LESSONS FROM *AVENT*: JUDICIAL ESTOPPEL AND DUTY TO DEFEND IN NO-INJURY PRODUCT LIABILITY LITIGATION

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INTRODUCTION

Consider the predicament an insured defendant faces in a typical no-injury product liability action. He must fight a battle on two fronts: first, against his insurance company, who will argue that it has no duty to defend him, and second, against the plaintiff, who is suing him.[1] Frequently, the defendant's best legal strategy will require him to assert one position against the insurance company while simultaneously asserting a different position against the plaintiff.[2] If the defendant is fortunate enough to prevail against one party, he may become vulnerable to the imposition of judicial estoppel, which will preclude him from asserting any position against the other party that directly contradicts his prior, successful argument.[3]

Furthermore, the defendant must navigate the judicial estoppel minefield while simultaneously traversing the somewhat uncharted terrain of the no-injury product liability lawsuit.[4] Traditionally, a plaintiff bringing a product liability

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1. *See* Haskel, Inc. v. Superior Court, 39 Cal. Rptr. 2d 520, 529 (Cal. Ct. App. 1995) (noting that the situation described "requires the insured to fight a two-front war, litigating not only with the underlying claimant, but also expending precious resources fighting an insurer over coverage questions—this effectively undercuts one of the primary reasons for purchasing liability insurance"); *see also* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 170 (Harvard Univ. Press 2008) (noting that, because of the insurance industry's practice of denying claims, insured defendants have actually only purchased an option to litigate those future claims, rather than a guarantee of defense and indemnity).

2. *See* Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 614 (7th Cir. 2010) (noting that "the insured may have to attack the opponent's case in ways that seem to remove it from the scope of the insurance contract").

3. Douglas W. Henkin, Comment, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1711 (1991).

4. *See* Meryl C. Maneker, *Defending the No-Injury Products Liability Class Action*, 14 PRAC. LITIGATOR, May 2003, at 13, 14-15 (noting that the no-injury product liability class action

lawsuit had to prove that he had suffered some injury as a result of the defective product.[5] However, some plaintiffs have brought claims based not on any present injury or illness, but rather on an increased future risk of injury or illness from a defective product.[6] Such claims still require the plaintiff to prove the increased risk to a "substantial (more probable than not) medical probability" in order to recover damages, which can present a significant obstacle to recovery.[7] The no-injury product liability claim removes that obstacle from the plaintiff's path.[8] Instead of proving an actual increased risk of future harm, the plaintiff tries to show that the risk of harm is itself an injury, regardless of the actual probability of harm, because it causes him to be unwilling to use the product as desired or unable to resell it for the expected value, thus depriving him of the enjoyment of his purchase.[9] To the extent that the plaintiff is arguing that he has been denied the benefit of his bargain, the no-injury product liability claim moves away from tort law and into the realm of contract law.[10]

To the defendant, however, these distinctions may seem unimportant; his main concern will be ensuring that his Commercial General Liability (CGL) insurance policy will both pay for the legal work necessary to defend him against the plaintiff's lawsuit and pay any judgment that the plaintiff might win against him.[11] All fifty states have laws requiring the insurer to defend the policyholder

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lawsuit is "increasingly common").

5. *See* Rebecca Korzec, Lloyd v. General Motors Corporation*: An Unfortunate Detour In Maryland Products Liability Law*, 38 U. BALT. L.F. 127, 127 (2008).

6. *Id.*

7. James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 820 (2002) (alteration in original).

8. *See* Maneker, *supra* note 4, at 14-15 (noting that "these lawsuits challenge a fundamental tenet of tort law—that the plaintiff must suffer an injury to be entitled to recover").

9. *See id.* (noting that plaintiffs frequently also claim emotional distress damages in no-injury product liability lawsuits).

10. *See* Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 320 (5th Cir. 2002) (noting that "[t]he plaintiffs' most plausible argument for finding they have suffered 'invasion of a legally protected interest' is their claim they were denied 'the benefit of the bargain' due to them under general, contract law type principles").

11. *See* Lisa C. Friedlander, Note, *Construction Defect Litigation: Courts' Fragmented Rationales Regarding Coverage for Contractor's Faulty Workmanship*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 119, 125-26 (2006) ("The CGL insurer has two major duties to the insured, the duty to indemnify for settlements and judgments within the coverage granted, and the duty to provide defense for the policyholder. . . . The duty to defend feature of the CGL policy is exceptionally significant to policyholders challenged with circumstances such as 'product liability [including asbestos], environmental, construction defects, intellectual property or any other potentially covered claim' where defense costs may considerably exceed policy limits.") (alteration in original) (quoting Tracy Alan Saxe, *What Every Lawyer, Risk Manager Should Know About Coverage*, CONN. LAW TRIB., Apr. 19, 2004, at 5); *see generally* Clyde M. Hettrick, *How an Insured Can Block a Carrier's Coverage Litigation Blitz*, 26 ENT. & SPORTS LAW. 9 (2008) (explaining, through

against any claim in which the complaint "even suggests facts which could potentially bring the claim within the policy's coverage grant."[12] Unfortunately for the defendant policyholder, however, his CGL policy likely only provides coverage for claims in which the plaintiff is alleging a "bodily injury."[13] By definition, in no-injury product liability cases, the plaintiff does not generally allege a "bodily injury."[14] Therefore, the insurer can easily argue that the plaintiff's claim falls outside the scope of the insurance policy, because it does not allege a "bodily injury," and try to deny coverage to the policyholder on that basis.[15] Ultimately, the determination as to whether a particular complaint makes a sufficient allegation of "bodily injury" to trigger coverage is dependent upon the precise language of both the complaint itself and the insurance contract.[16] The interpretation of that language is an unsettled area of the law; two federal circuit courts have recently examined virtually identical language and reached two different results.[17]

Avent America, Inc. was a defendant in just this situation, fighting against both the plaintiff and its own insurance company, in a recent case before the Seventh Circuit Court of Appeals.[18] In that case, the lower court had consolidated various class action lawsuits filed against Avent, a manufacturer of various products intended for use by children, including baby bottles.[19] The plaintiffs, consumers who purchased the baby bottles, claimed that Avent failed to warn them that the bottles were made from plastic containing a hazardous chemical called Bisphenol-A (BPA).[20] The plaintiffs were concerned that the BPA could leach out of the bottles and into their contents, where children could potentially

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extensive use of sports metaphors, various ways in which insured defendants can defeat their insurer's efforts to deny coverage).

12. Friedlander, *supra* note 11, at 125.

13. *See* Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1516 (2010) (noting that "almost all CGL policies" provide coverage for "claims against a policyholder for bodily injury to plaintiff(s) caused by an 'occurrence'") (quoting Addison Ins. Co. v. Fay, 905 N.E.2d 747, 753 (Ill. 2009)).

14. Maneker, *supra* note 4, at 13-14.

15. *See generally* 9A LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 129:5 (3d ed. 2010) (defining "bodily injury" for the purposes of most CGL policies as "bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time").

16. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613 (7th Cir. 2010).

17. *See id.* at 616 (holding that the plaintiffs' underlying complaints, relating to the presence of an allegedly toxic chemical in baby bottles, "do not reach the level of asserting claims 'because of bodily injury'" and thus do not trigger a duty to defend under the defendant's CGL policy); N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414, 419 (4th Cir. 2003) (holding that the plaintiffs' underlying complaint, relating to the alleged emission of radiation from cellular telephones, "asserts a claim for 'damages because of bodily injury,' as contemplated within the terms of the [defendant's CGL] [p]olicy").

18. *Avent*, 612 F.3d 607.

19. *Id.* at 609.

20. *Id.*

ingest it.[21] The plaintiffs also claimed that Avent failed to warn consumers of the potential health hazards associated with such ingestion.[22] In the majority opinion, Judge Flaum noted the potential for prejudice to the defendant inherent in an application of judicial estoppel in the insurance coverage context.[23] Judge Flaum encapsulated the "tension" between judicial estoppel and the duty to defend:

> We must be careful when applying judicial estoppel in the duty to defend context. If an insurance company refuses to defend its insured in a given case, that insured still must put forth a zealous defense. In doing so, the insured may have to attack the opponent's case in ways that seem to remove it from the scope of the insurance contract. That does not necessarily absolve the insurance company from providing the exact same defense, or later reimbursing the insured for the defense. While judicial estoppel may be appropriate in certain duty to defend situations, we must be cognizant of this tension when we consider applying this doctrine in these types of cases.[24]

Although Judge Flaum discusses this situation abstractly, *Avent* is actually a very concrete example. When Avent received notice of the plaintiffs' lawsuit, it sought "defense and indemnification" from three insurance companies from which it had purchased CGL policies during the relevant time period: Medmarc, Pennsylvania General, and State Farm.[25] All three denied coverage, and after some maneuvering, they all filed motions to dismiss Avent's coverage lawsuit on the grounds that the plaintiffs' complaint fell outside the scope of the CGL policies' coverage.[26]

Meanwhile, Avent began its defense against the underlying lawsuit by filing "a motion to dismiss the complaints on the ground that they did not state a legally cognizable injury."[27] In the ensuing coverage litigation, the insurance companies argued that by filing this motion, Avent had admitted that the underlying complaint did not seek damages either "for bodily injury" or "because of bodily injury," thus "remov[ing] it from the scope of the insurance contract."[28] Thus, the insurance companies asserted, Avent should be estopped from arguing the opposite position in the coverage litigation.[29] The court disagreed, however, and declined to impose judicial estoppel against Avent.[30]

Although he recognized that Avent was in an difficult position, Judge Flaum was careful not to say that judicial estoppel should never be applied against

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21. *Id.*
22. *Id.* at 609-10.
23. *Id.* at 614.
24. *Id.*
25. *Id.* at 612.
26. *Id.*
27. *Id.* at 610.
28. *Id.* at 614.
29. *Id.* at 613.
30. *Id.*

defendants who have lost their duty to defend battle, or that a finding of judicial estoppel necessarily requires a finding that the insurer has a duty to defend.[31] However, in his opinion, he made two important points about judicial estoppel and the duty to defend. First, he highlighted the interconnection between the two issues.[32] Second, he raised the issue of whether it is ever appropriate to apply judicial estoppel in the insurance coverage context, especially in such an unsettled area of the law as no-injury product liability.[33]

Part I of this Note briefly explains the doctrine of judicial estoppel, the two primary ways in which it is applied, policy arguments for and against it, and its recent applications in insurance coverage litigation. Part II provides an overview of the no-injury product liability lawsuit, including some special considerations that arise in the duty to defend context, as well as a survey of the conflicting circuit decisions. Part III explores various policy arguments for and against the imposition of judicial estoppel in the duty to defend context. Part IV suggests how the United States Supreme Court should rule if it grants certiorari in *Avent* and propounds a new framework for the application of judicial estoppel in the insurance coverage context that strikes a better balance between the insured defendant's interest in vigorously advocating for his interests and the judicial system's interest in consistency.

