



for summary judgment on the counterclaims of Bulger and MONY. (MONY's Motion for Summary Judgment, Dkt. Entry 173; Bulger's Motion for Summary Judgment, Dkt. Entry 177; Bennett's Motion for Summary Judgment on Counterclaims, Dkt. Entry 182.)<sup>1</sup>

Because Montrose and the Plan asserted in previous litigation that the benefit plans at issue in this case were not subject to ERISA and that the claims now being pursued were untimely, they will be barred from pursuing their current ERISA claims under the doctrine of judicial estoppel.

## **I. BACKGROUND**

In the late 1970's, Montrose told its accountant, Garvey, that it desired to establish a plan that provided retirement benefits to "contract medical personnel" and Montrose owners. (Pl's Stmt. of Material Facts, Dkt. Entry 198 at 1, ¶¶ 1,2.) Garvey contacted Bulger about creating a retirement plan for Montrose. (Id. ¶ 3.) As ultimately designed and proposed by Bulger and MONY in 1977, the Plan encompassed Montrose owners, contract medical personnel, administrators and other employees. (Id.) Montrose paid for life insurance policies and was identified therein as owner and beneficiary. (Id. at 8, ¶ 19.) All death benefits paid on life insurance policies on Plan participants, who died during the operation of the Plan, were used by MONY, Bulger and other MONY representatives in the ongoing operation of the Plan. (Id.)<sup>2</sup>

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<sup>1</sup> Defendant Garvey has not filed a motion for summary judgment.

<sup>2</sup> The Plan, also known as the PSP Plan, as proposed, involved ownership by Montrose of insurance policies issued on the lives of the PSP Plan participants. (D's Stmt. of Facts at 4, ¶ 5.) The PSP Plan was designed "for a select group of management, supervisory or highly compensated employees . . ." (D's Stmt. of Facts at 2, ¶ 4.) "A second plan, called the Supplemental Savings Plan ("SSP") was proposed for non-managerial employees . . ." (Id. at 3, ¶ 6.) Although the parties dispute whether the SSP

Throughout the duration of the Plan, Montrose had difficulty funding the premiums on the policies that comprised the Plan assets. Acting on Bulger's advice, MONY insurance policies were periodically replaced with policies from another carrier. Montrose, however, continued to have difficulties paying the insurance premiums. Around 1992, Montrose stopped paying premiums in connection with the Plan. (Id. at 14, ¶ 32.) Montrose paid over \$2 million in its proprietary capacity while it was making payments in connection with the Plan. (Id. at 14, 16, ¶¶ 32 & 35.)

"After Montrose discontinued benefit payments, a lawsuit, Hickok v. Montrose Med. Group Participating Sav. Plan, No. 3:CV-92-0284 (M.D. Pa.), was filed by fourteen plaintiffs who claimed benefits under the . . . Plans and alleged violations of ERISA." (D's Stmt. of Material Facts, Dkt. Entry 175 at 6-7, ¶ 33; Pl's Stmt. of Material Facts at 15, ¶ 33.) The history of the Hickok litigation was summarized as follows at pages 4 through 6 of this Court's January 11, 1996 Memorandum and Order:

The Hickok Action was filed by fourteen employees enrolled in the Plan. The plaintiffs asserted claims under (1) § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), to recover benefits, to enforce their rights and to clarify their entitlement to future benefits under the terms of the Plan; (2) § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to enjoin ERISA violations and to obtain restitution on behalf of the Plan; and (3) § 502(c)(3) of ERISA, 29 U.S.C. § 1132(c)(3), to impose statutory penalties. (Dkt. Entry 9, Exhibit "B," Complaint in Hickok Action.) Named as defendants were the Hospital [Montrose] and the Plan itself, which had stopped making payments to the Plaintiffs, MONY, the company from which the Plan insurance had been purchased, Bulger, the agent who sold the insurance to the Plan, and Garvey, the Plan's financial advisor. The Hickok Plaintiffs claimed that MONY and Bulger, as fiduciaries of the Plan, were liable for its mismanagement. As relief the Hickok Plaintiffs sought an accounting from

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Plan was a separate plan or a classification within the PSP Plan, the plans primarily differ in terms of employees covered and compensation offered. (Pl's Stmt. of Facts at 4-5, ¶¶ 5-7; D's Stmt of Facts at 3, ¶ 6.)

the Defendants for their actions as fiduciaries, payment of all amounts due to them under the Plan, an order directing all Hickok Defendants to make payment to the Plan of all Plan assets determined to have been disposed of other than in accordance with Plan terms and ERISA, an order requiring Defendants to properly fund the Plan, and an order directing the Defendants to make payment to the Plan of all premiums, commissions, administrative fees and other amounts received from the Plan. (Dkt. Entry 9, Exhibit "B.")

