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TRIAL BRIEFS

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Court erred in admitting text messages

By Michael R. Lied, Howard & Howard Attorneys PLLC, Peoria

While the following discusses a criminal case, *People v. Watkins*, 2015 IL App (3d) 120882, it provides guidance on admitting text messages into evidence.

On January 26, 2012, several police officers executed a search warrant at a residence at 608 East Thrush in Peoria, Illinois. While searching the residence, officers found an open drawer in the kitchen with one bag containing 47.3 grams of powder cocaine, two bags containing a total of 13.4 grams of marijuana, two scales with suspected cocaine residue, three cell phones, a spoon with suspected cocaine residue, and an empty plastic baggie with suspected cocaine residue.

Charles Watkins and several other people were present when the police began their search. Watkins was the only person at the residence that evening with the first name of "Charles." Watkins was found lying on a bed and was the only person in that room. Watkins had $577 in his pocket, mostly in $20 bills. An additional $4,566, which included 150 $20 bills, was found under the mattress in the same bedroom. No drugs or drug paraphernalia were found on Watkins' person.

Watkins was arrested and charged with unlawful possession of a controlled substance with intent to deliver and with unlawful possession of a controlled substance. During the pretrial stage of the case, the State filed a notice of its intent to offer into evidence several of Watkins' prior drug convictions as proof of Watkins' intent to deliver.

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Judicial "es-top-pel"—Bankruptcy debtors beware

By Patrick M. Kinnally, Kinnally Flaherty Krentz Loran Hodge & Masur, P.C., Aurora

In Illinois courts, the concept of estoppel emerges in various branches, such as: promissory estoppel (see, *Newton Tractor Sales Inc. v. Kubota Tractor Corp.,* 233 Ill.2d 46 (2009)); *res judicata* or claim preclusion (see, *Hudson v. City of* Chicago, 228 Ill.2d 462 (2008)); collateral estoppel or issue preclusion (see, *Pace Communications Corp. v. Express Products, Inc.,* 2014 IL App (2d) 131058). Or another alternative, judicial estoppel, or what is called estoppel by inconsistent positions. See, *New Hampshire v. Maine*, 532 U.S. 742 (2001) (*Maine*). Let's talk about the latter.

As we shall see, this last type of estoppel applies in cases where a debtor claims an asset not revealed in a bankruptcy filing, and his omission may or may not preclude him from seeking compensation on a viable state law tort claim. See, *Shoup v. Gore,* 2014 IL App (4th) 130911 (*Shoup*).

New Hampshire and Maine share a border that follows the Piscataqua River into Portsmouth Harbor. The two states sued each other in 1977 over fishing rights. In 1977, the U.S. Supreme Court entered a consent decree, which established the location of the border as to each state and fixed the littoral marine boundary and not the Piscataqua River line.

Thirteen years later, New Hampshire filed another suit, alleging that the inland river boundary as well as the Piscataqua River and Portsmouth Harbor belonged to it. The U.S. Supreme Court, on Maine's motion, tossed the case. Therein, the Supreme Court established what currently com-

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Court erred in admitting text messages

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On the date of the hearing on Watkins' motion *in limine*, defense counsel informed the trial court that he had just received some late discovery from the State. The discovery indicated that one of the police officers in the case had recovered several hundred text messages from one of the cell phones that was found in the same drawer as the drugs and that as an expert witness, the officer was going to opine that the text messages demonstrated an intent to distribute drugs.

Watkins asked that the text messages be excluded because they had not been turned over until just before the trial. The trial court denied that request and instead continued the trial for a few days to allow defense counsel to review the text messages and to further prepare for trial.

During the trial, Officer Dixon testified about the three phones that were recovered from the kitchen drawer. The phones were admitted into evidence.

Dixon had turned on the cell phones and was able to retrieve hundreds of text messages from one of the cell phones, which he believed were mostly drug-related, Dixon photographed the text messages that were on that cell phone. He did not alter, delete, or change the text messages, and testified that the photographs accurately depicted the text messages that were on the cell phone.