I. JUDICIAL ESTOPPEL

As Judge Easterbrook noted in *Neal v. Honeywell, Inc.*,[34] "[s]ometimes the judiciary must act in self-defense."[35] Judicial estoppel is a powerful weapon in the judiciary's self-defense arsenal.[36] This Part first explores the functions of judicial estoppel, including examples from case law. Second, it describes the two primary ways that judicial estoppel is applied. Third, it summarizes some of the policy reasoning both for and against the application of judicial estoppel in

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31. *Id.* at 614.

32. *Id.*

33. *Id.*

34. 191 F.3d 827 (7th Cir. 1999).

35. *Id.* at 830. Judge Easterbrook was expressing his frustration with a defendant who pursued an interlocutory appeal under 28 U.S.C. § 1292(b) (2006) (thus stipulating that the case turned on a controlling question of law; in this case, the length of the statute of limitations), lost that interlocutory appeal and the subsequent jury trial, and then appealed the final judgment on a factual question as to whether the plaintiff had timely filed. *Neal*, 191 F.3d at 829-30. The Seventh Circuit held that the factual question was precluded by the prior interlocutory appeal and accompanying stipulation—a clear application of judicial estoppel, although Judge Easterbrook did not use that term that in his opinion. *Id.* at 830.

36. Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 612 (1998) (noting that "the primary purpose of the doctrine of judicial estoppel is to protect courts").

general. Finally, it examines some recent applications of judicial estoppel in the context most germane to this study: insurance coverage litigation.

A. The Functions of Judicial Estoppel

Judicial estoppel primarily serves "to protect the integrity of the judicial process."[37] By limiting litigants to asserting arguments that are not inconsistent with each other, judicial estoppel prevents inconsistent rulings, the resulting appearance of unfairness, and ultimately "the devolution of the judicial system into a forum of 'mere gamesmanship.'"[38] In addition to its primary function, however, judicial estoppel also serves two secondary functions. First, it protects the efficiency of the judicial system by preventing parties from relitigating issues that have already been decided by the court, thus bringing a sense of finality to the judicial process.[39] Second, it increases the predictability of judicial outcomes, allowing litigants to more effectively plan their affairs, secure in the knowledge that they can rely on court precedent.[40]

Judicial estoppel allows the court to protect its own integrity when it is threatened by the machinations of litigants.[41] For example, in *RSR Corp. v. International Insurance Co.*,[42] the plaintiff corporation argued that its two different environmental CGL policies covered different types of industrial pollution.[43] However, in a previous successful action, the plaintiff had argued that the two policies covered the same liabilities.[44] The Fifth Circuit found that the plaintiff was judicially "estopped from arguing that the . . . policies covered different liabilities."[45] *RSR Corp.* illustrates the necessity of judicial estoppel as a protective measure; the court noted that the plaintiff corporation was asserting the inconsistent argument in an effort to obtain a "double recovery" by collecting

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37. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)).

38. Anderson & Holober, *supra* note 36, at 622 (quoting Brief and Appendix of Amicus Curiae Insurance Environmental Litigation Ass'n in Support of Continental Insurance Co., Aetna Casualty & Surety Co. and Firemen's Insurance Co. of Newark, N.J., at 25 n.21, Cnty. of Columbia, N.Y. v. Cont'l Ins. Co., 595 N.Y.S.2d 988 (N.Y. App. Div. 1993) (No. 65599)).

39. *Id.*

40. *See id.* (noting that judicial estoppel "fosters credibility and certainty within the judicial system").

41. *Id.* at 616.

42. 612 F.3d 851 (5th Cir. 2010).

43. *Id.* at 859-60.

44. *See* Int'l Ins. Co. v. RSR Corp., No. 3:00-CV-0250-P, 2003 WL 23175284 at *1 (N.D. Tex. Oct. 17, 2003) (holding that insurer was required to indemnify defendant for cleanup costs), *aff'd*, 426 F.3d 281, 284 (5th Cir. 2005); *see also* RSR Corp. v. Int'l Ins. Co., No. 3:00-CV-0250-P, 2009 WL 927527 at *9 (N.D. Tex. Mar. 23, 2009) (holding that the insured plaintiff's "arguments [in this case] are directly contrary to the position that it took in the Harrison County Action . . . a position that was adopted by the state court in 2003"), *aff'd*, 612 F.3d 851, 854 (5th Cir. 2010).

45. *RSR Corp.*, 612 F.3d at 861.

full indemnity from multiple insurers for the same occurrence.[46]

Moreover, the courts cannot depend upon the litigating parties to respect the dignity of the judicial process and refrain from arguing contradictory positions.[47] On the contrary, although they may not admit it to the court, many parties would likely not hesitate to adopt a contradictory position if doing so would be strategically advantageous.[48] As one seasoned litigant put it, "[W]e should push ahead, on a case by case basis, for whichever theory suits us best in a particular case. Thus, I have no problem with our simultaneously contending (in different courts, of course) for both . . . theories."[49] Although litigants understandably wish to achieve the best possible outcome for themselves, most courts have acknowledged that the judicial system has a responsibility to disallow such inconsistency.[50] As the First Circuit noted in *Patriot Cinemas, Inc. v. General Cinemas Corp.*,[51] "[i]f parties feel free to select contradictory positions before different tribunals to suit their ends, the integrity and efficacy of the courts will suffer."[52]

In much the same way that res judicata and collateral estoppel do,[53] judicial estoppel prevents needless and duplicative litigation and thus promotes judicial efficiency.[54] By asking a court to adopt a position that is inconsistent with one already adopted by an earlier court, a litigant is effectively "consuming the resources of the judiciary while creating the possibility that a later decision will render an earlier one meaningless."[55] Judicial estoppel allows the court to prevent this waste of resources.[56] If the Fifth Circuit had declined to apply judicial estoppel in *RSR Corp.*, the trial court would have been forced to revisit the policy language interpretation issue, despite the fact that another court had already

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46. *Id.* at 862.

47. Anderson & Holober, *supra* note 36, at 600-01.

48. *Id.*

49. *Id.* at 601 (quoting an internal corporate communication made by a "senior Aetna Life & Casualty Company claims executive") (alterations in original).

50. *Id.* at 597.

51. 834 F.2d 208 (1st Cir. 1987).

52. *Id.* at 214.

53. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."). Judicial estoppel, on yet a third hand, "precludes a litigant from asserting a position that is inconsistent with a position that the litigant or its privy unequivocally asserted in a prior testimony or affidavit, pleading, legal argument, brief, stipulation, or settlement which has received judicial acceptance." Anderson & Holober, *supra* note 36, at 608-09 (citations omitted).

54. Anderson & Holober, *supra* note 36, at 620-21.

55. Kelly L. Morron, *Time for the Federal Circuit to Take a Judicious Approach to Judicial Estoppel*, 28 AIPLA Q. J. 159, 162 (2000).

56. Anderson & Holober, *supra* note 36, at 620-21.

resolved that issue.[57] The application of judicial estoppel in *RSR Corp*. thus prevented valuable judicial resources from being wasted in unnecessary reexamination of a decided question.

Judicial estoppel also increases the reliability of judicial rulings, and thus the predictability of the judicial system.[58] For example, if the Fifth Circuit had not upheld the district court's imposition of judicial estoppel in *RSR Corp.*, the district court would have had the opportunity to reinterpret the same policy language that the state court had already construed to mean something different.[59] That opportunity would create the potential for two equally valid but diametrically opposed judicial interpretations of the same policy language.[60] This potential would decrease the reliability of judicial outcomes, weaken the value of precedent, and thus increase uncertainty for litigants.[61]

B. Common Approaches to the Application of Judicial Estoppel

Most courts and commentators agree as to the function of judicial estoppel, but its application is more varied.[62] Some commentators have suggested that this "fluidity" is a result of the doctrine's essentially equitable nature.[63] Although the details differ from court to court, judicial estoppel is generally applied under one of three approaches: the "judicial acceptance" approach, the "sanctity of the oath" approach, and the "fast and loose" approach.[64]

The "judicial acceptance" approach, sometimes called the "prior success" approach, is designed first and foremost to preserve the integrity of the judicial system.[65] Under the judicial acceptance approach, a court deciding whether to apply judicial estoppel against a litigant must consider whether or not another court accepted the litigant's prior inconsistent statement.[66] Some courts that have adopted this approach have made judicial acceptance a mandatory prerequisite to

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57. *See* RSR Corp. v. Int'l Ins. Co., No. 3:00-CV-0250-P, 2009 WL 927527 at *9 (N.D. Tex. Mar. 23, 2009) (noting that in 2003, a Texas state court accepted RSR's argument that its CGL policy covered "all unexpected and unintended pollution"), *aff'd*, 612 F.3d 851, 854 (5th Cir. 2010).

