CARLTON FIELDS

Don't Estop Believin' – Courts May Save Your Judicial Estoppel Argument

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The equitable doctrine of judicial estoppel 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. Generally, the doctrine is raised by a party — for example, as an affirmative defense — but a recent case out of the D.C. Circuit reminds us that it may also be raised by a reviewing court. In *Davis v. District of Columbia*, No. 17-7071, 2019 WL 2398007 (D.C. Cir. June 7, 2019), the D.C. Circuit reaffirmed that courts are not required to recognize a party's apparent waiver of a judicial estoppel argument. There, the plaintiffs argued that the defendant waived the affirmative defense when it did not raise the doctrine in its answer. The circuit court, however, held that the doctrine is not only a defense but, because it also protects the integrity of the judicial process, a court may invoke the doctrine *sua sponte at its own discretion*. It then affirmed the district court's dismissal of the plaintiff's claims on estoppel grounds. In this regard, judicial estoppel resembles subject-matter jurisdiction, given that both are ripe for court intervention (and might be raised as error or abuse of discretion on appeal) despite apparent waiver by the parties in the trial court. As the Eleventh Circuit Court of Appeals has explained, "[q]uestions of subject matter jurisdiction may be raised ... at any time during the pendency of the proceedings." *Ingram v. CSX Transp., Inc.*, 146 F.3d 858, 861 (11th Cir. 1998) (internal citations omitted). Indeed, although the court normally will not address issues raised for the first time at oral argument, it is bound to ascertain whether it possesses subject-matter jurisdiction whether it is challenged by the litigants or not. *Id.* While both are examples of occasions where apparent waiver can be salvaged, they operate differently. The court is duty bound to raise subject-matter jurisdiction issues, which cannot be waived, at any time. *See* Fed. R. Civ. P. 12(h)(3). Not so with the doctrine of judicial estoppel, which a court "may" invoke at its discretion to cure a party's otherwise effective waiver of the issue. **Practice Tip**: Although it is best to preserve issues in the first instance, there are limited occasions where new arguments, such as judicial estoppel or subject-matter jurisdiction, may be allowed on appeal. Consequently, before losing all hope, consider whether your issue may fall into an exception to strict preservation requirements. But in doing so, do not engage in gamesmanship. As the Eleventh Circuit has warned, attorneys, as officers of the court,

have a duty to raise alleged defects in subject-matter jurisdiction when they first become apparent, not merely when doing so becomes strategically expedient. *I.L. v. Alabama*, 739 F.3d 1273, 1284 n.6 (11th Cir. 2014). This is especially true in the judicial estoppel context because, unlike subject-matter jurisdiction, courts have *permissive*, rather than a mandatory, authority to invoke the doctrine. Since the purpose of the doctrine is to protect the integrity of the judicial process, do not expect courts to reward litigants who strategically and deliberately denied the court an opportunity to review the issue in the first instance.

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