When the State sought to admit a sample of those text messages, Watkins objected on the grounds of relevancy, foundation, and hearsay. The trial court found that the text messages were relevant to show that the phone was part of a drug-dealing enterprise. The trial court commented that it was "very sensitive" to defense counsel's argument that the cell phone was not connected to Watkins. The trial court ruled that the State could introduce the text messages that contained the name "Charles" and that were related to tying the cell phone to Watkins and drug dealing.

Dixon was shown a group exhibit containing the photographs of the text messages. Dixon testified that exhibit contained accurate photographs of messages on the cell phone that named or identified a person.

During cross-examination, Dixon acknowledged that he did not know the phone number of the cell phone in question, that there was no indication on the phone itself or on the screen of the phone as to who was the owner of the cell phone, and that two other cell phones were recovered from the drawer or drawer area during the execution of the search warrant. Watson was convicted.

On appeal, Watkins challenged both the admissibility of the other-crimes evidence and the admissibility of the text messages.

Watkins asserted first that the admission of the text-message conversations was error because the State failed to lay a proper foundation to authenticate the text messages. The State presented no evidence that Watkins owned or used the phone from which the messages were recovered. There was no testimony from the sender or receiver of the messages as to who authored the messages and no records connected Watkins to the phone. Finally, there was no testimony from an expert witness, who had analyzed the phone and who could testify as to the integrity and genuineness of the messages.

Second, Watkins argued that admission of the text messages was erroneous because the content of the messages themselves was inadmissible hearsay and was used impermissibly by the State for the truth of the matters asserted--to show that Watkins was dealing drugs.

The court provided a detailed analysis of the admissibility of the text message photos.

To establish a foundation for admissibility, text messages are treated like any other documentary evidence. To authenticate a document, the proponent must present evidence to demonstrate that the document is what the proponent claims it to be. The proponent need only prove a rational basis upon which the fact finder may conclude that the document did in fact belong to or was authored by the party alleged. The trial court, serving a limited screening function, must then determine whether the evidence of authentication, viewed in the light most favorable to the proponent, is sufficient for a reasonable juror to conclude that authentication of the particular item of evidence is more probably true than not.

Documentary evidence, such as a text message, may be authenticated by either direct or circumstantial evidence.

Here, the text messages were admitted for

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a limited purpose, to show that Watkins had used the cell phone found in the drawer, and therefore, by implication, that there was a connection between Watkins and the drugs found in the drawer. The only evidence presented by the State to authenticate the text messages was (1) the cell phone was found in the same house as Watkins, and (2) some of the messages referred to, or were directed at, a person named "Charles." In the appeals court's opinion that evidence was not sufficient to properly authenticate the text messages as being sent to Watkins.

As mentioned, there were no cell phone records to indicate that the cell phone belonged to or had been used by Watkins or anyone else at the residence. There was no eyewitness testimony to indicate that the cell phone belonged to or had been used by Watkins or that the messages were sent to Watkins. Additionally, there were no identifying marks on the cell phone itself or on the cell phone's display screen to indicate that the cell phone belonged to or had been used by Watkins.

Dixon's testimony was not sufficient to authenticate the text messages because Dixon had no personal knowledge of the text messages and had no idea who was the owner or user of the cell phone.

Thus, the appellate court held that trial court abused its discretion by admitting the text messages over Watkins's objection. Watkins's conviction was reversed and the case was remanded for a new trial.

Texting is ubiquitous, and even we oldtimers text. Lawyers who want to introduce text messages into evidence must be careful to lay the necessary foundation. ■

The author may be contacted at mlied@howardandhoward.com.

Judicial "es-top-pel"—Bankruptcy debtors beware

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prise the contours of judicial estoppel.

Basically, the judicial estoppel doctrine "prevents a party from prevailing in one phase of a case on a fact-based position and then relying on a contradictory position to prevail in another phase." *Maine*, citing *Pegram v. Herdrich*, 530 U.S. 211, 227 (2000).

The *Maine* court went on to describe the factors that make judicial estoppel operable.

