ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SUMMER 2023

A CONSTITUTIONAL CRISIS —THAT HAS A READY SOLUTION

Hon. Samantha P. Jessner

Hon. Lawrence P. Riff

Allan Browne, the Founding President of the ABTL, famously said, "All of us share similar concerns in the courthouse as well as the legislature." We, the Presiding Judge of the Los Angeles Superior Court ("LASC") and the former Supervising Judge of the Family Law Division, write with hope—and *expectation*—that members of the ABTL indeed share a deep concern about a genuine constitutional crisis in our courtrooms right now. So far in 2023, tens of thousands of litigants in the LASC—which number will run into the hundreds of thousands this calendar year—are being denied elemental justice, namely, review on appeal. Why? Because of the unavailability

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— *INSIDE* —

ESG LITIGATION TRENDS

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In recent years, companies have been under increased scrutiny from investors, consumers, and government agencies over environmental, social, and governance (ESG) issues. As companies continue to expand their ESG programs in part due to greater public and political attention on ESG issues, companies must also confront an increased risk of attention from private litigants.

Companies should anticipate ESG-related litigation in the form of shareholder derivative lawsuits, consumer protection litigation, suits by environmental advocacy groups, employment discrimination claims, and other private litigation. We have listed below a few categories of ESG-related litigation that have been on the rise thus far.

Green Marketing

As consumer demand for environmentally and ethically sustainable products grows, companies are expanding their assortment of "green" offerings and marketing them accordingly. This increased emphasis on green marketing—the promotion of environmentally friendly products or services—has led to a rise in private lawsuits. Although plaintiffs have historically targeted consumer goods with allegations of false and misleading marketing claims, there has been a notable increase of these claims within the green marketing sector, with plaintiffs often

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PRESIDENT'S MESSAGE

Kevin Boyle

It has been wonderful to see everyone at the great events we have had so far in 2023. The dinner programs on the Johnny Depp and Elon Musk cases, as well as the Judicial Reception, were all very enjoyable and well-attended. As always, thanks much to our Dinner Chairs (Terry Bates and Eric Lorenzini) and our Executive Director (Linda Sampson), as well as to all of you, for making them so successful.

The way Mr. Musk is going, we will surely need a second installment of that dinner soon. Or maybe we can host the Musk v. Zuckerberg Cagematch as dinner entertainment? And who knows, Mr. Depp could surprise us with some new fireworks too.

Looking forward to the rest of ABTL 2023, including, of course, Hawaii in October.

Aloha!

Kevin

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JUDICIAL ESTOPPEL CAN BAR A FORMER DEBTOR FROM RECOVERING FOR MERITORIOUS LITIGATION CLAIMS

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When a defendant faces claims by a plaintiff that recently emerged from bankruptcy, there is a potential basis to reduce the plaintiff's recovery to zero, regardless of whether the plaintiff has a slam-dunk liability case that would otherwise yield millions of dollars in damages.

Judicial estoppel is the long-standing judicial principle that "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party . . . in a previous proceeding." 18 Bender, Moore's Federal Practice (3d ed. 2000) § 134.30, pp. 134–62. In the bankruptcy context, the Bankruptcy Code requires a debtor to disclose *all* of his or her assets. Importantly, this disclosure must include all of the debtor's known litigation claims, even those not yet asserted in court, because those litigation claims have the potential to enhance the value of the bankruptcy estate and thus have at least some current value. A debtor that does not disclose a potential litigation claim during the course of its bankruptcy represents to the Bankruptcy Court and his or her creditors that no such claim exists. Consequently, when a debtor later pursues a claim that was not disclosed during the bankruptcy proceedings, the debtor takes the exact opposite position—*i.e.*, that those claims *do* in fact exist. It is under these circumstances that the traditional principles of judicial estoppel can bar the debtor from receiving any benefit at all—even a single dollar—based on those concealed claims, regardless of the merit or value of those claims.

Many defendants, who often are complete strangers to the plaintiff's bankruptcy, are completely unaware of this potentially case-dispositive defense.

Every Debtor Must Disclose Its Potential Litigation Claims

The Bankruptcy Code requires a debtor to disclose all of the estate's property and assets. Because litigation claims are assets of the estate, when filing a bankruptcy petition, the debtor must list all "causes of action against third parties (whether or not a lawsuit has been filed)," and "[o]ther contingent and unliquidated claims or causes of action of every nature, including counterclaims of the debtor and rights to set off claims." Official Form 206A/B (for non-individuals); *see also* Official Form 106A/B (same requirement for individuals). This disclosure requirement is triggered by the debtor's knowledge of "material facts surrounding the [claim]," regardless of the debtor's knowledge of the Bankruptcy Code. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784–85 (9th Cir. 2001).

When a Bankruptcy Court confirms a plan of reorganization, it relies on the debtor's representations to the Court and creditors that all of the debtor's assets have been disclosed, including all potential claims against third parties. Courts often note that "the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all their assets." *See, e.g.*, *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999) (emphasis omitted). To protect the integrity of the bankruptcy system, courts can invoke the doctrine of judicial estoppel to "wip[e] out a potentially meritorious action" when the lawsuit is based on claims that were previously concealed from a Bankruptcy Court. *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 273 (9th Cir. 2013).