58. Anderson & Holober, *supra* note 36, at 619-20.

59. *See* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 860-61 (5th Cir. 2010).

60. *Id.*

61. Anderson & Holober, *supra* note 36, at 621-22.

62. *See generally* Kira A. Davis, Note, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law*, 89 CORNELL L. REV. 191, 202-08 (2003) (providing a survey of the different approaches to judicial estoppel taken by the U.S. Courts of Appeals).

63. Steve R. Johnson, *The Doctrine of Judicial Estoppel*, 11 NEV. LAW., Dec. 2003, at 8, 10.

64. *See* Anderson & Holober, *supra* note 36, at 623 (describing the "judicial acceptance" and "sanctity of the oath" approaches and noting the presence of a third approach, "fast and loose," that is similar to but broader than the "sanctity of the oath" approach because it does not require that the prior inconsistent statement have been made under oath in order for judicial estoppel to apply).

65. *Id.* at 627-29.

66. *Id.* at 623.

the application of judicial estoppel, but others have established judicial acceptance as merely one of several factors that a court should consider when deciding whether to apply judicial estoppel.[67]

The majority of lower federal courts have adopted some form of the judicial acceptance approach,[68] including all of the federal circuit courts of appeal except the Third Circuit and the Eleventh Circuit.[69] Further, the United States Supreme Court adopted the judicial acceptance approach in *New Hampshire v. Maine*.[70] In that case, the Court acknowledged the unsettled state of the law of judicial estoppel, but noted three factors that courts commonly consider when deciding whether judicial estoppel is appropriate in a particular case:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not

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67. *Compare* Perry v. Blum, 629 F.3d 1, 11 (1st Cir. 2010) ("The party proposing an application of judicial estoppel must show that the relevant court actually accepted the other party's earlier representation."), *with* United States v. Liquidators of Eur. Fed. Credit Bank, 630 F.3d 1139, 1148 (9th Cir. 2011) ("In determining whether to apply [judicial estoppel], we typically consider (1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position; and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'") (quoting United States v. Ibrahim, 522 F.3d 1003, 1009 (9th Cir. 2008)).

68. Eric A. Schreiber, Comment, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions*, 30 LOY. L.A. L. REV. 323, 336 (1996).

69. *Liquidators of Eur. Fed. Credit Bank*, 630 F.3d at 1148; CRV Enters., Inc. v. United States, 626 F.3d 1241, 1248 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 2459 (2011); *Perry*, 629 F.3d at 11; Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co., 617 F.3d 1040, 1051 (8th Cir. 2010); Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 414 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2097 (2011); RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 859 (5th Cir. 2010); Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613 (7th Cir. 2010); Comcast Corp. v. FCC, 600 F.3d 642, 647 (D.C. Cir. 2010); Israel v. Chabra, 601 F.3d 57, 65 n.2 (2d Cir. 2010); Whitten v. Fred's, Inc., 601 F.3d 231, 241 (4th Cir. 2010); Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1156 (10th Cir. 2007).

70. 532 U.S. 742, 749 (2001) ("This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" (quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000))).

estopped.[71]

This is a flexible inquiry, not a list of requirements; for example, if "the litigant has made an egregious attempt to manipulate the legal system," or other circumstances warrant it, the court can apply judicial estoppel even if the litigant asserted the prior position unsuccessfully.[72] Furthermore, the Court noted that the three enumerated considerations were not necessarily the only relevant factors to consider, and suggested that courts should supplement those considerations as necessary and appropriate to the facts of the individual case at bar.[73]

A minority of courts, including the Eleventh Circuit,[74] take the "sanctity of the oath" approach to judicial estoppel.[75] Under this approach, the preservation of the sanctity of the oath, rather than the dignity of the court, is the primary public policy reason behind the doctrine.[76] In deciding whether to apply judicial estoppel under this approach, the courts consider only one question: "whether the position that the litigant seeks to assert in the present proceeding conflicts with a position stated *under oath* in a prior proceeding."[77] If so, the court will apply judicial estoppel to bar the litigant from asserting the conflicting position in the present proceeding.[78] Unlike the judicial acceptance approach, the sanctity of the oath approach does not depend on whether the court accepted the litigant's prior position.[79]

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71. *Id.* at 750-51 (internal quotations and citations omitted).

72. 30 JEFFREY A. SCHAFER, CAL. JUR. 3D, *Estoppel and Waiver* § 29 (2011).

73. *New Hampshire*, 532 U.S. at 751.

74. Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1273 (11th Cir. 2010) (stating a two-part test for the application of judicial estoppel: "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system") (quoting Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002)). The court also noted that judicial acceptance is one of the circumstances that courts should consider as part of a holistic analysis. *Id.* (citing *New Hampshire*, 532 U.S. at 750-51).

75. *See* Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 414 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2097 (2011) ("The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted *under oath* in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. A court should also consider whether the party has gained an unfair advantage from the court's adoption of its earlier inconsistent statement." (quoting Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP, 546 F.3d 752, 757 (6th Cir. 2008)) (emphasis added)); *see also* Schreiber, *supra* note 68, at 326 (describing the "sanctity of the oath" approach as an early application of judicial estoppel that has now been largely abandoned as overly harsh in favor of the judicial acceptance approach); Anderson & Holober, *supra* note 36, at 625-26 (describing various cases in which courts have taken the sanctity of the oath approach).

76. Anderson & Holober, *supra* note 36, at 624.

77. *Id.* at 624-25 (emphasis added).

78. *Id.*

79. *Id.*

Lastly, a few courts, including the Third Circuit,[80] take the "fast and loose" approach to judicial estoppel.[81] Although it is similar to the sanctity of the oath approach, the fast and loose approach does not require that the litigant's prior statement have been made under oath in order for judicial estoppel to apply.[82] Of the three approaches, the fast and loose approach gives the court the most discretion in the application of judicial estoppel, because the only requirement (aside from the assertion of an inconsistent position) is a finding that the litigant "changed his or her position in bad faith—i.e., with intent to play fast and loose with the court."[83] From a public policy angle, the fast and loose approach takes account of the fact that litigants may try to argue contradictory positions even without having previously stated them under oath, and that such a contradiction would still be problematic from the court's perspective.[84] However, it has also been criticized as being too vague; the courts have not established any firm definition of "fast and loose behavior" deserving of judicial estoppel.[85]

C. The Public Policies Underlying Judicial Estoppel

The application of judicial estoppel in appropriate cases promotes several important public policies. First, as discussed previously, it combats the problems that can result when litigants are freely permitted to assert contradictory positions: unnecessary litigation, fractured judicial integrity, and a corresponding decline in public respect for the courts.[86] In addition, judicial estoppel helps promote predictability and consistency in litigation.[87] For example, if a court accepts a party's position, the opposing party may rely on that position as established, not only for the purposes of the instant case, but for subsequent litigation against the same party.[88] Although the doctrine of equitable estoppel is also available to

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80. *In re* Kane, 628 F.3d 631, 638 (3d Cir. 2010).

81. *See* Anderson & Holober, *supra* note 36, at 625-26 (describing various cases in which courts have applied judicial estoppel against litigants who were attempting to "play[] 'fast and loose' with the courts") (quoting Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987)); *see also* Schreiber, *supra* note 68, at 338 (noting that a minority of courts have adopted the "fast and loose" approach to judicial estoppel).

82. Schreiber, *supra* note 68, at 338.

83. *Kane*, 628 F.3d at 638 (applying the "fast and loose" approach, but also restricting the application of judicial estoppel to situations where it is "tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct") (emphasis omitted) (quoting Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 319 (3d Cir. 2003)); *see also* Schreiber, *supra* note 68, at 342-43 (criticizing the "fast and loose" approach as overbroad and unclear).

84. Anderson & Holober, *supra* note 36, at 627.

85. Schreiber, *supra* note 68, at 343.

86. Anderson & Holober, *supra* note 36, at 591.

87. *Id.* at 621-22.

88. *See* Schreiber, *supra* note 68, at 355 (listing "reliance" as one of the factors that courts should weigh in applying judicial estoppel).

protect parties who can show detrimental reliance on the prior position, no such showing is required for judicial estoppel, so the burden on the opposing party is lower.[89]

There are, however, some significant costs associated with the imposition of judicial estoppel. The most obvious cost is prejudice to the party who is estopped from asserting an argument—prejudice that can result in the loss of a single claim or even an entire case.[90] Furthermore, because judicial estoppel is such a "flexible" doctrine, it can be difficult for litigants to predict how and when it will apply.[91] Even when litigants are able to make those predictions with relative confidence, the differences in application between various courts may lead litigants to forum shop for the jurisdiction most likely to allow them to assert inconsistent positions or to impose judicial estoppel against their opponent.[92]

D. Judicial Estoppel in Insurance Coverage Litigation

The insurance industry in particular has a complicated relationship with judicial estoppel. On the one hand, large national insurance companies are particularly vulnerable to the imposition of judicial estoppel because they are involved in a huge number of lawsuits in virtually every jurisdiction.[93] Indeed, some companies have positively embraced the use of inconsistent arguments whenever courts will allow their use.[94] On the other hand, many of the same insurance companies have frequently used judicial estoppel as a defensive weapon in coverage litigation, arguing for its imposition against insured defendants to preclude their arguments in favor of coverage.[95]

In some insurance coverage cases, courts have applied the "judicial acceptance" approach and declined to impose judicial estoppel against a party because the lower court had not accepted the party's prior position. For example, in *Capella University, Inc. v. Executive Risk Specialty Insurance Co.*,[96] the plaintiff requested reimbursement for a certain amount of fees and costs from the

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89. *Id.* at 331; *see also* Anderson & Holober, *supra* note 36, at 632-35 (criticizing the Second Circuit for conflating equitable estoppel and judicial estoppel in Young v. U.S. Dep't of Justice, 882 F.2d 633 (2d Cir. 1989), but noting that the court "omitted entirely any discussion of reliance" in later judicial estoppel cases).

