

A Primer on Judicial Estoppel

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Judicial estoppel. For plaintiff's counsel, those two words could spell the potential termination of your suit. As a defense attorney, judicial estoppel could be your best defense in a case.

This begs the question: When was the last time you, as a defense attorney, even asserted the defense of judicial estoppel? If you are not inquiring into the applicability of judicial estoppel in every case, you could be overlooking a valuable defense to your client. However, evaluating whether judicial estoppel applies in your case is a bit like looking into a carnival, fun-house mirror. At times, it is difficult to know exactly what you are looking at or even where it begins or ends. To help elucidate this area of the law, this article will focus on:

- 1) what is judicial estoppel;
- 2) the key elements in any analysis of judicial estoppel; and
- 3) the difference in the application of judicial estoppel between state and federal courts.¹

Overview

Before launching into a full analysis of judicial estoppel, a brief overview of what type of defense this is may be in order. First, judicial estoppel is an affirmative defense. Jones v. Littlejohn, 222 Ga. App. 494, 496-497, 474 S.E.2d 714 (1996). As such, it must be raised in either the first responsive pleading or in a motion for summary judgment. If you omit to raise an affirmative defense like judicial estoppel in your answer or in your initial brief for summary judgment, you have waived the defense. Rimes Tractor &

¹ Although judicial estoppel is a federal doctrine, it is applied in Georgia state courts. Nelson & Hill, P.A. v. Wood, 245 Ga. App. 60, 537 S.E. 2d 670 (2000).

Equip. v. Agrifit Acceptance Corp., 216 Ga. App. 249, 454 S.E. 2d 564 (1995).

(“Estoppel is an affirmative defense and must be set forth affirmatively in a responsive pleading or in a motion for summary judgment. Accordingly, [defendant] waived this defense by untimely asserting it in its supplemental brief.”) See also, Brown v. Little, 227 Ga. App. 484, 489 S.E. 2d 596 (1997).

With those practical matters in mind, judicial estoppel is based on a federal doctrine that works to preserve the integrity of judicial proceedings by precluding a party from presenting a legal position which is inconsistent with a position previously and successfully asserted in a prior proceeding.² New Hampshire v. Maine, 532 U.S. 742, 121 S.Ct. 1808 (2001); Chicon v. Carter, 258 Ga. App. 164, 573 SE 2d 413 (2002). In short, judicial estoppel is aimed at preventing a party from purposely misleading the bankruptcy court about the non-existence of an actual or potential claim and thereby gaining an unfair advantage from it. In practical terms, the doctrine is commonly applied to preclude a bankruptcy debtor from pursuing a monetary damages claim that was omitted from his assets in the bankruptcy petition. A failure to reveal assets, including unliquidated tort claims³, operates as a denial that such assets exist because it deprives the bankruptcy court of the core information it needs to evaluate and rule upon the bankruptcy petition. It also deprives the creditors of resources that may satisfy unpaid obligations. Thus, the application of judicial estoppel preserves the integrity of the judicial forum.

² Judicial estoppel was first recognized as a defense by Georgia courts in 1994. Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 455, 442 S.E. 2d 265 (1994)

³ A plaintiff/debtor is to disclose not only actual claims or assets, but potential claims or assets as well. Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 456, 442 S.E. 2d 265 (1994).

Given that background, it is important for defense counsel to determine whether judicial estoppel is even potentially at play in your case early on. It can take several months of discovery to confirm whether or not judicial estoppel is applicable in your case. As initial step, upon receipt of the complaint, a search should be done of the bankruptcy records for the plaintiff using LEXIS or a similar online legal resource. In searching the bankruptcy records, it is best to have as much information about the plaintiff as possible, including the plaintiff's social security number. If you do not have time to make such a background check into the plaintiff prior to the filing of the answer, you should assert the defense of judicial estoppel in the answer to preserve the defense.⁴

If the court records indicate that the Plaintiff has filed for bankruptcy, then you need to request the entire bankruptcy file from the appropriate bankruptcy court. This typically entails calling the clerk for that bankruptcy court and inquiring into the costs for an authenticated copy of the debtor's bankruptcy file. It usually takes the bankruptcy court two (2) to four (4) weeks to comply with this request.