The Supreme Court has established a three-part test to assess whether judicial estoppel should be applied: (1) the party must be advancing a legal position which is "clearly inconsistent" with its earlier position; (2) a court must have accepted the initial position; and (3) the party would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001).

The Ninth Circuit has held that non-disclosure of potential litigation claims generally warrants application of judicial estoppel. First, courts treat a failure to disclose a claim on a bankruptcy schedule as a representation that the claim does *not* exist. When a debtor later pursues the claim, he or she effectively takes the contrary position that the claim *does* exist. *See Ah Quin*, 733 F.3d at 271. Second, when the Bankruptcy Court

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MAXIM-IZING RESULTS: HOW TO USE MAXIMS OF JURISPRUDENCE TO PERSUADE

Gary Wax

Judges often cringe when advocates use Latin phrases. The reason is simple: they usually don't remember exactly what the phrases mean.

The most common Latin phrases that lawyers learn in law school are the "Maxims of Jurisprudence." Advocates shouldn't shy away from invoking these legal maxims in court. But, they should learn how to say them in plain English so they can deliver succinct legal and equitable concepts that courts will remember. When advocates paraphrase maxims in English, the court is better able to understand the principles behind the maxims, making them more persuasive and effective. Judges may not know what the Latin phrases mean, but they will most likely know the fundamental fairness principles behind the phrases. You should know them too.

Speaking in Latin doesn't necessarily make you sound smart.

Do you know what this phrase means? *Si hoc legere scis nimium eruditionis habes.* It means: if you can read this you're overeducated.

In the 17th century, Sir Francis Bacon compiled a list of the known legal maxims in Latin "because he regarded that language 'as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument.'" (Smith, *The Use of Maxims in Jurisprudence* (1895) 9 Harv. L.Rev. 13, 25.) Two and a half centuries later, Harvard law professor Jeremiah Smith recommended that lawyers avoid stating legal maxims in Latin, observing that "there is the obvious disadvantage that maxims 'put in Latin' will be more liable to be misunderstood by the average lawyer than by a man of Bacon's scholarship." (*Id.* at p. 26.) Professor Smith also observed that clothing legal maxims "in the words of a dead language has had, in some instances, the effect of preventing proper inquiry into their meaning." (*Id.* at p. 25.)

Some lawyers still use Latin phrases to sound smart or because they don't know the English translations. But if the reader or listener, such as a judge, doesn't remember the meaning of the Latin phrases, then they can be received as gibberish, making them less effective.

Remember these phrases: *Ejusdem generis*, *expressio unius est exclusio alterius*, and *noscitur a sociis*? I'd be willing to wager that you kind of, sort of, remember learning about these maxims in law school, and you vaguely remember that they have something to do with interpreting statutes or contracts. But if someone put you on the spot without having Black's Law Dictionary by your side, you probably wouldn't be able to define exactly what they mean (unless you took Latin in high school).

"[*N*]*oscitur a sociis*" means that a word "'is known by its associates.'" (*People v. Prunty* (2015) 62 Cal.4th 59, 73.) Thus, if a word's meaning in a statute or contract is unclear, its definition should be determined by the words immediately surrounding it. When the time comes to argue this interpretive principle to the Court of Appeal, one of my partners doesn't state the maxim in Latin. Rather, he will refer to "that Latin phrase that I can't pronounce about a word being known by its associates." Usually that leads to a trio of nodding judicial heads, as they understand the legal principle even though they may not remember how to pronounce the phrase in Latin.

Paraphrasing maxims in English is always more effective than trying to state them in Latin. After all, a maxim is simply a traditional legal or equitable principle "that has been frozen into a concise expression." (Black's Law Dict. (11th ed. 2019).) So, the key is to state the legal or equitable concept behind the maxim simply, clearly, and concisely so the recipient understands its meaning and why it favors your side.

Use the English version of maxims to argue what's fair and equitable.

Although many maxims are regularly stated in Latin, many are not. Indeed, several maxims are codified in English in the California Civil Code. (Civ. Code, §§ 3510–3548.) These 38 maxims, most of which were codified in 1872, "are a pithy set of principles / proverbs / rules of construction for interpreting and applying California law." (*Macias / Hall / Bisto / Avina v. Chrysler* (C.D.Cal., Aug. 13, 2020, No. ED CV 17-511 MRW) 2020 WL 4723976, at p. *1 [nonpub. opn.].) Generally, these maxims cannot be used as primary authority, but they can be wielded effectively in the right context to inject some argument into your case about what the "fair" result should be for your client.

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YOUNG LAWYERS DIVISION UPDATE

Robert Glassman

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The ABTL's Young Lawyers Division is off to a hot start in 2023, with more exciting events planned for the remainder of the year. So far, the programming has been successful in bringing together young lawyers in the Los Angeles legal community. Events have included a Young Lawyers Happy Hour at Eataly in Century City, an afternoon Dodgers Baseball game, and brown bag lunches with members of the Los Angeles bench, including the Honorable Dalila Corral Lyons, the Honorable David S. Cunningham, and the Honorable Maria A. Audero.