90. Schreiber, *supra* note 68, at 330.

91. *See* Anderson & Holober, *supra* note 36, at 635 (emphasizing the "flexible approach" as best for courts).

92. *See* George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 656 n.38 (1993) (noting that, according to the United States Supreme Court, "the twin aims of *Erie* were the avoidance of forum-shopping and inequitable administration of the laws").

93. *See* Anderson & Holober, *supra* note 36, at 592-93 (noting that "the insurance industry is the largest, most frequent private user of the civil justice system").

94. *Id.* at 600-02.

95. *Id.* at 597-99.

96. 617 F.3d 1040 (8th Cir. 2010).

defendant insurance company.[97] The trial court refused its request, but did order reimbursement of a smaller amount.[98] Subsequently, the plaintiff amended its request to include interest.[99] The defendant argued that the plaintiff should be estopped from so amending by its earlier request, but the district court disagreed.[100] The Eighth Circuit upheld the district court's decision not to impose judicial estoppel against the plaintiff for two reasons: first, the district court did not accept the plaintiff's original position; and second, the defendant would not suffer any unfair prejudice if the court allowed the plaintiff's new argument.[101]

Similarly, in *G-I Holdings, Inc. v. Reliance Insurance Co.*,[102] the defendant withdrew its first argument and substituted a new one before the district court had a chance to rule on the pending motion.[103] The Third Circuit upheld the district court's denial of judicial estoppel against the defendant's original argument because the district court had never accepted that argument.[104] The appellate court held that "[w]here, as here, a defendant has changed position in response to an amended complaint, there is no offense to the integrity of the judicial process warranting estoppel. There is only danger to that process averted."[105] The court fleshed out its reasoning by exploring the ramifications of the opposite ruling, which would allow plaintiffs to "checkmate opposing counsel by introducing a new claim the defense of which contradicts the opposition's initial position," and thus would require the defendant to forfeit one of the defenses or else face judicial estoppel.[106] The court decried this result as contrary to public policy, noting, "a defendant ought to have the opportunity to put up the best possible defense in light of all the claims against it."[107]

In other cases, however, courts have applied judicial estoppel against defendants in the insurance coverage litigation context. For example, in *RSR Corp.*, the plaintiff corporation held both an environmental insurance policy and a CGL policy for indemnity in case it was found liable for industrial pollution.[108] In a previous successful action against other insurance companies for industrial pollution indemnification, the plaintiff had argued that the two policies covered the same liabilities, and the court accepted that argument and approved the subsequent settlement agreement.[109] In the instant action, the plaintiff wanted its insurer to indemnify it against an Environmental Protection Agency assessment

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97. *Id.* at 1044.
98. *Id.*
99. *Id.*
100. *Id.* at 1051.
101. *Id.*
102. 586 F.3d 247 (3d Cir. 2009).
103. *Id.* at 262.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 854-55 (5th Cir. 2010).
109. *Id.* at 855-56.

of cleanup costs for industrial pollution, but the insurer demurred, arguing that the plaintiff had already been indemnified by the prior settlement agreements.[110] The plaintiff then tried to argue that the environmental policy and the CGL policy actually covered different liabilities, so the plaintiff should not be precluded from recovering indemnity from the insurer by the existence of the prior negotiated settlement agreements.[111] However, the district court imposed judicial estoppel to bar the plaintiff from arguing that the policies did not cover the same liabilities.[112] The Fifth Circuit affirmed, in a clear application of the judicial acceptance approach.[113]

Likewise, in *United National Insurance Co. v. Spectrum Worldwide, Inc.*,[114] the plaintiff sued the defendant for trademark infringement.[115] At the beginning of the litigation, the plaintiff petitioned the court for a preliminary injunction to force the defendant to stop using the allegedly infringing label on its products.[116] Based on the defendant's assertion that it had been using substantially the same label since 1999 (over two years prior to the filing of the lawsuit in 2001), and that therefore the defendant "was not in danger of experiencing immediate harm," and despite the plaintiff's assertion that the defendant did not begin using the allegedly infringing label until 2001, the court did not issue the preliminary injunction.[117]

Ultimately, the parties settled, and the defendant looked to its insurer to pay the settlement.[118] The insurer demurred, arguing that the policy had been issued in 2001 and thus did not cover the defendant's 1999 label.[119] The defendant countered "that it was the 2001 label, not the 1999 version, that resulted in the [underlying] action, and that the 2001 label constituted distinct infringing material."[120] The Ninth Circuit held that the defendant was judicially estopped from making that argument because it had "benefitted from arguing in 2001 that [the plaintiff's] alleged infringement claim arose from materials first published in 1999."[121] The court reasoned that if the defendant was permitted to change its position in the duty to defend suit, its "'gaming' of the courts" would allow it to win by asserting the same argument that it successfully opposed when it defeated the motion for a preliminary injunction.[122] The court concluded that as a result, the plaintiff and the defendant's insurer would both suffer unfair prejudice, and

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110. *Id.* at 856.
111. *Id.* at 860.
112. *Id.* at 860-61.
113. *Id.*
114. 555 F.3d 772 (9th Cir. 2009).
115. *Id.* at 774-76.
116. *Id.* at 775.
117. *Id.*
118. *Id.* at 776.
119. *Id.* at 775-76.
120. *Id.* at 779.
121. *Id.*
122. *Id.* at 779-80.

the defendant would enjoy an undeserved windfall.[123]

Spectrum clearly illustrates how arguments that seem effective against the plaintiff in the underlying lawsuit can come back to haunt the defendant in the subsequent determination of his insurer's duty to defend or indemnify. Even if the defendant tries to resolve the coverage issue first, hoping to avoid fighting two battles at once, he may be unable to do so; insurers can choose to begin defending the case immediately, but reserve some coverage defenses for later determination.[124] Thus, the insurance coverage litigation can drag on long past the resolution of the underlying lawsuit.[125]

II. THE DUTY TO DEFEND IN NO-INJURY PRODUCT LIABILITY CASES

As previously discussed in the Introduction, insurance coverage litigation becomes particularly problematic for the insured defendant facing no-injury product liability claims.[126] A no-injury product liability lawsuit is something of a misnomer, because although these cases often involve a defective product, most successful actions are brought under contract claims (such as breach of contract) rather than traditional product liability claims (such as negligence or failure to warn).[127] This Part first defines a no-injury product liability lawsuit and discusses the three main types of no-injury product liability claims in the context of an example case. Second, it engages in an extended analysis of *Medmarc Casualty Insurance Co. v. Avent America, Inc.*,[128] a no-injury product liability lawsuit that incorporated both insurance coverage and judicial estoppel issues.[129] Finally, it examines some alternative interpretations of similar policy language from other recent and factually analogous cases.

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123. *Id.*

124. *See* ABRAHAM, *supra* note 1, at 167-70 (describing the many barriers that stand in an insured defendant's way in his quest to obtain coverage); *see also* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 856 (5th Cir. 2010) (noting that the defendant's insurer chose to litigate some of its coverage issues in a jury trial "while reserving unripe coverage and damages issues for future resolution").

125. *See* Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co., 617 F.3d 1040, 1042-43 (8th Cir. 2010) (noting that the underlying complaint was dismissed in 2005, and finally resolving the coverage issue); *see also RSR Corp.*, 612 F.3d at 855 (noting that the insurance coverage litigation in that case began back in 1993, and finally resolving the coverage issues).

126. *See* discussion *supra* Introduction.

127. *See* Maneker, *supra* note 4, at 20 (noting that "by far the most common and successful challenge to no-injury products liability class actions has been to seek dismissal based on the plaintiffs' failure to plead damages" which are often a required element in traditional product liability claims such as "negligence, strict liability, fraud, breach of warranty, and violation of the consumer protection statute").

128. 612 F.3d 607 (7th Cir. 2010).

129. *Id.*

A. The No-Injury Product Liability Lawsuit: Definitions and an Example

In a no-injury product liability lawsuit, the plaintiff is generally suing to recover based on a defect that has not yet manifested itself in his particular product or an injury that he expects his past use of the product may cause him in the future.[130] These cases are frequently brought as class actions because the individual claims generally have a low value; only by aggregating them can they be made worthwhile for the plaintiffs and their attorneys to pursue in court.[131] The most salient and unconventional characteristic of these cases is that for which they are named: the total lack of any allegation that the product caused any actual injury to any plaintiff.[132] Rather, "the plaintiffs have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it."[133] As such, the plaintiffs allege purely economic harm caused by their inability to use the product for its intended purpose.[134]

The myriad cases huddled under the "no-injury product liability" umbrella can be categorized as follows: "true" product liability cases, "false" product liability cases, and hybrid cases.[135] In a true product liability case, the plaintiff brings tort claims that require him to show that the product is defective, but do not require him to allege any physical injury.[136] Rather, he alleges that his use of the defective product places him at greater risk of future injury or illness.[137] He may also seek damages for the mental anguish he suffered as a result of that increased risk or for the medical monitoring he will now require.[138] These suits are almost always dismissed, either for substantive failures (such as failure to state a claim or required element of a claim) or procedural failures (such as lack of standing for failure to allege an injury).[139] In false product liability cases, on the other hand, the plaintiff brings claims that do not require him to show that the product is defective.[140] Usually these are breach of contract or other contract claims, and plaintiffs can often recover expectation damages.[141]

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130. Maneker, *supra* note 4, at 14.