Once you have the bankruptcy file, you next need to delve into the specific facts of your case. At the outset, you will want to check the schedule of assets that your plaintiff/debtor filed with the bankruptcy petition to see if he/she ever listed the case as an asset on the schedule or amended the petition to list the asset. If the claim is listed, that ends the analysis. Judicial estoppel does not apply if the plaintiff/debtor disclosed to the bankruptcy court the claim against your client. If the claim is not listed, then you

⁴ A related defense that counsel should be mindful of is that every action shall be prosecuted in the name of the real party interest. O.C.G.A. § 9-11-17(a). Here, if the claim is part of the bankruptcy estate, then the bankruptcy trustee is real the party in interest, not the plaintiff/debtor. See, Denis v. Delta Airlines, Inc., 248 Ga. App. 377, 546 S.E. 2d 805 (2001); United Technologies Corp. v. Gaines, 225 Ga. App. 191, 483 S.E. 2d 357 (1997); Cincinnati Ins. Co. v. Macleod, 259 Ga. App. 761, 577 S.E. 2d 799 (2003). While beyond the scope of this article, defense counsel should consider a motion to dismiss based on the real party of interest is the bankruptcy trustee.

next want you to determine what kind of bankruptcy case this is. In other words, is it a Chapter 7, 11 or 13 case? The distinction between the type of bankruptcy cases is most critical in state court cases where the defense of judicial estoppel is being contemplated.

Did the asset or claim become part of the bankruptcy estate?

The significance of the type of bankruptcy to any judicial estoppel analysis is most clearly explained by the Georgia Supreme Court in Period Homes, Ltd. v. Wallick, 275 Ga. 486, 487, 569 S.E. 2d 502 (2002). There, the Georgia Supreme Court explained the standard as:

Unlike a bankruptcy proceeding under Chapter 13, there are only limited circumstances in which Chapter 7 or 11 debtors must amend the schedule of assets to reflect property acquired after commencement of the case. 11 USC §541 (a)(7). This is in stark contrast to the amendment requirement that a Chapter 13 debtor is under, which directs that all property acquired after the commencement of the bankruptcy proceeding be included in an amended schedule of assets. 11 USC §1306 (a). There is no analogous provision for bankruptcy proceedings under Chapter 7 or 11. Accordingly, a debtor under Chapter 7 or 11 is under no statutory duty to amend its schedule of assets. Period Homes, 275 Ga. at 487.

In determining whether an asset or claim became part of the bankruptcy estate⁵, and therefore has to be disclosed, the Georgia Supreme Court in Period Homes clearly laid out a pre-petition or post-petition dichotomy for the various types of bankruptcies. Hence, the strongest case for the potential application of judicial estoppel in state court is typically in the context of a Chapter 13 bankruptcy case.⁶ That's because a Chapter 13 debtor is under an affirmative duty to amend and disclose a potential asset on the schedule of assets in a Chapter 13 Bankruptcy Petition no matter when the asset arose,

⁵ "A debtor's interest in a cause of action, including an unliquidated tort claim, is personal property included as part of the bankrupt estate". Byrd v. JRC Towne Lake, Ltd., 225 Ga. App. 506, 484 S.E. 2d 309 (1997).

⁶ Wolfork v. Tackett, 273 Ga. 328 (540 S.E. 2d 611) (2001) stood for the proposition that any bankruptcy debtor was required to amend their petition to disclose post-petition assets. It is important to note that the holding of Wolfork was limited by Period Homes. The Georgia Supreme Court ruled in Period Homes that only Chapter 13 debtors are under an affirmative duty to amend their assets to disclose claims that arose post-petition. See also, Chicon v. Carter, 258 Ga. App. 164, 573 S.E. 2d 413 (2002).

either before or after the filing of the bankruptcy petition. Harper v. GMAC Mortgage Corp., 245 Ga. App. 729, 538 S.E. 2d 816 (2000)⁷. If the plaintiff/debtor fails to list a claim, or amend a bankruptcy petition to list a claim, then the case for judicial estoppel is much stronger. Smalls v. Walker, 243 Ga. App. 453, 532 S.E. 2d 420 (2000); Byrd v. JRC Towne Lake, Ltd., 225 Ga. App. 506, 484 S.E. 2d 309 (1997); Wolfork v. Tackett, 273 Ga. 328, 540 S.E. 2d 611 (2001); Spoon v. Johnson, 247 Ga. App. 754, 545 S.E. 2d 328 (2001).