The YLD also has a number of programs planned for the remainder of the year. This includes a community outreach project with the Inner City Law Center (ICLC), where YLD members fundraise to assemble and provide hygiene kits to individuals transitioning from the streets to emergency housing and shelters. Stay tuned for more brown bag lunches too. Also of note, the YLD is coordinating a panel discussion with E. Martin Estrada, United States Attorney for the Central District of California, which is scheduled to take place in the Fall.

Be sure to keep an eye on the ABTL Report and your email inboxes for updates about upcoming YLD events. If interested in helping plan YLD events or getting involved in other ways, please reach out to YLD co-chairs Robert Glassman and Nalani Crisologo or YLD vice-chair Dylan Noceda! Many thanks to YLD committee members Annie Bagdasaryan, Abby Hudson, Noorvik Minasian, Uri Niv, Yoseph Rixit, Adam Shoshtari, and Mitchell Wellman for their remarkable efforts planning this year's YLD programming.

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of verbatim transcripts of proceedings in family law, probate, and unlimited civil cases. Again, why? Because (a) there is a profound shortage of Certified Shorthand Reporters ("CSRs")—they do not exist to be hired by our court (we have nearly 100 CSR vacancies now), and (b) Government Code section 69957 prohibits the court from using electronic recording devices to generate a verbatim transcript in family law, probate, and unlimited civil cases, even though the identical technology may be used for the identical purpose for infraction, misdemeanor, and limited civil cases. Yet the Appellate Division of the LASC successfully handles over 500 appellate matters every year using transcripts generated by electronic recordation. Electronic recording technology works.

ABTL lawyers and their clients now know that they must dig ever deeper into their pockets to pay a shrinking number of *private* CSRs to appear for their hearings and trials. No doubt this generates grumbling and dissatisfaction among your clients. But what if there were no pocket to dig into? What if you and your client simply had to forgo a verbatim transcript and, with it, any practical reality of review on appeal? Unthinkable, right? Please think again. This is today's reality for a huge number of modest-means litigants (not just those who are impoverished) in our civil, probate, and family law courts.

Bluntly, here's the question: Should our civil justice system supply a practical possibility of appellate review for potential legal error or abuse of discretion? Take family law as an example: Should the four-year-old child have been permitted to move with a parent to New York, causing heartbreak to the stay-in-LA parent? Or when parents cannot agree, which parent should make medical decisions (e.g., about vaccinations or gender-affirming care) for the 15-year-old child? Or should the restraining order have been imposed upon the father, thereby meaningfully restraining his liberty (e.g., requiring him to stay 100 yards away or refrain from electronic communications), possibly eliminating his custody rights and meaning that his name will appear on state and federal law enforcement websites for years to come? These are very significant issues that each of our family law judicial officers is called upon to decide dozens of times each week. They are very good at it but, like all of us, not perfect. There is a role for the Court of Appeal—but not if there is no record.

No record means no appeal—it's that simple. "If it is not in the record, it did not happen." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) Per the California Supreme Court, the lack of a verbatim record will "frequently be fatal" to a litigant's ability to have an appeal decided on the merits. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608.) And, in *Griffin v. Illinois* (1956) 351 U.S. 12, the United States Supreme Court addressed the problem of litigants' being denied a transcript, precluding appellate review. Finding that both due process and equal protection rights were violated, Justice Hugo Black, writing for the Court, observed that there is "no meaningful distinction" between denying indigent defendants the right to appeal and denying them a trial. (*Id.* at p. 18.) What's more, in *M.L.B v. S.L.J.* (1996) 519 U.S.102, the U.S. Supreme Court held that decrees forever terminating parenting rights are in the category of cases in which the State may not, consistent with the Equal Protection and Due Process Clauses, "'bolt the door to equal justice,'" meaning that Mississippi could not withhold from M.L.B. a "'record of sufficient completeness'" to permit proper appellate consideration of her claims. (*Id.* at pp. 105-106.)

Before going further, let us be clear: In our view, the gold standard for the creation of a verbatim transcript is a licensed (living, breathing) CSR. It is by far our court's preference over any other option. But despite offering unprecedented signing and retention benefits, and very generous salary and employment benefits, our court has been unable to make a dent in our CSR employee shortfall. It is a fact of life—the number of CSRs retiring from court service outpaces the number of new hires. There is no reason to believe in the short or even the long run that the court will be able to staff all of its courtrooms (in which electronic recording is prohibited) with CSRs, and it will not be long before court-employed CSRs will be unavailable for statutorily mandated proceedings such as felony and juvenile justice cases. The licensed CSR population is aging and retiring, and people are not going into the profession. Sufficient CSRs cannot be hired because sufficient CSRs do not exist. We would love to be shown that we—and the 54 Chief Executive Officers of California's Superior Courts who issued a comprehensive report in November 2022 entitled, "There is a court reporter shortage crisis in California"—are wrong. But "wait and see" is not an option.

For these reasons, we say again: We are in the midst of an undeniable constitutional crisis, and none of us should sleep well at night under the assumption that all is well. Or that this will work itself out just fine one of these days. We often hear from

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lawyers, "What can we do to help the court?" We appreciate the question, but it is not stated correctly. The question, we suggest, as you look in the mirror, is "what did *I* do when thousands of the most vulnerable members of *my* community were frankly being denied basic justice?"