131. *Id.*

132. *Id.*

133. *Id.* at 15 (quoting Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 455 n.4 (5th Cir. 2001)).

134. *Coghlan*, 240 F.3d at 455 n.4.

135. These categorizations are helpful because they clearly delineate the cases based on type of claim. *But see* Maneker, *supra* note 4, at 14-15 (dividing the cases into three somewhat different categories: "diminished value" cases, "fraud or violation of consumer protection statute" cases, and "combined theories" cases).

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.* at 15 ("The courts, both state and federal, have not been eager to embrace the no-injury products liability class action.").

140. *Id.* at 14.

141. *Id.*

In hybrid cases, the plaintiff brings both product liability and contract claims.[142] The product liability claims are generally dismissed, but the contract claims are sometimes allowed to go forward.[143] For example, in *Coghlan v. Wellcraft Marine Corp.*, the plaintiffs purchased a boat, believing that it was made entirely of fiberglass.[144] When they discovered that it was actually made of fiberglass-coated plywood, they sued the manufacturer on both product liability and contract claims.[145] The district court dismissed all of the plaintiffs' claims for failure to plead damages, but the Fifth Circuit overturned the dismissal of the contract claims,[146] reasoning that the plaintiffs had adequately pled "benefit of the bargain" damages when they requested "the difference in value between what they were promised, an all fiberglass boat, and what they received, a hybrid wood-fiberglass boat." [147]

B. Avent*: A Case Study*

Medmarc Casualty Insurance Co. v. Avent America, Inc.[148] is a good example of both a no-injury product liability lawsuit and an application of judicial estoppel. *Avent* is a hybrid no-injury product liability case; the plaintiffs pled both contract claims ("unjust enrichment") and product liability claims (breach of warranties and of various consumer protection and fair trade practices laws) in their complaint.[149] However, the Seventh Circuit implied that only the contract claims had any validity, pointing out that the plaintiffs "never allege[d] that they or their children ever used the products or were actually exposed to the BPA. Instead, the plaintiffs allege a uniform injury across all plaintiffs that stems from their purchasing an unusable product."[150] In their complaint, the plaintiffs requested relief in the form of reimbursement for the cost of the products purchased, as well as myriad other damages, costs, and fees.[151]

Avent filed a motion to dismiss, arguing that the plaintiffs' failure to plead any concrete injury, medical expenses, mental anguish, potential for future illness or corresponding need for medical monitoring demonstrated that the case was "essentially a 'no-injury product liability' action and should be dismissed."[152]

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142. *See id.* at 14-15 (describing these types of cases as "combined theories").

143. *See* Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 455 (5th Cir. 2001) (dismissing the plaintiff's product liability claims, but allowing the contract claims to go forward).

144. *Id.* at 451.

145. *Id.*

146. *Id.* at 455.

147. *Id.* at 452.

148. 612 F.3d 607 (7th Cir. 2010).

149. *Id.* at 610.

150. *Id.*

151. *Id.*

152. *Id.* at 610-11 (quoting Omnibus Introduction to Defendants' Motions to Dismiss at 9, *In re* Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., 687 F. Supp. 2d 897 (W.D. Mo. 2009) (No. 08-1967)).

The trial court accepted this argument in part and subsequently dismissed the negligence claims, but allowed some of the contract claims to go forward. The court reasoned that in this case, like in *Coghlan*, the plaintiffs had purchased a product and then learned something about it that made it impossible for them to use it as they had intended, in which case they may be entitled to expectation damages.[153] In the concurrent insurance coverage litigation, the trial court resolved the coverage issue on similar grounds, finding that the plaintiffs' claims were for purely economic injury and thus not covered by the terms of Avent's policies with any of its three insurers.[154] Avent appealed the trial court's ruling on the coverage issue to the Seventh Circuit.[155]

While that appeal was pending, Avent continued defending itself against the underlying lawsuit, and argued that the plaintiffs' claims should be dismissed because they were not "for bodily injury," but in fact were "no-injury" product liability claims.[156] The district court accepted Avent's argument and dismissed most of the plaintiffs' claims, finding that the real "injury" in the case was that the plaintiffs were unaware of the presence or health risks of the BPA.[157] Unfortunately for Avent, this favorable ruling would be used against it in the insurance coverage litigation.[158]

In response to Avent's partial victory in the underlying lawsuit, the insurance companies argued that in the coverage litigation, Avent should be judicially estopped from asserting that the plaintiffs' claims were "for bodily injury," and thus covered under the terms of the policies.[159] The insurers argued that Avent had successfully asserted the opposite position before another court, and thus judicial estoppel should bar Avent's coverage argument.[160] The Seventh Circuit, however, found that judicial estoppel did not apply on the grounds that Avent's arguments did not actually contradict each other.[161] Rather, the court found that Avent was arguing that the language "because of bodily injury" (which was used in the insurance contract) is broader and implies a duty to defend in more cases than the language "for bodily injury" (which Avent used in its motion to

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153. *Id.* at 611.

154. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 653 F. Supp. 2d 879, 885 (N.D. Ill. 2009) (granting "Medmarc's Motion for Judgment on the Pleadings . . . Pennsylvania General's Motion for Judgment on the Pleadings . . . [and] State Farm's Motion for Summary Judgment"), *aff'd*, 612 F.3d 607 (7th Cir. 2010).

155. *Avent*, 612 F.3d at 608-09.

156. *Id.* at 610-11.

157. *In re* Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., No. 08-1967, 2009 WL 3762958 at *2 (W.D. Mo. Nov. 9, 2009) (allowing all plaintiffs to assert unjust enrichment claims, and allowing plaintiffs who still owned the products when they learned of the health risks to assert claims for "fraudulent and negligent omissions of material fact (under common law or statute) and breach of implied warranty of merchantability").

158. *Avent*, 612 F.3d at 613.

159. *Id.*

160. *Id.*

161. *Id.*

dismiss).[162] Thus, the court reasoned, "because Avent only argued the claims were not 'for bodily injury' in the underlying suit, it does not preclude their argument here that the underlying complaints state claims for damages 'because of bodily injury.'"[163]

Although the Seventh Circuit did not preclude Avent's argument in support of its appeal of the duty to defend issue, the court did not accept that argument either.[164] In affirming the trial court's finding that the insurers were not obligated to defend Avent against the BPA lawsuit, the Seventh Circuit framed the question as: "whether the allegations in the complaint point to a theory of recovery that falls within the insurance contract: Do the allegations amount to a claim for damages 'because of bodily injury' due to 'an occurrence'?"[165] The court answered this question in the negative, finding that "even if the underlying plaintiffs proved every factual allegation in the underlying complaints, the plaintiffs could not collect for bodily injury because the complaints do not allege any bodily injury occurred."[166]

C. Avent *as Compared to* Baltimore Business*: The Circuit Split*

As the *Avent* court acknowledged, however, other circuits have found that pleadings that do not allege bodily injury can still trigger a duty to defend under policies with similar language.[167] In *Northern Insurance Co. of New York v. Baltimore Business Communications, Inc.*,[168] the defendant's insurance company argued that the underlying lawsuit fell outside the scope of the policy coverage.[169] The Fourth Circuit held that as long as the complaint alleges that the product is potentially harmful, the coverage issue should be resolved in the insured's favor.[170] After examining the plaintiffs' complaint, the court concluded that the standard was satisfied: "in alleging that persons using cell phones without headsets suffer from the radiation emitted by such phones, the Complaint alleges a 'bodily injury.'"[171] The court made this finding in spite of unequivocal language in one of the plaintiffs' briefs stating that their recovery was not predicated on allegations of injury.[172] The court noted that other passages in the brief did allege that use of the defendant's product had exposed the plaintiffs to

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162. *Id.* at 613-14.

163. *Id.* at 614.

164. *Id.* at 613-14.

165. *Id.* at 613.

166. *Id.* at 614.

167. *Id.* at 617-18.

168. 68 F. App'x 414 (4th Cir. 2003).

169. *Id.* at 422.

170. *Id.*

171. *Id.* at 419 (finding that the plaintiffs' complaint fell within the confines of the policy language: "damages because of bodily injury").

172. *Id.* at 420.

health risks,[173] and concluded that overall, the plaintiff's statements in the brief did not "eliminate the potentiality that [the defendants] could be liable" to the plaintiffs for "damages because of bodily injury."[174] In light of that "potentiality," the court found that the insurer did have a duty to provide a defense to the insured defendant.[175]

Avent cited *Baltimore Business* in its argument to the Seventh Circuit on the coverage issue, but the court rejected the Fourth Circuit's reasoning.[176] Treating the standard for pleading as a state law issue, the Seventh Circuit declined to apply the Fourth Circuit's rule, citing concerns that it "would trigger the duty to defend at the mere possibility that a complaint, which on its face falls outside the parameters of the insurance policy, could be amended at some future point in a manner that would bring the complaint within the coverage limits."[177] According to the Seventh Circuit's reading of Illinois law, the court instead concluded that the proper way to address the coverage issue was to "look only to the complaint as it stands now and not as it may (or may not) stand in the future."[178] As the next section will show, this conclusion was both well-reasoned and fair to both parties, and other courts should follow suit.

III. POLICY CONSIDERATIONS WEIGH AGAINST THE APPLICATION OF JUDICIAL ESTOPPEL IN THE DUTY TO DEFEND CONTEXT: WHY *AVENT* WAS CORRECTLY DECIDED

Although judicial estoppel can further important public policy goals in some cases, these goals are often diminished or outweighed by negative outcomes when judicial estoppel is applied in duty to defend cases. First, this Part briefly states some of the negative consequences that follow an application of judicial estoppel in any context. Second, it hypothesizes several different holdings that the Seventh Circuit could have reached in *Avent* and compares and contrasts them with the actual holding. Finally, this Part discusses other actions that Avent and similarly situated defendants could take to improve their lot, and why those actions are generally impracticable.