However, a Chapter 13 plaintiff/debtor who has not listed a potential claim will doubtlessly attempt to avoid the application of judicial estoppel. For such a plaintiff/debtor, two potential arguments exist. First, the plaintiff/debtor may argue that he/she is not under any obligation to disclose a claim or asset because that claim or asset never formed a part of the bankruptcy estate. Chicon v. Carter, 258 Ga. App. at 164. In Chicon, the plaintiff/debtor and another driver were involved in a motor vehicle collision. Prior to the collision, the debtor filed a Chapter 13 bankruptcy petition providing for payment of all their creditors in full. The plaintiff/debtor was discharged and the bankruptcy case was closed. The Georgia Court of Appeals held that the injury and the tort suit occurred after the confirmation of the bankruptcy plan. The plaintiff/debtor gained no unfair advantage by nondisclosure and the bankruptcy court determined that their personal injury claim did not form a part of the bankruptcy estate. “It stands to reason that the Georgia court in which the tort claim is asserted should honor the bankruptcy court’s actions. To hold otherwise would produce overly harsh and inequitable results.” Chicon, 258 Ga. App. 166.

⁷ “The duty to amend Chapter 13 bankruptcy schedules is clear. A debtor may not conceal property belonging to the estate. A debtor has an affirmative duty to supplement the list of assets with any claims arising during the pendency of the bankruptcy proceeding.” Harper, 245 Ga. App. at 731.

Alternatively, the Chapter 13 plaintiff/debtor can voluntarily dismiss the bankruptcy petition, which terminates the bankruptcy estate and restores the property back to the plaintiff/debtor. Weiser v. Wert, 2001 Ga. App. LEXIS 1078 (2001). As explained by the Weiser court, “there was no misleading the bankruptcy court by ‘successfully taking the inconsistent and irreconcilable position in the Bankruptcy Court’” because “the bankruptcy petition for Chapter 13 was voluntarily abandoned to avoid such a possibility of an inconsistent position.” Id.

As indicated in Period Homes, the plaintiff/debtor in the Chapter 7 or 11 case has a different obligation to disclose assets to the bankruptcy court and consequently may not be required to list the claim at all on the schedule of assets with the bankruptcy court. In a Chapter 7 or 11 bankruptcy proceeding, only claims arising before the filing of the bankruptcy petition are required to be disclosed. Reagan v. Lynch, 241 Ga. App. 642, 524 S.E. 2d 510 (1999); Kittle v. Conagra Poultry Co., 247 Ga. App. 102, 543 S.E. 2d 411 (2000); Southmark Corp. v. Trotter, Smith & Jacobs, 212 Ga. App. 454, 442 S.E. 2d 265 (1994). In other words, if the claim arose after the filing of the bankruptcy petition, then the asset probably did not become part of the bankruptcy estate and thus was not required to be disclosed. Period Homes, 275 Ga. at 487.

The only exception found to the Chapter 7 or 11 pre-petition/post-petition dichotomy is if the claim “is sufficiently rooted in the pre-bankruptcy past and so little entangled the bankrupt’s ability to make an unencumbered fresh start that it should be regarded as property under [Bankruptcy Code.]” In re: Raymond E. Richards, 249 B.R. 859 (E.D. Mich. 2000). While there is no Georgia case citing Richards, there is one bankruptcy case out of the Eleventh Circuit referencing that case. Johnson, Blakely,

Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez), 224 F.3d 1273(11th Cir. 2000). In Richards, the plaintiff/debtor in that case filed for Chapter 7 bankruptcy on March 18, 1999. On October 20, 1999, he was diagnosed with an asbestos related injury. On February 23, 2000, he filed a personal injury lawsuit. There, the bankruptcy court determined that the plaintiff/debtor's claim was part of the bankruptcy estate. In re: Richards, 249 B.R. at 862. There was no discussion of the application of judicial estoppel in that case. The trustee in Richards sought the turnover of the plaintiff/debtor's lawsuit to the trustee. However, defense counsel may find these cases useful in making a judicial estoppel argument against plaintiff/debtors who have a similar fact pattern as Richards.