We have a responsibility as leaders in the legal community to ensure that the administration of the law is not unequal or unfair.

There is a legislative solution—permitting electronic recording in family, probate, and unlimited civil cases to create a verbatim transcript *when a CSR is not otherwise available*. Senator Susan Rubio's bill SB-662 - Courts: court reporters would permit electronic recording under specified conditions. Unfortunately, the legislature will not address it further until 2024 at the earliest. There are no doubt other legislative solutions to be offered and considered.

The point, however, is that this cannot be treated as business as usual. Thus, we ask you to add your voice to ours as we strive to preserve equal and meaningful access to justice.

Judge Samantha P. Jessner *is the Presiding Judge of the Los Angeles County Superior Court.*

Judge Lawrence P. Riff *is a Judge of the Los Angeles County Superior Court and the former Supervising Judge of the Family Law Division.*

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alleging that companies are misleading or deceiving consumers through their claims of environmental sustainability. Because of this increased liability risk, companies should be wary of making overstated, misleading, or inaccurate environmental claims (particularly in light of the growing number of consumers who have an increased expectation of transparency with respect to carbon emissions, the reduction of those emissions, and other environmental-related issues).

Within the green marketing sector, carbon emissions have become a hot target for plaintiffs. Although companies have explored multiple ways to reduce carbon emissions, one method is garnering attention from plaintiffs—the purchase of carbon offsets. For instance, plaintiffs have filed a consumer protection lawsuit alleging that the "carbon-neutral" claim on the label of Evian water is false and misleading. According to plaintiffs, a reasonable consumer would interpret the carbon-neutral label to suggest that no carbon dioxide was released in the manufacturing of Evian products. Plaintiffs also argue that the carbon-offset verification process is unreliable.

Delta Airlines is also facing a proposed class action lawsuit over its claim to be the world's "first carbon-neutral airline." In 2020, Delta announced a $1 billion pledge to become carbon neutral. To mitigate its greenhouse gas emissions, Delta purchased carbon credits. The plaintiff challenging Delta's claim alleges that Delta relies on "junk" offsets that do nothing to counteract the climate crisis. The plaintiff further argues that eco-conscious customers would not have purchased—or would have paid substantially less for—Delta tickets if they knew the airline's carbon neutrality claims were misleading.

These cases reinforce that as consumer expectations around carbon neutrality evolve, companies should assess their carbon neutrality claims to maintain customer trust and reduce potential litigation risks.

Similarly, words such as "clean" and "sustainable" are also giving rise to false advertising claims. For example, a utility company is currently defending claims that it deceptively advertises natural gas as a "clean" source of energy when natural gas combustion emits methane. In another instance, a personal and household cleaning products brand is being sued for advertising its products as "non-toxic," safe, and

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environmentally-friendly when the products allegedly contain toxic chemicals and substances.

In addition to these direct claims, when a company's claim about the environmentally-friendly attributes or qualities of a product leads to a drop in stock price, shareholders often bring a derivative action, alleging securities fraud and breach of fiduciary duty claims. For example, a bioplastics company was sued by its shareholders after the Wall Street Journal published an article alleging that the company's claim that its plastic substitute was 100% biodegradable was greatly exaggerated.

Climate Pollution

States and municipalities have also brought lawsuits against oil and gas companies for climate change deceit and other contributions to climate change. Generally, these states and municipalities allege that companies knowingly made false and misleading claims to deceive the public about the existence of climate change and the degree to which their products have been exacerbating anthropogenic global warming. To date, more than forty states and cities have filed this type of action.

Some environmental statutes allow a private party to bring lawsuits to enforce the statute against polluters. For instance, an environmental advocacy group recently sued a manufacturing company claiming that its production facility was polluting the Merrimack River in violation of the Clean Water Act. Although the U.S. Supreme Court has significantly limited the ability of the Environmental Protection Agency to enact anti-pollution regulations and reduced the reach of federal protections, companies looking to reduce litigation risk should understand their pollution output and devise a sustainable plan with various stakeholders to reduce that output over time.

Diversity, Equity, and Inclusion

With a growing emphasis on the importance of DEI in the workplace, employers are facing an increasing number of employment discrimination and shareholder derivative actions related to DEI missteps. For example, employees and investors have targeted the lack of diversity on corporate boards and leadership positions, discriminatory hiring and firing practices, and misleading statements about commitments to diversity and equity.

Since 2020, over a dozen corporations have faced shareholder derivative lawsuits based on their allegedly misleading statements about their commitment to diversity and equity. These lawsuits typically allege that the corporation's directors breached their fiduciary duties by failing to ensure the corporation complied with anti-discrimination laws or by authorizing false statements in public materials regarding the corporation's commitment to diversity, equity, and inclusion.

Shareholders recently brought a derivative action against a technology company, claiming that the company's board omitted from its proxy statements that its public claims of supporting diversity and inclusion at all levels, including on the company's board, were false or misleading. The derivative action pointed to the absence of any African American representation on the company's board and within the senior executive leadership team, as well as single-digit percentages of African Americans within leadership and managerial positions.