As discussed previously, judicial estoppel can preserve the consistency of judicial decisions and thus help maintain public respect for the courts;[179] however,

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173. *Id.* at 421; *see also* Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss the Third Amended Farina Complaint at 25, Farina v. Nokia, 578 F. Supp. 2d 740 (E.D. Pa. 2008), *aff'd*, 625 F.3d 97 (3d Cir. 2010), *cert. denied*, 2011 WL 4536521 (U.S. Oct. 3, 2011) (No. 10-1064) (alleging that "the phones [the defendant] sold are defective right now, and . . . [e]very time someone uses that defective product he or she is being exposed to [radio frequency radiation] which can and does cause biological changes in the body").

174. *Balt. Bus.*, 68 F. App'x at 421-22.

175. *Id.*

176. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 617-18 (7th Cir. 2010).

177. *Id.*

178. *Id.* at 618.

179. Anderson & Holober, *supra* note 36, at 591.

a defendant who is barred by judicial estoppel from asserting a vigorous defense is unlikely to appreciate that consistency, and may have less respect for a court system that he feels treated him unfairly. The imposition of judicial estoppel can be highly prejudicial to the estopped party, resulting in the loss of a single claim or even an entire lawsuit.[180] In addition, both because different courts take different approaches to judicial estoppel[181] and because many courts take a highly discretionary approach,[182] it can be difficult for litigants to know if a particular argument will cross the line and provoke the court to impose judicial estoppel against them. Furthermore, even if a litigant feels confident in his ability to predict which court will be most favorable to the arguments he wishes to make, that very prediction will naturally lead him to "shop around" for the most advantageous forum, a practice that the courts have long been anxious to prevent.[183] Finally, in the insurance coverage context, the application of judicial estoppel against insured defendants may have the long-term effect of discouraging the purchase of CGL policies. Corporations are unlikely to want to pay premiums if they believe that they are only purchasing an option to litigate every underlying claim and coverage issue under the threat of judicial estoppel.[184]

Although it avoided the above difficulties, Avent is likely displeased with the Seventh Circuit's holding that its insurers have no duty to defend it; however, things could have gone much worse for Avent. Obviously, if the court had found against Avent on both the judicial estoppel issue and the duty to defend issue, the situation would have been grim. Avent would have had essentially no remaining argument that the plaintiffs' claims were covered under the terms of its insurance policy, so any appeal of the duty to defend issue would have been extremely difficult without first winning a reversal of the judicial estoppel issue. As the decision stands, Avent still has a few options to appeal the adverse coverage decision. It can petition the Seventh Circuit for a rehearing en banc,[185] and there is also some chance (albeit a very slim one) of making a successful application for a writ of certiorari to the Supreme Court.[186]

On the other hand, consider the consequences that would have resulted if the

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180. Schreiber, *supra* note 68, at 330.

181. Anderson & Holober, *supra* note 36, at 622 (noting that courts do not apply judicial estoppel according to any "pat formula" (quoting Czajkowski v. City of Chicago, 810 F. Supp. 1428, 1436 (N.D. Ill. 1993))).

182. *See* Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (noting that judicial estoppel is "an equitable doctrine invoked by a court at its discretion" (quoting Religious Tech. Ctr. v. Scott, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting))).

183. *See* Brown, *supra* note 92, at 651 (listing the myriad evils of forum shopping).

184. *See* ABRAHAM, *supra* note 1, at 170 (noting that insured defendants are likely to have to litigate any claims that they make under their CGL policy).

185. *See* FED. R. APP. P. 40 (describing the procedures that parties must follow when petitioning for rehearing en banc).

186. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting) (noting that "[t]he success rate for certiorari petitions before this Court is approximately 1.1%").

court had imposed judicial estoppel against Avent but found on some other ground that its insurers had a duty to defend. Such an outcome might have been acceptable for Avent, but the future implications might have been troublesome for defendants and their insurers alike. If insured defendants had to worry about staying within the scope of their policy while defending themselves against a lawsuit, they would be left with two equally unattractive options.

First, they could take an extremely cautious approach to plaintiffs, making sure only to make arguments that kept them within the scope of their policy. This would be bad for defendants, because they would not be able to make a vigorous defense, so they would be less likely to choose this option. Also, if the insurer later lost the coverage lawsuit, it might be obligated to defend against the underlying claim while bound by the arguments that the plaintiff had made in the coverage lawsuit. An insurer in that situation would find the defense process especially difficult. The plaintiff might be able to win a large verdict or leverage an equally large settlement, and the insurer could end up paying out more than it would have if it had simply assumed the defense at the outset and reserved its coverage defenses until after the underlying case was concluded.

Alternatively, defendants in this situation could try to force the coverage determination before the underlying litigation goes forward, so that the defendant and the insurance company could be on the same side. Insurance companies, however, often enjoy the right to reserve some coverage issues for later litigation,[187] so even if they are initially required to defend, they can essentially relitigate that decision later and potentially win a reversal.[188] Thus, any attempt to completely resolve the coverage issue prior to addressing the underlying claim would be both difficult procedurally and bad for plaintiffs because it would needlessly prolong their litigation.

Ultimately, based on an examination of the alternative policy outcomes, the Seventh Circuit's decision in *Avent* offers the best result both for that particular case and for future cases. In cases where the defendant's positions can be clarified so that they are not in direct opposition to each other, the policy favoring the defendant's right to present a vigorous defense outweighs the court's concern about inconsistent outcomes. In the rare cases where they are undeniably mutually exclusive, that balance reverses, and the defendant's interest in advocating its position must yield to a greater necessity: the preservation of judicial integrity.

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187. RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 856 (5th Cir. 2010) (noting that "RSR and International tried certain coverage issues . . . before a jury, while reserving unripe coverage and damages issues for future resolution").

188. *Id.* at 863 (affirming the trial court's determination that the defendant insurance company did not owe indemnity to the plaintiff insured, in spite of an earlier determination to the contrary).

IV. IN CASE OF CERTIORARI: WHY THE SUPREME COURT SHOULD CLARIFY THE LAW OF JUDICIAL ESTOPPEL AND THE STANDARD FOR PLEADING IN THE INSURANCE COVERAGE LITIGATION CONTEXT

By granting certiorari in *Avent*, the Court would have the opportunity to resolve two circuit splits in one case. This Part first provides an overview of established Supreme Court precedent on the law of judicial estoppel. Next, it describes the two circuit splits that the Court could address if it granted certiorari in *Avent*. Finally, it explores various options for resolving those splits, and suggests the best possible outcome.

A. The Current State of the Law of Judicial Estoppel

Although the Supreme Court, by its own admission, has rarely addressed the issue of judicial estoppel,[189] it has done so in two recent cases.[190] The first of these, *Cleveland v. Policy Management Systems Corp.*,[191] resolved a circuit split on the question of whether a plaintiff's successful application for Social Security Disability Insurance benefits could be used to judicially estop her from bringing a claim for wrongful termination under the Americans with Disabilities Act.[192] The Court noted that the plaintiff successfully distinguished her allegedly contradictory statements in her brief.[193] As such, it held that the imposition of judicial estoppel to defeat the plaintiff's claim on summary judgment was inappropriate and remanded the case to the trial court.[194]

The second case, *New Hampshire v. Maine*,[195] adopted a form of the judicial acceptance approach to judicial estoppel[196] and has been cited favorably by several circuit courts of appeals.[197] In that case, the party states were contesting the location of a state boundary line.[198] The dispute was long-standing; the defendant's argument for the imposition of judicial estoppel to dismiss the plaintiff's case was predicated on "two prior proceedings—a 1740 boundary determination by King George II and a 1977 consent judgment entered by [the

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189. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (noting "we have not had occasion to discuss the doctrine elaborately").

190. *See* Johnson, *supra* note 63, at 9 n.23.

191. 526 U.S. 795 (1999).

192. *Id.* at 800-01.

193. *Id.* at 807.

194. *Id.*

195. 532 U.S. 742 (2001).

196. *Id.* at 749-51.

197. *See, e.g.*, CRV Enters., Inc. v. United States, 626 F.3d 1241, 1248 (Fed. Cir. 2010) ("Under the doctrine, courts weigh whether (1) the supposedly contradictory positions are 'clearly inconsistent,' (2) the party succeeded in persuading the lower court of its earlier position, and (3) the party would derive an unfair advantage from the inconsistent advantage." (quoting *New Hampshire*, 532 U.S. at 750)).

198. *New Hampshire*, 532 U.S. at 745.

Supreme] Court."[199] Both of those proceedings established that, as the plaintiff argued, the boundary line was located at the midpoint of the Piscataqua River.[200] In the instant case, the plaintiff was arguing that the Maine shoreline was the boundary.[201] The Court noted that it had accepted the plaintiff's prior position as to the boundary line, and accordingly, it imposed judicial estoppel to bar the plaintiff from asserting its new and directly contradictory position.[202]

These two cases establish an important precedent. In both of them, the Court spends a significant portion of its analysis discussing whether or not the allegedly contradictory positions can be reasonably reconciled, either by the plaintiff or by the Court itself.[203] This aspect of the judicial estoppel inquiry—the strict requirement that the two positions be mutually exclusive—figures prominently in the solution suggested in this Note.[204]

B. The Two Circuit Splits

By revisiting the judicial estoppel issue and granting certiorari in *Avent*, the Court could address two important and disputed issues in a single case. In *Avent*, the appellant raised two issues for the Seventh Circuit's consideration: whether Avent should be judicially estopped from making its coverage argument,[205] and whether the underlying complaint was sufficient to trigger coverage under Avent's CGL policies.[206] The lower courts have split on both of these issues,[207] and the Court should take this opportunity to resolve both splits.