Successful Assertion Issue

If the asset or claim is part of the bankruptcy estate, then it is required to be disclosed to the bankruptcy court. Recall that judicial estoppel "precludes a party from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding." Southmark, 212 Ga. App. at 455. To be sure, Plaintiff/debtors are under a strict duty to disclose assets to the bankruptcy court. Byrd, 225 Ga. App. at 506.

In determining whether a party has successfully asserted an inconsistent position, the Georgia Court of Appeals has held that a party has "successfully asserted a previously inconsistent position when the first court adopts or accepts a party's previous inconsistent position in a manner that provides an unfair advantage or benefit to that partying the first proceeding." Dillard-Winecoff, LLC v. IBF Participating Income Fund, 250 Ga. App. 602, 552 S.E. 2d 523 (2001).

Over the years, the Georgia courts have rejected a rather sizeable list of “excuses” given by plaintiff/debtors who were attempting to explain why they failed to list a claim or asset with the bankruptcy court. That list includes the following: A failure to read the bankruptcy schedule or any neglect of the attorney for the plaintiff/attorney. Byrd, 225 Ga. App. at 508; informing the bankruptcy trustee of the claim is not enough. Reagan, 241 Ga. App. at 642; informing the plaintiff/debtor’s attorney is not enough. Harper, 245 Ga. App. at 729.

The Georgia courts also look to see whether the plaintiff/debtor has gained any “unfair advantage” from the inconsistent positions by determining whether the bankruptcy court “confirmed the debtor’s plan or discharged his or her debts.” Dillard-Winecoff, 250 Ga. App. at 604. Particularly significant to the Georgia courts are whether the plaintiff/debtor has received a discharge from bankruptcy or whether the plaintiff/debtor dismissed the bankruptcy case altogether. As the Dillard court explained: “. . . while a debtor benefits from a discharge of his debts in a case in which the bankruptcy court has accepted his underreporting of assets, there is no benefit when the case is dismissed.” Id. See also, Jowers v. Arthur, 245 Ga. App. 68, 537 S.E. 2d 200 (2000); Weiser, 2001 Ga. App. LEXIS at 1078 (no successful assertion of an inconsistent position because the bankruptcy petition was dismissed.) Stated more fully, a dismissal of the bankruptcy petition would not be a successful assertion because a “dismissal effectively vacates a confirmed plan, returns the debtor, with the creditors, to the status quo ante, and reverts the estate’s property in the debtor, with the debtor again liable for his debts and with the creditors free to pursue all legal remedies against the debtor.”

Dillard-Winecoff, 250 Ga. App. at 604. As a result, the bankruptcy court has not adopted the inconsistent position.

In addition to a dismissal of the bankruptcy petition, the plaintiff/debtor can avoid judicial estoppel by timely moving to reopen the bankruptcy case, even after the case is closed, to include the damages claim with the bankruptcy court.⁸ Jowers, 245 Ga. App. at 68; Rowan v. Green Oil, 257 Ga. App. 774, 572 SE2nd 338 (2002); Cochran v. Emory University, 251 Ga. App. 737, 555, S.E. 2d 92 (2001); Johnson at 651, 478 S.E. 2d 629 (1996). The Georgia Courts are clear that a plaintiff/debtor can avoid judicial estoppel when they have “successfully amended [the] petition to include any claim against the defendant as a potential asset. Under those circumstances, it cannot be said that the present position in the trial court is inconsistent with the position asserted by plaintiff in a prior proceeding and, therefore, judicial estoppel does not bar her claim.” Cochran, 251 Ga. App. at 739; See also, Chicon, 258 Ga. App. at 166 (“ . . . the bankruptcy court determined that the claim in question did not form part of the bankruptcy estate. The omission of the claim therefore did not garner [plaintiff/debtor] any advantage during the bankruptcy proceedings, and did not deprive any creditors of resources against which they would satisfy their claims. As observed in Jowers, it stands to reason that the Georgia court in which the tort claim is asserted should honor the bankruptcy court’s actions. To hold otherwise would produce overly harsh and inequitable results.”)