In another example, shareholders filed a derivative action against a bank and its executives, alleging the bank inflated its stock by misleading the investor community about the bank's workplace diversity efforts. The shareholders allege that the bank conducted fake job interviews to satisfy internal diversity guidelines, leading to stock drops, a class action, and a criminal probe. This misconduct, according to the complaint, renders false and misleading certain statements made in the bank's financial filings and press releases about its diversity initiatives.

Anti-ESG Measures

In response to increasing levels of ESG-related litigation, enforcement, and public conversation, certain state legislatures have proposed or enacted a wave of anti-ESG legislation or initiated anti-ESG investigations or other actions. Most often, these anti-ESG measures involve preventing state fund managers from considering ESG factors when investing state funds or preventing public entities from doing business with financial institutions deemed to be "boycotting" industries such as fossil fuels or firearms.

But anti-ESG legislation has begun to extend further. Florida, for example, has enacted a law that bans public colleges and universities from using state or federal funds for DEI programs. Texas lawmakers have approved similar legislation, pending approval by the governor, which would ban DEI

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offices, programs, and training at publicly funded universities. Other states have proposed legislation prohibiting or limiting mandatory DEI trainings for state employees.

We expect a number of states to propose or adopt additional anti-ESG laws and, in turn, other states to propose or adopt pro-ESG laws in response. For example, California and New York have introduced bills that would require corporations to track and disclose regularly the greenhouse gas emissions generated through their business activities.

Although there has not yet been any litigation involving these new anti-ESG measures, we expect plaintiffs (and certain governmental entities) to initiate litigation involving these measures. That litigation may range from challenging the measures to attempting to enforce compliance via monetary awards or otherwise.

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With an evolving ESG landscape, it is imperative that companies continue to monitor relevant regulatory and litigation trends. To reduce the risk of liability, companies should appropriately embed ESG principles into their business operations and adequately reflect their commitment to customers, employees, and other stakeholders.

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confirms a reorganization or repayment plan, it "accept[s]" the plaintiff-debtor's legal position. *Id.* Finally, the Ninth Circuit has noted that there are several ways to receive an "unfair advantage" in the bankruptcy context, including by inducing the Bankruptcy Court to confirm a plan or grant a final discharge without allocating all estate assets to the stakeholders. *See id.*; *Hamilton*, 270 F.3d at 784.

Plaintiffs Can Argue Judicial Estoppel Does Not Apply Even If All Three Factors Are Met

Judicial estoppel is not absolute. Following the Supreme Court's decision in *New Hampshire v. Maine*, the Ninth Circuit in *Ah Quin* recognized an exception to judicial estoppel when "a party's prior position was based on inadvertence or mistake." 733 F.3d at 271 (internal quotation marks omitted). Parties often attempt to correct their prior "mistake" by reopening their bankruptcy case to disclose the claim in an amended schedule. The Ninth Circuit has, in some cases, applied a more lenient standard to a plaintiff-debtor that remedies the non-disclosure *before* a defendant raises judicial estoppel as a defense. *See id*. at 278.

The "Inadvertence Or Mistake" Exception For Never-Disclosed Claims

If a plaintiff-debtor declines to reopen bankruptcy proceedings and fails to amend his or her bankruptcy schedules to include the previously undisclosed claims, then the "inadvertence or mistake" defense is "a narrow exception." *See id.* at 271–72. When a court applies the inadvertence or mistake exception narrowly (as opposed to applying the broader common meaning of inadvertence or mistake), the court presumes that the plaintiff-debtor intentionally deceived the Bankruptcy Court and that the plaintiff-debtor "knew about the claim when he or she filed the bankruptcy schedules." *Id*. at 271. Courts have noted that debtors "nearly always" have a motive to conceal claims from the Bankruptcy Court because concealment can "keep[] any potential proceeds from creditors." *Id*. at 271–72. Put simply, if a debtor takes no action to correct its mistake, the Ninth Circuit presumes deceit and it is exceedingly difficult to overcome the "default rule" that judicial estoppel bars undisclosed claims. *See id.* ("[T]he federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending . . . lawsuit from the bankruptcy schedules and obtains a discharge . . . , judicial estoppel bars the action.").

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The "Inadvertence Or Mistake" Exception For Later-Disclosed Claims

When a plaintiff-debtor amends his or her bankruptcy schedules to include previously undisclosed claims, the Ninth Circuit interprets "inadvertence" and "mistake" according to the common understanding of those terms. *Ah Quin*, 733 F.3d at 276–77 (declining to follow other circuits which apply the narrow standard of "inadvertence or mistake" to all cases). Under this more lenient standard, the relevant inquiry focuses on "the plaintiff's subjective intent when filling out and signing the bankruptcy schedules." *Id*. Two important factors to this inquiry are: (1) whether the plaintiff-debtor submitted an affidavit that adequately explains the omission as inadvertent or mistaken; and (2) whether the bankruptcy schedule was amended before or after the defendant raised judicial estoppel as a defense. *See Dzakula v. McHugh*, 746 F.3d 399, 401–02 (9th Cir. 2014).