Like all estoppel theories, judicial estoppel shares the notion that whether it should be employed to bar a claim is a discretionary decision for a trial court. And, like all estoppel theories, unless proved by clear and convincing evidence, it should not be utilized. See, *Seymour v. Collins,* 2014 IL App (2d) 140100 (*Seymour*).

The doctrine's five elements require that the party to be estopped must have:

- taken two positions
- that were *factually* inconsistent (not opinions)
- in separate judicial or quasi-judicial proceedings
- intending the trier of fact to accept the truth of the facts alleged; and
- prevailed in the first proceeding while receiving some benefit from the factual position taken.

See, *People v. Runge*, 234 Ill. 2d 68 (2009).

Apparently, in Illinois, whether the inconsistent positions were taken under oath is not a requirement. Maybe it should be. Our Illinois Supreme Court has never opined explicitly on this issue in the civil context.

Unverified pleadings in litigation whether in a State or Federal venue are commonplace. Where forfeiture of valid claims may result, the requirements of an oath or verification seem paramount. See, *People v. Caballero*, 206 Ill.2d. 65 (2002), citing *Bidani v. Lewis*, 285 Ill.App.3d 545, 549 (1st Dist. 1996).

One defect in applying judicial estoppel is the fact that the truth of the two contradictory positions is not based on an evidentiary hearing. See, *Bidani*, *citing Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App.3d 836, 856-857 (1st Dist. 1994). One court has opined its use should be employed with caution *Bidani*.

In a Chapter 13 bankruptcy the debtor's estate includes all property, such as claims acquired subsequent to the filing of the bankruptcy petition and before the case is closed. 11 USC 541 (a)(1). This requires the debtor to disclose his/her assets while the bankruptcy is pending, as well as after the debtor's plan is confirmed. *Seymour*, citing *Rainey v. United Parcel Service Inc.*, 466 Fed.Appx. 542, 2012 WL 753680 (7th Cir. 2012). Financial disclosures in bankruptcy proceedings are obligations. They afford creditors the right to object to a plan the debtor asks a trustee or a bankruptcy judge to ratify. *Seymour*.

Practice Pointer

Be circumspect. Plaintiff attorneys need to ask their clients whether they have ever filed for bankruptcy protection. Expect that defense counsel in the tort claim you may file, will. Bankruptcy attorneys, likewise, need to inquire about tort and other claims their clients may have and schedule them in the bankruptcy court. Full disclosure is foremost.

Of course, most of us, both judges and lawyers, are not involved in the geography of where state river boundaries extend. But, with tort claims and how they relate to bankruptcy proceedings, we face similar challenges. See, *Shoup*, *Berge v. Mader*, 2011 IL App (1st) 103778, *Holland v. Schwan's Home Service, Inc.,* 2013 IL App (5th) 110560 (*Holland*).

Practice Pointer

In all state and federal civil cases a common discovery interrogatory should include whether the party, his or her spouse or any entity in which either have an interest has ever filed a bankruptcy petition.

In February 2010, John Shoup filed a Chapter 13 bankruptcy petition. In his bankruptcy case, he began making payments and never disclosed his tort claim to the bankruptcy tribunal before receiving a discharge by the bankruptcy court.

John Shoup filed his tort claim in 2012. In his state law action, defendants filed a motion for summary judgment alleging judicial estoppel since Shoup never advised the bankruptcy court of his tort claim. The trial court granted the motion. Shoup appealed, claiming he did not take inconsistent positions in different proceedings under oath. The appellate court affirmed the trial court's ruling.

The Appellate court held that a chapter 13 bankruptcy petition creates a new "estate,"

which is comprised of all the debtor's property at the time the case begins. This includes unliquidated claims, such as litigation.

The appellate court held all the elements of judicial estoppel were present. First, the plaintiff failed to disclose a tort claim to the bankruptcy tribunal. Next, conflicting positions were advanced in separate judicial proceedings. Third, he presented two separate, diametrically opposite positions under oath in the separate actions. And, finally, he received a benefit by having his debts discharged where creditors were unaware of any possible state court recovery.