Conversely, judicial estoppel does apply if the amendment of the bankruptcy petition to reopen the bankruptcy case is untimely. That is, if the trial court grants a

⁸ The bankruptcy courts in general liberally allow amending of the bankruptcy petition to permit disclosure of assets. In re Daniel, 205 Bankr. 346, 348 (N.D. Ga. 1997), the bankruptcy court allowed a debtor to reopen a Chapter 7 bankruptcy to add a personal injury claim as an asset, noting that the bankruptcy rules allow debtors the right to amend bankruptcy schedules as a matter of course and to liberally reopen a case.

motion for summary judgment based on judicial estoppel before the motion to reopen the bankruptcy case is filed, then judicial estoppel is applied. Cochran, 251 Ga. App. at 739; Reagan, 241 Ga. App. at 642; Harper, 245 Ga. App. at 729. Hence, the plaintiff/debtor must move to reopen the bankruptcy case before the court enters an order granting summary judgment. See, Johnson, 223 Ga. App. at 650 (1996)(no judicial estoppel applied where plaintiff/debtor told his attorney and the bankruptcy attorney as well as moved to reopen the bankruptcy case to disclose the asset.) Clark v. Perino, 235 Ga. App. 444, 509 S.E. 2d 707 (1998) (a pro se plaintiff/debtor misunderstood the bankruptcy forms but still filed a motion to reopen the bankruptcy case before the entry of the order on the motion for summary judgment.)

Evidentiary considerations

If judicial estoppel still applies after running that legal labyrinth, then you should be mindful of a few evidentiary considerations at summary judgment. Most significantly, the evidentiary burden for an affirmative defense, like judicial estoppel, is on the movant. Hence, that burden is different than moving for summary judgment based on the lack of evidence to support a single element of the plaintiff's claim. Cochrane, 251 Ga. App. at 737. The defendant moving for summary judgment based on judicial estoppel must provide the trial court with evidence supporting the application of the defense. Whiten v. Murray, 2004 Ga. App. LEXIS 671 (2004).

This means that the defendant should be prepared to submit admissible evidence for purposes of summary judgment regarding the plaintiff's bankruptcy. This typically requires that the defendant admit an authenticated copy of the bankruptcy documents. Authenticated copies of documents from other courts can be admitted under Georgia law

as an exception to the hearsay rule. O.C.G.A. § 24-4-42; Rice v. State, 178 Ga. App. 748, 344 S.E. 2d 720 (1986).

Federal Court cases

In vivid contrast to Georgia courts, judicial estoppel is more strictly enforced in the federal courts. In the Eleventh Circuit, judicial estoppel is applied to prevent a plaintiff/debtor from pursuing a claim when that claim was not disclosed on the bankruptcy petition, but should have been. Federal courts differ from state courts on several issues as to how they handle judicial estoppel matters. First, the plaintiff/debtor cannot avoid judicial estoppel in federal court by merely moving to re-open the bankruptcy petition after the defense has filed a dispositive motion.⁹ The plaintiff/debtor must move disclose the asset to the bankruptcy court before a motion for summary judgment is filed.

The federal rule is set out in Burnes, where the plaintiff/debtor originally filed a Chapter 13 bankruptcy petition. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1283 (11th Cir. 2002); Juan De Leon v. Comcar Industries, Inc., 321 F.3d 1289 (11th Cir. 2003). The statement of financial affairs form asked the employee to list all suits to which he is or was a party within one year of filing for bankruptcy. At that time, the employee was not a party to a lawsuit and indicated that on his forms. When the employee later brought suit against the employers for monetary and injunctive relief, he never amended his