- **The Affidavit.** The Ninth Circuit's "subjective intent" test for the defense often turns on the plaintiff-debtor's affidavit explaining the reason for the omission—*i.e.*, the debtor's subjective intent. If a plaintiff-debtor does not submit an affidavit explaining why he or she omitted pending claims from the bankruptcy schedules, courts are more likely to reject claims of inadvertence or mistake. If the plaintiff-debtor does submit such an affidavit, however, courts often treat intent as an issue of fact unless the affidavit is "blatantly contradicted by the record." *Ah Quin*, 733 F.3d at 278 (internal quotation marks omitted). Therefore, when a plaintiff-debtor both amends his or her bankruptcy schedule and submits an uncontroverted affidavit claiming the original omission was inadvertent or mistaken, the court is less likely to bar the claims as a matter of law. *See id.* at 277–79; *see also In re Plise*, 719 F. App'x 622, 624–25 (9th Cir. 2018); *Locke v. Wells Fargo Bank*, No. 2:19-cv-08854-ODW, 2020 WL 3546069, at *4–5 (C.D. Cal. June 30, 2020).

- **Timing Of The Disclosure.** Second, the timing of when the plaintiff-debtor amends his or her bankruptcy schedule is a relevant factor. When a plaintiff-debtor amends *before* a defendant raises judicial estoppel as a defense, courts treat this action as evidence that the omission truly was inadvertent. On the other hand, if the plaintiff-debtor only amends his or her bankruptcy schedules *after* the defendant raises judicial estoppel, it is more likely that a court applies judicial estoppel because the "timing of the reopening of the bankruptcy case seems inculpatory," rather than an honest correction of a mistake. *Ah Quin*, 733 F.3d at 278; *see Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006) ("[I]f [plaintiff-debtor] were really making an honest attempt to pay her debts, then as soon as she realized that [the claim] *had* been omitted, she would have filed amended schedules and moved to reopen the bankruptcy, so that the creditors could benefit from any recovery.").

Application Of Judicial Estoppel In The Ninth Circuit

The leading Ninth Circuit case applying judicial estoppel stemming from bankruptcy proceedings, *Ah Quin v. County Of Kauai Department of Transportation*, applied the doctrine to a plaintiff who disclosed her claims after judicial estoppel was raised. 733 F.3d 269. In *Ah Quin*, the plaintiff filed for bankruptcy while litigation against her former employer was pending. *Id*. The plaintiff failed to list the employment lawsuit as an asset on her bankruptcy schedule and, after standard bankruptcy proceedings, the Bankruptcy Court (still unaware of the debtor's employment lawsuit) issued a discharge and closed the cased. *Id*. When the plaintiff's counsel in the employment litigation learned about the bankruptcy non-disclosure, she promptly notified the defendant and claimed that the non-disclosure was a mistake stemming from the "vague" wording in the bankruptcy paperwork. *Id.* at 270, 276–77. The defendant immediately notified the district court of its intention to raise judicial estoppel as a defense. *Id*. at 269–70, 278. In response, the plaintiff reopened the bankruptcy case and amended her schedules to include the discrimination lawsuit. *Id*. at 270. Nevertheless, the district court found that the plaintiff was estopped, granted summary judgment, and dismissed the case. *Id*.

The plaintiff's appeal to the Ninth Circuit was grounded in the district court's interpretation of the "inadvertence or mistake" exception. The district court in *Ah Quin* applied the Tenth Circuit's rule that a failure to disclose "is inadvertent or mistaken 'only when . . . the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.'" *See Ah Quin v. Cnty. of Kauai Dep't of Transp.,* 433 B.R. 320, 324–25 (D. Haw. 2010) (quoting *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007)). The district court, noting the plaintiff's knowledge of the claims and inherent financial motive to conceal them from her creditors, declined to engage in further fact finding and granted summary judgment for the defendant. *See id.* at 325.

The Ninth Circuit discussed whether to adopt the Tenth Circuit rule, and in doing so grappled with debtors' incentives

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to disclose assets during a bankruptcy case. The Ninth Circuit began by acknowledging that "full disclosure in bankruptcy proceedings 'cannot be overemphasized'" and is "essential to the functioning of the bankruptcy system." *Ah Quin*, 773 F.3d at 271–73. However, the court rejected the argument that strict application of judicial estoppel is always appropriate to deter plaintiff-debtors from lackadaisical or fraudulent accounting of assets. *Id*. at 273.[1]

The Ninth Circuit noted that when a bankruptcy case is reopened to accurately list the debtor's assets, the second and third prongs of the *New Hampshire* test might be reversed. *Id*. at 274. When disclosures are accurate, the Bankruptcy Court knows that the previously undisclosed claim exists, and the debtor has lost his or her unfair advantage by ceding the litigation claim for creditors to recover. *Id*. The court further noted that the bankruptcy system already provides strong incentives to disclose, given that a plaintiff-debtor could face civil or criminal penalties for non-disclosure. *Id.* at 275. Invoking these justifications, the court declined to follow other circuits in presuming deceit in all cases where a debtor initially fails to disclose claims to the Bankruptcy Court. *Id*. at 276–77. Instead, the court held that the inadvertence or mistake defense is interpreted broadly or narrowly depending on whether the plaintiff-debtor ultimately discloses the claims to the Bankruptcy Court. *Id*. at 277. Since *Ah Quin* eventually disclosed her claims to the Bankruptcy Court, the Ninth Circuit remanded the case for additional fact finding about whether she had subjective intent to conceal the claim, and the parties ultimately settled before the district court could issue a ruling on remand. *See id.* at 278–79.