In other words, a debtor who fails to disclose an asset cannot achieve a benefit from that asset after having obtained a discharge in bankruptcy. See, *Cannon-Stokes v. Potter,* 453 F.3d. 446 (7th Cir. 2006) (*Potter*).

Review *Potter*. Traci Cannon-Stokes, a letter carrier, claimed the Postal Service violated the Rehabilitation Act (29 U.S.C. 791) by not accommodating her mental aversion in making deliveries of mail to residences, and then retaliated against her for asserting her statutory rights.

While pursuing this administrative claim for $300,000, Traci filed a Chapter 7 petition with the bankruptcy court. She expressly denied in the latter petition that she had any valuable legal claims. She received a discharge based on this averment by the bankruptcy court.

The 7th Circuit held Traci was judicially estopped to seek recovery. Quite simply, it held a litigant cannot benefit from "lying." It's hard to argue otherwise.

Practice Pointer

Prior to seeking a discharge, bankruptcy counsel should contact the debtor and inquire about any litigation claims that have arisen during the bankruptcy proceeding, and schedule them.

For most of us involved in litigation, let's look at some facts. Shirley Berge filed a Chapter 13 petition in the bankruptcy court. One month later, while that petition is pending, she is injured in a car wreck. She never discloses her personal injury tort claim as an asset in her bankruptcy. Later, she gets discharged of all her debts when her Chapter 13 bankruptcy is converted to a Chapter 7 proceeding.

Back in state court on Shirley's tort claim, the defendants file a motion for summary judgment. They claim Shirley is judicially estopped from proceeding because of her failure to disclose her tort claim during her bankruptcy filing. The state court cause of action is an asset in her bankruptcy, which belongs to the bankruptcy trustee. In short, Shirley is estopped from making a representation, really an omission, in the bankruptcy tribunal that she did not have an asset---the tort claim---and then seeking to recover in state court on that very claim.

Faced with this motion, Shirley heads back to bankruptcy court and amends her asset and debt schedules to include the state law tort claim as an asset.

Both the trial court and the appellate court found this belated filing to be a "disservice" to the doctrine of judicial estoppel. In short, a real claim that the trustee could have pursued in Shirley's bankruptcy case was forfeited.

Notwithstanding, Shirley argued she had told her bankruptcy lawyer about her state court negligence claim when it occurred. Shirley claimed her omission was not undertaken in "bad faith." Consequently, she argued her tort claim should proceed.

Since "bad faith" is not an element of the application of judicial estoppel, the appellate court affirmed. It observed that Shirley's actions had a noisome effect on the judicial system by "promoting less than truthful asset disclosures with the hope of not getting caught." *Berge*, ¶ 18.

Another court has looked at the propriety of the judicial estoppel doctrine quite differently.

The plaintiff in *Holland* filed for bankruptcy in 2008. His tort claim did not arise until a year later. The court concluded that his tort claim did not arise prior to his bankruptcy petition. Therefore, he could not have disclosed a claim that had not occurred. *Holland*, ¶ 117.

Of course, absent from this analysis is any consideration of the continuing duty he had to disclose the asset in his bankruptcy filing. Nevertheless, the court held his failure to disclose the asset was not inconsistent with his state court filing. Apparently, the court felt that because the tort plaintiff's bankruptcy was dismissed, he never intended to omit the claim as an asset. In other words, he never received a benefit-a discharge-in his bankruptcy case.

Like other theories of estoppel, judicial estoppel can prohibit worthy claims. And, let us not overlook that whether a trial court approves of an estoppel claim is entirely a prudential one. It requires the exercise of the trial court's discretion. And, its applicability requires proof by clear and convincing evidence. That quantum of proof sets its adoption by a trial court on a higher plane.

