See *Id.* The "under oath" requirement is met when a party previously asserted an inconsistent position in a written filing and argued the motion on the merits before the court. *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, Prof. Corp.*, 855 F. App'x 239, 245 (6th Cir., 2021) Settlements and alternative pleadings will not satisfy this prong. See e.g. *Audio Technica US, Inc. v United States*, 963 F.3d 569, 576 (6th Cir. 2020) ("Settlements, even in the form of an agreed order, ordinarily do not constitute judicial acceptance of whatever terms they contain.").

ii. Judicial acceptance

Judicial acceptance "means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Teledyne Indus, Inc. v NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990) (quoting Edwards, 690 F.2d at 599 n.5). In order to satisfy this element, the underlying court must have accepted the position to the detriment of the opposing party. *See Kelly v. Herrell*, No. 21-2442, No. 21-2443, 2022 WL 17851675, at *2-4 (7th Cir. Dec. 22, 2022) (holding that judicial estoppel did not apply when the United States Trustee sought an order that a third party abandoned a property sale and later withdrew its motion).

c. Rationale

The purpose of the doctrine is to protect the integrity of the judiciary by preventing a party from convincing two different courts of contradictory positions, which would mean that one of those two courts was deceived. For this reason, courts will typically apply judicial estoppel only

where "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Audio Technica US, Inc. v. United States*, 963 F.3d 569, 575 (6th Cir. 2020).

V. Conclusion

Res judicata, collateral estoppel, and judicial estoppel can be useful legal vehicles for creditors and debtors facing litigation in bankruptcy. While the doctrines can prevent multiple lawsuits and protracted litigation, the application of the doctrines is fact intensive. Accordingly, practitioners should be well-versed in the specific facts of their case and application of these doctrines.

Faculty

Samuel M. Andre is a senior associate with Fredrikson & Byron P.A. in Minneapolis and represents businesses, commercial lenders and individuals in the areas of debtor/creditor law, bankruptcy and complex commercial litigation. His practice focuses on corporate restructuring, creditors' remedies, bankruptcy and commercial litigation. Prior to joining Fredrikson, Mr. Andre served as a judicial law clerk for the U.S. Bankruptcy Court in the Southern District of Texas. He is a member of the Turnaround Management Association and the Minnesota State Bar Association, and he was a member of the Houston Young Lawyers Association from 2016-18, the Houston Association of Young Bankruptcy Lawyers from 2016-18, and the Land, Water and Energy Clinic of the University of Minnesota Law School, for which he served as student director and attorney from 2014-16. Mr. Andre is and adjunct professor at the University of Minnesota Bankruptcy Clinic. He received his B.A. *summa cum laude* in 2013 from Valparaiso University and his J.D. *cum laude* in 2016 from the University of Minnesota Law School, where he served as managing editor from 2015-16 of the *Minnesota Law Review*.

Hon. Joel D. Applebaum is a U.S. Bankruptcy Judge for the Eastern District of Michigan in Flint. Prior to taking the bench, he was a member of Clark Hill PLC, where he practiced in the firm's Corporate Restructuring and Bankruptcy Practice Group and focused in the areas of bankruptcy and corporate reorganization, creditors' rights, commercial and bankruptcy litigation, and general commercial law. Judge Applebaum's practice included representing debtors, creditors' committees, customers, trade vendors, distressed-asset-purchasers, liquidating agents and trustees, among other parties in interest, in bankruptcy courts throughout the U.S. and in all industries and business types. He successfully briefed and argued cases in the U.S. Courts of Appeals for the First, Third and Sixth Circuits, including issues of first impression in *United Food & Commercial Workers Union v. A/mac's Inc. {In re A/mac's Inc.)*, 90 F.3d 1 (1st Cir. 1996), and *Bayer Corp. v. Masco Tech Inc. {In re Autostyle Plastics Inc.)*, 269 F.3d 726 (6th Cir. 2001). His practice also included federal and state law creditors' rights procedures, including receiverships, assignments for the benefit of creditors and trust mortgages. A member of the Michigan, New York, American and Federal Bar Associations, Judge Applebaum is also a Fellow of the American College of Bankruptcy and of the American Bar Foundation, and he was selected as a leading attorney in bankruptcy and creditors' rights by *The Best Lawyers in America* (2011 through present), *Michigan Super Lawyers* (2007 through present) and *dBusiness* magazine (2009 through present). He was also named by *Michigan Super Lawyers* as a "Michigan Top 50 Business Lawyer" and a "Michigan Top 100 Lawyer." Judge Applebaum is a past co-chair of the State Bar of Michigan's Creditors' Rights Committee and has authored and lectured extensively on bankruptcy, creditors' rights and general commercial law topics. He received his B.A. with honors from Michigan State University in 1979 and his J.D. with honors from Wayne State University Law School in 1983.

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