Impact Of Judicial Estoppel On Debtors And Creditors

Judicial estoppel is a uniquely powerful doctrine. It can "wip[e] out a potentially meritorious action against an unrelated third party" due to the plaintiff's prior representation to a prior court, even though that false representation may not have prejudiced the defendant. *Ah Quin*, 733 F.3d at 273.

But what about the plaintiff-debtor's creditors that were deprived of their opportunity to recover on account of the debtor's litigation claims? Some courts have held that even if judicial estoppel bars the plaintiff-debtor from recovering, a trustee can be appointed to pursue the estopped claims for the benefit of the innocent creditors. *See id.*; *Weinstein v. AutoZoners LLC*, No. 2:11-CV-00591-LDG, 2014 WL 898081, at *9 (D. Nev. Mar. 6, 2014).

However, even if a trustee were permitted to pursue the claims for the benefit of creditors, judicial estoppel could nonetheless limit the defendant's exposure to only the amount owed to creditors, because no additional money can be paid to the plaintiff who is barred from receiving any recovery. For example, a defendant that may otherwise be facing $1 billion in asserted damages may be able to limit its exposure to the millions (or less) that the creditors were shorted in the bankruptcy. In this circumstance, judicial estoppel would still represent a significant victory for a defendant.

Conclusion

Judicial estoppel is a powerful doctrine that can prevent a plaintiff from recovering even if the plaintiff's claims are meritorious.

When defending claims against a plaintiff that has recently emerged from bankruptcy, check whether the claims asserted against your client were ever disclosed. And if you are asserting claims on behalf of a client who recently emerged from bankruptcy, ensure that the claims you are pursuing were properly disclosed to the Bankruptcy Court before the defendant beats you to the punch and blunts your inadvertence defense by raising judicial estoppel first.

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[1]There is currently a split in authority regarding the inadvertence or mistake exception. The Tenth and Fifth Circuits use the stricter rule. See Allen v. C & H Distributors, L.L.C., 813 F.3d 566, 573–74 (5th Cir. 2015); Anderson v. Seven Falls Company, 696 F. App'x. 341, 348 (10th Cir. 2017) (explicitly declining to follow the Ninth Circuit). Other Circuits, including the Fourth and Seventh, have followed the Ninth Circuit's approach. See Martineau v. Wier, 934 F.3d 385, 393–94 (4th Cir. 2019); Spaine v. Community Contacts, Inc., 756 F.3d 542, 547–48 (7th Cir. 2014).

Maxim-izing Results...continued from Page 4

Judges tend to do what they think is fair. In a sense, equity is involved in every case, even those not involving equitable rights. And, "maxims of jurisprudence serve as guideposts of equity and fairness." (*Tintocalis v. Tintocalis* (1993) 20 Cal. App.4th 1590, 1595.) For instance, one well-known maxim says that "[i]nterpretation must be reasonable." (Civ. Code, § 3542.) So even in a case involving contract or statutory interpretation that doesn't *directly* implicate equity, reasonableness (i.e., "fairness") is always at play.

The primary reason that you should use maxims to bolster your legal arguments is that judges generally want to decide a case based on what's fair and equitable. The maxims of jurisprudence give them a legal hook to do what's right even when a statute or contract is confusing or conflicting. Above all, counsel should remember that these maxims (even the best of them) are only maxims; "they are neither definitions nor treatises"; and "in many instances, they are merely guide-posts pointing to the right road, but not the road itself." (Smith, *supra*, 9 Harv. L.Rev. at p. 26.) Thus, legal maxims should be invoked when they demonstrate the equitable policy reason behind the legal argument that you are making to the court.

How to use maxims to persuade courts.

Don't hesitate to take advantage of maxims when equity is on your side, and you want to ask the court to do what's fair. For instance:

When you want to argue that a law has outlived its usefulness, invoke this maxim: "When the reason of a rule ceases, so should the rule itself" (*Cessante ratione legis, cessat lex ipsa*). (Civ. Code, § 3510.)

* "The first maxim of California jurisprudence is that 'When the reason for a rule ceases, so should the rule itself.' (Civ. Code, § 3510.) Insurance Code section 11580.2, subdivision (i) has long outlived its usefulness and should be repealed." (*Kortmeyer v. California Ins. Guarantee Assn.* (1992) 9 Cal.App.4th 1285, 1297 (conc. opn. of Johnson, J.).)

When you want to argue that your client has an absolute right to take legal action through the court system: "For every wrong there is a remedy" (*Ubi jus ibi remedium*). (Civ. Code, § 3523.)

* "Equitable relief is by its nature flexible, and the maxim allowing a remedy for every wrong (Civ. Code, § 3523) has been invoked to justify the invention of new methods of relief for new types of wrongs." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 390.)