Yet, the reasons for judicial estoppel's utility, depending on the facts, are sound. Litigation is not amusement. Advocating inconsistent positions for profit when it suits gamboling our judicial system is a concept which should not make our system of advocacy just a pretense. Notwithstanding, with full revelation and planning, deserving claims can, at least, get a trial on their merits. ■

Statutory silence on burden of proof

By Jeffrey A. Parness, Professor Emeritus, NIU College of Law

In the case of *In re Parentage of Rogan M.,* 2014 IL App (1st) 141214 (*Rogan*), the court ruled that any custodial parent seeking to remove a child from Illinois over the objection of the other parent who "continued an active relationship" with the child must show that removal is in the child's best interests by a preponderance of the evidence. It reasoned that since the relevant statute "does not set forth a quantum of proof for removal petitions," preponderance was the required quantum since, per *In re Enis*, 121 Ill.2d 124, 131-32 (1988), preponderance applies "absent a statutorily assigned evidentiary standard." *Rogan* at ¶ 5.

The *Rogan* court recognized that the quantum of proof in a proceeding to modify a prior custody judgment is "clear and convincing evidence," but that was because of the explicit language in the relevant statute. Further, it observed that "a removal petition is not a petition to modify custody," citing earlier rulings in *In re Marriage of Bednar*, 146 Ill. App. 3d 704 (1st Dist. 1986) and *In re Marriage of Mueller*, 76 Ill. App. 3d 860 (5th Dist. 1979). *Rogan* at ¶ 8.

The *Rogan* approach to burden of proof in removal cases has since been employed in the Fourth District in the case of *In re Marriage of Tedrick*, 2015 IL App (4th) 140773.

It makes no sense to allow a mother, Keisha M. in *Rogan*, "to remove her minor child from Illinois to California" over the objection of a father, John M., if she shows her son's best interests are served by an evidentiary preponderance, but only to allow her to move with her child from Geneva, Illinois to St. Charles, Illinois if she shows her son's best interests are served by clear and convincing evidence.

An order granting a removal petition often effectively modifies a custody judgment more significantly than an order granting a custody judgment modification. So the statute on removal petitions should expressly require clear and convincing evidence.

But without an explicit statute, is there necessarily a default rule arising from *In re Enis* mandating a preponderance norm whenever a relevant statute is silent as to quantum of proof?

Enis involved a State's petition to terminate the parental rights of a mother and father whose six-year-old child was then in foster care. The termination process was significantly controlled by *Santosky v. Kramer*, 455 U.S. 745 (1982), which held that Fourteenth Amendment due process requires "at least clear and convincing evidence" of permanent parental neglect. *Enis,* 121 Ill.2d 129 - 30, quoting *Santosky*, 455 U.S. at 747-48.

The trial court's termination of parental rights in *Enis* was reversed because it was founded on two findings of parental physical abuse, as well as a finding that the parents "failed to correct the conditions causing the court" to make the child "a ward of the court," that were each supported only by a preponderance of the evidence. In fact, this preponderance standard had earlier been judicially sanctioned since the Illinois Juvenile Court Act on, *e.g.,* parental physical abuse, "did not specify whether the applicable standard is preponderance of the evidence or clear and convincing evidence." Presumably this is the default rule used in the *Rogan* case, though its use in *Enis* was deemed unconstitutional.

So, back to *Rogan*. Per *Santosky*, is an order allowing relocation by a parent and child from Illinois to California an effective termination of the parental rights of the second, fit parent who remains in Illinois with childcare interests that just became very difficult, if not impossible, to exercise?

And beyond the due process issues in *Santosky*, are there other federal (if not state) constitutional problems with the *Rogan* ruling, including the practical inequalities between parents left behind in Geneva, Illinois when their kids move to Los Angeles rather than to St. Charles, as well as the irrationality of deeming a petition to a move from Illinois to California not to constitute a petition to modify a Geneva, Illinois child custody order?

For lawyers and judges uninterested in making every quantum of proof issue a constitutional one when the relevant statute is itself silent on the necessary quantum, the default rule to preponderance can be avoided when General Assembly intent as to quantum can be inferred from legislative enactments in very comparable settings. It seems reasonable to infer that the General Assembly desires the same clear and convincing evidence norm in removal petition cases as it has expressly articulated for custody order modification cases. Individual statutes should be interpreted, at times, by references to other statutes. ■

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