First, the Court could clarify the law of judicial estoppel by resolving two sub-issues. The primary issue is determining what qualifies as a "clearly inconsistent" position for the purposes of the first factor in the judicial estoppel

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 755.

203. *Id.* at 751-55; Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802-07 (1999).

204. *See* discussion *infra* Part IV.D.

205. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613-14 (7th Cir. 2010).

206. *Id.* at 614-18.

207. *Compare id.* at 613-14 (holding that the phrases "for bodily injury" and "because of bodily injury" were not in "direct tension" and declining to impose judicial estoppel against the defendants), *with* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 860 (5th Cir. 2010) (imposing judicial estoppel based on an implied contradiction in the plaintiff's arguments); *compare Avent*, 612 F.3d at 616 (holding that the plaintiffs' underlying complaints, relating to the presence of an allegedly toxic chemical in baby bottles, "do not reach the level of asserting claims 'because of bodily injury'" and thus do not trigger a duty to defend under the defendant's CGL policy), *with* N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414, 419 (4th Cir. 2003) (holding that the plaintiffs' underlying complaint, relating to the alleged emission of radiation from cellular telephones, "asserts a claim for 'damages because of bodily injury,' as contemplated within the terms of the [defendant's CGL] [p]olicy").

analysis that the Court laid out in *New Hampshire*.[208] The secondary issue is the addition of a new factor to the judicial estoppel analysis.[209]

The circuit courts have split on exactly what constitutes "clearly inconsistent." In *Avent*, the Seventh Circuit established a firm requirement that the conflicting positions be in "direct tension" when it held that there was enough of a distinction between the phrases "for bodily injury" and "because of bodily injury" to allow the defendant to escape the imposition of judicial estoppel.[210] In *RSR Corp*., however, the Fifth Circuit imposed judicial estoppel based on an inference that the court made about what the plaintiff corporation was alleging: "[the plaintiff] has not alleged that any of its pollution at Harbor Island was intentional. Therefore, by implication, all of the pollution at Harbor Island was alleged to be accidental" and thus covered by both the environmental policy and the CGL policy.[211] Thus, the Fifth Circuit imposed judicial estoppel against the plaintiff for attempting to argue that the policies covered different liabilities, even though the plaintiff was not making a contradictory argument until the court interpreted it as such.[212] Establishing an unequivocal definition of "clearly inconsistent" would make it easier for parties to determine whether the court would be likely to judicially estop them from making their argument.

Second, the Court could decide if a complaint must specifically allege "actual physical harm to the plaintiffs" in order to trigger the duty to defend, as the Seventh Circuit held in *Avent*, or if the duty can be triggered even in the absence of such specific allegations, as the Fourth Circuit held in *Baltimore Business*.[213] That would effectively clarify the standard for pleading required to trigger a duty to defend in a no-injury product liability case. Although insurance coverage law is generally determined at the state level,[214] the Court has recently characterized state "pleading standards" as procedural;[215] therefore, there is unlikely to be an *Erie* barrier to the establishment of a uniform federal pleading standard of this kind. Based on the current trend toward judicial rejection of no-injury product liability cases,[216] as well as on the fact that the Seventh Circuit's approach is

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208. *New Hampshire*, 532 U.S. at 750-51.

209. *See* discussion *infra* Part IV.D.

210. *Avent*, 612 F.3d at 613-14.

211. *RSR Corp.*, 612 F.3d at 860.

212. *Id.* (interpreting the plaintiff's arguments as diametrically opposed to each other).

213. *Compare Avent*, 612 F.3d at 615 (finding no duty to defend because the complaint failed to specifically allege that the plaintiffs suffered any physical injury), *with* N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414 (4th Cir. 2003), *and* Plantronics, Inc. v. Am. Home Assurance Co., 2008 WL 4665983 (N.D. Cal. 2008) (both holding that no specific allegation of physical injury was necessary in order to trigger the duty to defend).

214. *See Avent*, 612 F.3d at 618 (noting that the interpretation of the policy language was a question to which the court applied Illinois law).

215. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 (2010) (citing "pleading standards" as an example of a state procedural rule for the purposes of analysis under the *Erie* doctrine).

216. *See* Maneker, *supra* note 4, at 13 ("Recently, some plaintiffs have attempted to bring

clearer and thus easier for courts to apply, the Court should require a specific allegation of physical harm in the event that it addresses this issue.

C. Two Solutions to the Judicial Estoppel Problem and Why the Court Should Reject Them

There are two solutions to the judicial estoppel problem that may seem obvious, but should be rejected. First, the Supreme Court could simply disallow judicial estoppel in the insurance coverage context altogether. Second, the Court could import the requirement of detrimental reliance from the equitable estoppel analysis into the judicial estoppel analysis. Neither of these solutions are advisable, however, because they would defeat the policy objectives behind judicial estoppel and leave the courts overly vulnerable to the assertion of inconsistent positions.

The Supreme Court should not impose a complete bar against the application of judicial estoppel in the insurance coverage context, for three reasons. First, the waste of judicial resources caused by such a bar would be considerable.[217] For example, imagine a case in which *A* asserts an argument against *B*, and the court accepts *A*'s argument. In subsequent litigation, *A* asserts a new argument (either against *B* or against a new party, *C*) that is in direct tension with its prior position. If the court could not apply judicial estoppel to bar *A*'s new argument, it would likely find against *A*, based both on the reasoning behind the first ruling and on a desire to avoid overruling itself.[218] The result would be a kind of "estoppel effect" in which the court's ruling would essentially be a foregone conclusion. By disallowing judicial estoppel, thus forcing the court and the parties to go through the motions of revisiting the already litigated issue, a great deal of time and money could be wasted.[219]

Second, judicial estoppel effectively ensures consistent judicial outcomes and thus preserves the value of court precedent.[220] Consider what would happen if, in the above hypothetical, the court accepted both *A*'s initial argument and its subsequent directly contradictory argument. The resulting precedents would be impossible both for lawyers and other courts to reconcile and apply.[221] Such contradiction would frustrate litigants and damage public perception of the legal

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class action products liability actions that don't allege typical tort damages. The results have been encouraging—for the defense.") (emphasis omitted).

217. *See* Anderson & Holober, *supra* note 36, at 620 (noting that "judicial estoppel prevents unnecessary litigation which diminishes the efficiency of the judicial system").

218. *Id.* at 619.

219. *Id.* at 620-21 (discussing Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982), and noting that "[t]rial and judgment notwithstanding the verdict would have been avoided had the district court exercised its judicial estoppel power before the trial stage to preclude the litigant's inconsistent position").

220. *Id.* at 619.

221. *See id.* at 622 (noting that "inconsistent positions obstruct the orderly administration of justice by undermining principles of finality of judgments").

system.[222]

Finally, the Court should find that the maintenance of judicial integrity weighs heavily in favor of preserving courts' ability to apply judicial estoppel. Where the Court must balance a party's right to assert an argument against a court's right to preserve consistency and dignity in its rulings and proceedings,[223] it has a vested interest on one side of the scale, as well as a duty to protect itself and lower courts from becoming parties to absurd contradictions.[224] Ultimately, the Supreme Court, as highest judicial authority,[225] should find this balance in favor of the judiciary rather than the litigant.

The Court could also decide to borrow one of the requirements from equitable estoppel and add it to the judicial estoppel framework in insurance coverage cases. Equitable estoppel "bars a party from asserting an inconsistent position when another person has [detrimentally] relied upon the prior position."[226] The key feature of equitable estoppel is reliance by a party; if no party has demonstrated reliance, the doctrine does not apply.[227] The key feature of judicial estoppel (at least in the prior acceptance approach) is also reliance, but it is reliance by a court; if no court has demonstrated reliance by accepting the prior position, the doctrine does not apply.[228]

In light of this similarity, the Court could borrow one of the requirements for equitable estoppel for use in the application of judicial estoppel in insurance coverage cases: detrimental reliance.[229] The Court could find that judicial estoppel only applies against a party (*A*) if equitable estoppel also applies; in other words, both the court and at least one adverse party (*B*) must have materially relied on *A*'s prior position in order for *A* to be estopped from asserting a new position that directly contradicts the prior one.[230] Because *B* would be prejudiced if *A* were allowed to assert the new position, the prejudice caused to *A* by barring the old position is somewhat balanced out. However, this kind of

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222. *See id.* at 619 (noting that "inconsistent judicial results . . . weaken public confidence in the judiciary").

223. *See* New Hampshire v. Maine, 532 U.S. 742, 751 (2001) (considering the "balance of equities" when determining whether to apply judicial estoppel).

224. *See* Grochocinski v. Mayer Brown Rowe & Maw LLP, No. 06-c-5486, 2010 WL 1407256, at *17 (N.D. Ill. Mar. 31, 2010) (noting that "judicial estoppel is reserved for those cases where considerations of equity persuade the court that the integrity of the judicial system must be protected, and in those instances, a court should not shy from its duty to preserve that integrity").

225. Janella Ragwen, Developments, *The Propriety of Independently Referencing International Law*, 40 LOY. L.A. L. REV. 1407, 1436 (2007) (describing the Supreme Court as "the head of the judicial branch").

226. Anderson & Holober, *supra* note 36, at 604.

227. *See id.*

228. *Id.* at 637.

229. *See id.* at 632 ("A doctrine intended to protect *courts*, judicial estoppel does not require elements of the related doctrines of equitable and collateral estoppel, which are intended primarily to protect *litigants*.").