⁹ In the Eleventh Circuit, the federal courts apply judicial estoppel if the plaintiff/debtor does not amend the bankruptcy petition prior to the filing of the motion for summary judgment. The Georgia rule on this issue is stated as follows: “. . . if the debtor initially fails to list the claim as a potential asset but later successfully amends the bankruptcy filing or reopens the bankruptcy proceeding to include the claim, judicial estoppel will not bar recovery on that claim. Our first case applying this concept, Johnson v. Trust Co. Bank, did not accept the rationale that allowing such an amendment or reopening to cure the omission permits dishonest plaintiff/debtors to conceal the asset from the bankruptcy court until ‘caught’ by the defendant in the subsequent personal injury action. A majority of this Court was not persuaded that a tardy bankruptcy amendment, spurred by the filing of a summary judgment motion in the state tort action, represents a plaintiff/debtor’s manipulating the court system by shifting positions when his interests change, which judicial estoppel is designed to prevent.” Jowers, 245 Ga. App. at 69.

statement of financial affairs to include his lawsuit, and did not report the pending lawsuit when he converted his bankruptcy petition to a Chapter 7 case. The appellate court found that the record contained sufficient evidence from which to infer intentional manipulation by the employee because the undisputed facts showed that the employee had knowledge of his claims during the bankruptcy proceedings. After suit was filed, the plaintiff/debtor reopened the bankruptcy proceeding and amended the petition.

The Burnes court specifically refused to consider whether the plaintiff/debtor's motion to re-open the bankruptcy case would change their opinion. The Court stated: "In an attempt to remedy the situation, [plaintiff] argues that he should now be allowed to re-open his bankruptcy case to amend his filings and include his lawsuit against [defendant]. We disagree. The success of our bankruptcy laws requires a debtor's full and honest disclosure. Allowing [plaintiff]to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of the debtors' assets. See Traylor v. Gene Evans Ford, LLC, 185 F. Supp. 2d 1338, 1340 (N.D. Ga. 2002)(denying a debtor's request to back up and disclose a previously undisclosed claim to the bankruptcy court in the face of an adversary's challenge); Scoggins v. Arrow Trucking Co., 92 F. Supp. 2d 1372, 1376 (S.D. Ga. 2000); Chandler v. Samford University, 35 F. Supp. 2d 861, 863-865 (N.D. Ala. 1999)(applying the doctrine of judicial estoppel to bar a plaintiff from asserting a previously undisclosed tort claim, even though she eventually informed her attorney and the bankruptcy court of the claim)."

What's more federal courts do not use the pre-petition/post-petition dichotomy as Georgia Courts do to decide when a debtor must disclose an asset in the various bankruptcy chapters. In Burnes, the court stated "We also conclude that any distinction between the types of bankruptcies available is not sufficient enough to affect the applicability of judicial estoppel because the need for complete and honest disclosure exists in all types of bankruptcies." The Burnes court articulated the test for applying judicial estoppel as when the plaintiff/debtor fails to disclose an asset to the bankruptcy court when the party knew of the claim and had a motive to conceal the claim from the court. Burnes, 291 F. 3d 1285.

There is no discussion in the Burnes case about the impact on the Bankruptcy Courts of the foregoing application of judicial estoppel in the Eleventh Circuit. While beyond the scope of this article, several commentators have questioned the Eleventh Circuit's application of judicial estoppel.¹⁰

Summary

In sum, in terms of practice pointers, judicial estoppel is most stringently applied in federal court cases in the Eleventh Circuit and defense counsel probably has the best chance of prevailing on this defense in those courts. In state court cases, the plaintiff/debtor can easily avoid the defense of judicial estoppel by moving to reopen the bankruptcy case to disclose the asset.

¹⁰ Robert B. Chapman, "Bankruptcy," 53 Mercer L. Rev. 1199 (Summer, 2002); Honorable William H. Brown, "Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums," 75 Am. Bankr. L.J. 197 (Spring, 2001); Thomas E. Ray, "Judicial Estoppel in Chapters 7 and 13," 2002 ABI JNL. LEXIS 113 (July, 2002).

Nevertheless, you should initially determine whether judicial estoppel is applicable in your case. If in doubt, you should plead judicial estoppel in your answer as it is an affirmative defense so you do not inadvertently omit it later. Next, if judicial estoppel is potentially at play, you need to obtain an authenticated copy of the Plaintiff's bankruptcy file and apply the foregoing analyses to determine whether or not judicial estoppel is an affirmative defense in your case.