When you're trying to avoid a procedural mistake or prevent a case from being decided on a technicality, or if you're asking the court to pierce the corporate veil under the alter ago doctrine: "The law respects form less than substance." (Civ. Code, § 3528.) This is also known as the substance-over-form principle. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1356.)

* "First, it is a codified maxim of jurisprudence that '[t]he law respects form less than substance.' (Civ. Code, § 3528.) Thus, '[o]n appeal, the substance and effect of the order controls, not its label.'" (*Salmon v. Salmon* (2022) 85 Cal.App.5th 1047, 1055.)

* "'The alter ego doctrine is an equitable principle that elevates substance over form in order to prevent an inequitable result arising from unjustifiably observing a corporation's separate existence.'" (*Cruz v. Fusion Buffet, Inc.* (2020) 57 Cal.App.5th 221, 243.)

When you want to avoid the effect of extraneous terms in a statute or contract so the court focuses on the writing's basic principles: "Superfluity does not vitiate" (*Utile per inutile non vitiatur*). (Civ. Code, § 3537.)

* "This maxim directs that the presence of arguably unnecessary terms in a statute should not, by itself, produce an interpretation that will defeat the Legislature's central aim in enacting the law." (*General Development Co., L.P. v. City of Santa Maria* (2012) 202 Cal.App.4th 1391, 1395.)

When you want to blame the other side for doing something wrong (unclean hands): "No one can take advantage of his own wrong" (*Nullus commodum capere potest de injuria sua propria*). (Civ. Code, § 3517.)

* "There can be no doubt that a terrible miscarriage of justice occurred in this case. If ever a case demanded application of the legal maxim 'No one can take advantage of his own wrong,' this would be the case. (Civ. Code, § 3517.) Simply put, Roché misused our state court system to seize his neighbor's land." (*Lang v. Roche* (2011) 201 Cal.App.4th 254, 266.)

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Maxim-izing Results...continued from Page 12

When the other side previously agreed—or failed to object—to what they are now complaining about (waiver/estoppel): "Acquiescence in error takes away the right of objecting to it" (*Consensus tollit errorem*). (Civ. Code, § 3516.)

> * "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221–222, citing, e.g., Civ. Code, § 3516.)

When you want the court to excuse your client from having to perform a statutory or contractual duty because performance would be impossible: "The law never requires impossibilities" (*Lex non cogit ad impossibilia*). (Civ. Code, § 3531.)

> * "We note that it would often be impossible for a party to prove he was prejudiced by not learning what he hasn't learned and doesn't know. The law requires neither the impossible nor idle acts which attempt it. (Civ. Code, §§ 3531, 3532.)" (*Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877, 886, fn. 9.)

When you want to say "sh*t happens" (force majeure/act of God): Remind the court that "[n]o man is responsible for that which no man can control" (*Actus Dei nemini facit injuriam*). (Civ. Code, § 3526.)

> * "Acts of God which are within the rule of law that 'no man is responsible for that which no man can control' (Civ. Code, [§] 3526) are those which operate independently of human agency. [Citations.] The jury was required to determine as a fact whether the injury was caused by an act of God, and its conclusion, if reasonably supported by evidence, is conclusive on appeal." (*Conlin v. Coyne* (1937) 19 Cal.App.2d 78, 87.)

Everyday proverbs, adages, and aphorisms can also be used to help guide your clients during litigation and outside of court.

The Maxims of Jurisprudence aren't the only phrases that encapsulate fundamental fairness principles. Advocates should also consider using other well-known sayings to persuade the court. For instance:

To the person trying to get out of a contract he or she signed: "Wise or not, a deal is a deal." (*United Food and Commercial Workers Union v. Lucky Stores, Inc.* (9th Cir. 1986) 806 F.2d 1385, 1386.)

When you want to remind your clients or cocounsel the importance of making alternative arguments and seeking alternative remedies: "Don't put all your eggs in one basket." (See *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1481 ["Having chosen to 'put all her eggs in one basket,' she cannot come back years later and add others"].)

When you want to persuade one of your clients that he or she should start thinking about settlement: "A bad compromise is better than a good lawsuit." (French proverb.)

An important reminder to hire good people to represent you: "A man is known by the company he keeps." (Greek philosopher, Aesop.)

Never forget to make a record of objections: "Better safe than sorry." (Samuel Lover, *Rory O'More* (1837).)

Remind your clients that objecting to opposing counsel's extension requests and other courtesy requests is bad practice and counterproductive: "Do unto others as you would have them do unto you." (See Luke 6:31; Matthew 7:12 [The Golden Rule].)

Always remember to be nice to your clients, or you won't have any: "Don't bite the hand that feeds you." (Greek poet, Sappho.)

And finally, remember that hiring an appellate attorney to help you during trial can save your client money in the long run: "[A]n ounce of prevention is worth a pound of cure." (Benjamin Franklin, *On Protection of Towns from Fire*, The Pennsylvania Gazette (Feb. 4, 1735), capitalization omitted.)

In a sense, equity is involved in every case, even those not involving equitable rights. So, don't forget to find the right Maxim of Jurisprudence or equitable principle to help you explain what is fundamentally fair.

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