230. *See generally id.* at 635-45 (explaining the application of equitable estoppel).

bright-line rule might not give the court enough power to protect itself.[231] For instance, the court would be unable to apply judicial estoppel if *B* did not detrimentally rely on the earlier position; instead, *A* would still be able to place the court in the position of potentially making two contradictory findings.

D. Towards a Solution: "threading the judicial estoppel needle"[232]

The Court should derive a better solution from Judge Flaum's majority opinion in *Avent*: "Although appellant's argument may appear to be threading the judicial estoppel needle, it is meritorious."[233] Essentially, the Seventh Circuit found judicial estoppel was inappropriate because the two arguments were not in "direct tension."[234] Requiring such a precise showing of total opposition would allow the defendant to have more freedom in his defense, secure in the knowledge that as long as he could "thread the needle" and distinguish his positions from each other, he would not be estopped from asserting either of them. It would also retain the protection of the judicial system that the doctrine of judicial estoppel was originally intended to provide; the court could still impose it where absolutely necessary to protect itself from the indignity of entertaining two directly contradictory arguments from the mouth of a single litigant.

For this reason, the Supreme Court should adopt the narrower "direct tension" standard employed by the Seventh Circuit, rather than the broader "implication" standard employed by the Fifth Circuit. The Seventh Circuit standard is better for litigants because it allows them more latitude to assert their best arguments while still allowing courts to preclude obviously self-serving contradictory positions.[235] Although the direct tension standard still permits a certain amount of judicial discretion in the determination of whether a litigant's arguments are reconcilable with each other, that discretion is appropriate in light of the primary purpose of judicial estoppel: the protection of judicial integrity.[236]

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231. *Id.* at 635 (expressing concern that conflating the doctrines of equitable estoppel and judicial estoppel by imposing the reliance requirement in judicial estoppel doctrine "fails to protect the judiciary from the appearance of control by powerful and frequent litigants").

232. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 614 (7th Cir. 2010).

233. *Id.*

234. *Id.*

235. *See generally* Anderson & Holober, *supra* note 36, at 635 (advocating a "flexible approach" to judicial estoppel).

236. From a procedural standpoint, the judicial estoppel doctrine would operate in substantially the same way that it does now. The court would still have the right to impose judicial estoppel *sua sponte*, because the purpose of the doctrine is to protect the court itself. Anderson & Holober, *supra* note 36, at 632. This is analogous to the court's ability to raise a question of subject-matter jurisdiction *sua sponte*, because the court is responsible for ensuring that it does not overstep its jurisdictional bounds. FED. R. CIV. P. 12(h)(3). Much like the summary judgment standard, the court should be required to draw all inferences in favor of the party against whom judicial estoppel is being considered. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

In order for this solution to be effective, however, courts must consider the alignment of the parties, which is the whole source of the difficulty in insurance coverage litigation. The defendant fighting a war on two fronts has a vested interest in being able to assert different (and sometimes contradictory) arguments against each of his adversaries. However, such a defendant does not have that same interest in asserting contradictory arguments against the same or similarly aligned adversaries. Consider *RSR Corp.*, in which the plaintiff corporation made a similarly fine distinction, arguing that its two different insurance policies covered different types of industrial pollution.[237] However, in a previous (and successful) action, the corporation had argued that the two policies provided overlapping coverage.[238] The Fifth Circuit upheld the district court's imposition of judicial estoppel against the plaintiff corporation, reasoning:

> RSR clearly alleged in state court that its [Comprehensive General Liability] policies covered all accidental pollution, whether or not it was sudden. RSR has not alleged that any of its pollution at Harbor Island was intentional. Therefore, by implication, all of the pollution at Harbor Island was alleged to be accidental. Because RSR's original interpretation of the CGL and Environmental policies allowed accidental pollution to be covered under both policies, and because the only pollution alleged to have occurred at Harbor Island was accidental, we hold that the district court did not abuse its discretion by holding that RSR was estopped from arguing that the CGL and Environmental policies covered different liabilities.[239]

The solution to this conflict is to consider the identity and alignment of the parties as a fourth factor in the judicial estoppel inquiry, to be considered either only and specifically in the insurance coverage litigation context or more broadly. By considering alignment, the Court could neatly synthesize *Avent* and *RSR Corp.*; after all, the plaintiff in *RSR Corp.* had already prevailed against some of its insurers with its prior argument, and yet it was asserting its new argument against its other insurers in an effort to collect on its other policies.[240] In *Avent*, on the other hand, the defendant had partially prevailed against the plaintiffs with its first argument, but was asserting its new argument against its insurer, a party differently aligned from the plaintiffs.[241] The potential for prejudice is greater in the latter case, because the plaintiff in *RSR Corp.* had already collected on some of its policies and was suing its insurers for more,[242] while the defendant in *Avent* had not received any benefit from its policies and was simultaneously fighting the

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237. RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 860 (5th Cir. 2010).

238. *Id.*

239. *Id.* at 860-61.

240. *Id.* at 862 (expressing concern about the plaintiff possibly obtaining a windfall "double recovery" if it prevailed in this case).

241. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613-14 (7th Cir. 2010).

242. *RSR Corp.*, 612 F.3d at 856.

plaintiffs and its own insurer.[243] This new requirement would require courts to fully consider the interests of insured defendants, make their "two-front battle" a little easier to fight, and preserve the value of the insurance coverage that they purchased for just this type of eventuality. Therefore, the Court should hold that a court considering the application of judicial estoppel must consider not just the content of the conflicting positions, but also the parties by whom and against whom they are offered.

These two minor yet important changes to the law of judicial estoppel, required showings of direct contradiction and similarly aligned parties, could go a long way toward mitigating the prejudice to the party against whom estoppel is imposed. Requiring courts to consider the alignment of the parties would give special consideration to defendants caught between a rock (the plaintiff) and a hard place (their own liability insurer). Similarly, allowing parties to "thread the judicial estoppel needle" when necessary would preserve as much of the parties' freedom to vigorously litigate as possible while still permitting the court to disallow egregious manipulation.

CONCLUSION

Insurance coverage litigation is a particularly thorny area of the law in which to apply judicial estoppel because of the extreme potential for prejudice to a defendant who is simultaneously litigating against the plaintiff and his own insurance provider. However, certain changes to the law could mitigate that prejudice. If the United States Supreme Court granted certiorari in *Avent*, it would have the opportunity to make those changes in two ways. First, it could resolve two existing splits among the circuit courts of appeal: what language must be present in the plaintiff's complaint in order to trigger a duty to defend under a CGL policy, and what constitutes a "clearly inconsistent" position for the purposes of judicial estoppel.[244] Second, it could impose a new requirement for the application of judicial estoppel in the duty to defend context.[245]

The Court could choose to bar judicial estoppel entirely in the insurance coverage context, or it could impose an additional requirement of detrimental reliance. The total bar is inadvisable because it leaves courts unprotected and generally defeats the important policy objectives behind judicial estoppel. Similarly, although borrowing the reliance requirement from equitable estoppel could result in less prejudice to the defendant, it may not be enough to protect the courts from inconsistent arguments.[246]

Instead, the Court should establish a uniform federal standard of pleading required to trigger the duty to defend in a product liability case. In *Avent*, the Seventh Circuit held that a specific allegation of harm was required to trigger the

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243. *Avent*, 612 F.3d at 612.

244. *See* discussion *supra* Part IV.B.

245. *See* discussion *supra* Part IV.B.

246. *See* discussion *supra* Part IV.C.

duty,[247] but in *Baltimore Business*, the Fourth Circuit held that the duty could be triggered even without such a specific allegation.[248] The Court should apply the Seventh Circuit's approach because it is clearer, easier to apply, and generally more in line with the judiciary's current strict approach to no-injury product liability cases.[249] Requiring that the two "inconsistent" positions be absolutely irreconcilable, rather than simply somewhat contradictory, is an effective choice because it permits courts to protect themselves regardless of the reliance issue, but only when it is absolutely necessary to prevent an inconsistent judicial result.[250]

The Court should also add a fourth factor to the judicial estoppel inquiry: the alignment of the parties. This factor would target the problem of prejudice to the defendant who is involved in litigation on two fronts, where it is most serious.[251] If a litigant successfully asserted its first argument against one party and later attempts to assert a second and irreconcilable argument against the same or a similarly aligned party (like the plaintiff did in *RSR Corp.*), that should weigh in favor of imposing estoppel because it is more likely that the second argument was driven by self-interest than by necessity.[252] If, on the other hand, a litigant had asserted its first argument against one party and attempts to assert a second and irreconcilable argument against a differently aligned party (like the defendant did in *Avent*), that should weigh against imposing estoppel, because it is more likely that the second argument was driven by necessity than by self-interest.[253]

By establishing a uniform standard of pleading required to trigger a duty to defend and requiring a showing of irreconcilability and a consideration of party alignment before imposing judicial estoppel, the Court could mitigate much of the prejudice to the defendant inherent in an application of judicial estoppel in the duty to defend context. In *Avent*, the defendant had the benefit of these refinements to the law of judicial estoppel, and as a result, it was not estopped from vigorously contesting its insurer's attempt to deny coverage. Whenever possible, defendants should have that benefit, so that their two-front battle is easier to fight, and they do not end up wishing that they had never purchased their CGL policy in the first place.

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247. *Avent*, 612 F.3d at 615.

248. N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414, 422 (4th Cir. 2003).

249. *See* discussion *supra* Part IV.D.

250. *See* discussion *supra* Part IV.D.

251. *See* discussion *supra* Part IV.D.

252. *See* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 862 (5th Cir. 2010) (suggesting that the plaintiff was trying to get a windfall "double recovery" by asserting its second argument).

253. *See* Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 614 (7th Cir. 2010) (noting that if his insurance company refuses to defend him, the plaintiff "may have to attack the opponent's case in ways that seem to remove it from the scope of the insurance contract").