During the Hickok Action, Bulger and MONY filed cross-claims against the Plan and the Hospital. (Dkt. Entry 9, Exhibits "D" and "E.") The Hospital and the Plan likewise filed cross-claims against MONY and Bulger. (Dkt. Entry 9, Exhibit "F.")

The Hickok Action was ultimately resolved by the parties' execution of a Settlement Agreement and Release. (Dkt. Entry 9, Exhibit "C.") The Settlement Agreement provided for Bulger and MONY, as well as the Plan and the Montrose Medical Group, to make separate payments to the plaintiffs, with the payments to be allocated among the Hickok Plaintiffs and their counsel. Under the terms of the Settlement Agreement there was no payment made to the Plan itself. In other words, only the fourteen Hickok Plaintiffs benefitted from the settlement of the Hickok Action.<sup>3</sup>

Having settled the claims of fourteen Plan participants or beneficiaries, Montrose and the Plan have essentially switched sides in the dispute pertaining to the design and administration of the benefit plans at issue. While they asserted that the Hickok plaintiffs had no rights under ERISA and that their claims were time-barred, they now embrace ERISA purportedly on behalf of the remaining Plan participants and beneficiaries and insist that the allegedly untimely claims of the Hickok plaintiffs are timely asserted in this case. After seeing that the fourteen Plan participants and beneficiaries recovered a fraction of the full value of their claims in the Hickok case, the Plan and Montrose seek full recovery on essentially the same claims on behalf of the remaining Plan participants and

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<sup>3</sup> The January 11, 1996 Memorandum and Order addressed motions to dismiss based upon the Settlement Agreement and Release executed by the Plan and Montrose. MONY and Bulger contended that the Release barred the present action. Because I found the pertinent language in the release to be ambiguous, the motions to dismiss were denied. (January 11, 1996 Memorandum and Order at 13-18.) The effect of the Release, therefore, has not been adjudicated.

beneficiaries.<sup>4</sup>

During the course of the Hickok litigation, Montrose and the Plan continually denied that ERISA was applicable to the Plan. (D's Exhibits in Supp. of Mot'n for Summary Judgment, Exhibit 13 at 2, ¶ 7 (Answer to Complaint) & Exhibit 15 at 2, ¶ 7 (Answer to Amended Complaint.)) Moreover, in their Pre-Trial Memorandum, Montrose and the Plan represented: "The plans are not subject to ERISA. The PSP plan, which provides payment to management and highly compensated employees, is exempt from ERISA under the provisions of 29 U.S.C. 1051(2), 29 U.S.C. 1081(a)(3), and 29 U.S.C. 1011(a)(1). The SSP plan is exempt under the provisions of 29 U.S.C. 1002." (D's Exhibits in Supp. of Mot'n for Summ. Judgment, Exhibit 16 at 3.)

Montrose and the Plan settled the claims asserted against them in the Hickok litigation for \$100,000. (Pl's Stmt. of Material Facts at 16, ¶ 35.) Montrose does not dispute that their \$100,000 payment represented roughly 10% of the damages claimed in the

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<sup>4</sup> Specifically, Montrose and the Plan in this case allege that Defendants:

- # failed to act solely in the interests of Plan participants and for the exclusive purpose of providing benefits;
- # breached their alleged duty of prudence by improperly designing the Plan and following imprudent funding policies;
- # made misrepresentations to Montrose in the late 1970s about the nature of the Plan to induce Montrose to establish the Plan;
- # failed to diversify the Plan's investments;
- # failed to design the Plan in accordance with ERISA's requirements; and
- # engaged in other prohibited transactions.

As relief, the Plan and Montrose request restitution and recovery of all amounts lost as a result of the Defendants' alleged breaches of fiduciary duties, the amount required to properly fund the Plan in accordance with the Plan provisions and ERISA, attorney's fees and costs of suit, and any other legal or equitable relief which the Court would deem appropriate.

Hickok litigation. After settling the Hickok litigation, Montrose and the Plan filed the instant suit. Presently pending before this Court and ripe for disposition are Bulger's and MONY's motions for summary judgment and Bennett's motion for summary judgment on the counterclaims of Bulger and MONY.<sup>5</sup>

### III. DISCUSSION

#### A. Summary Judgment Standard

Summary judgment should be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is “material” if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Facts that could alter the outcome are material facts.” Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 197 (3d Cir.), cert. denied, 115 S. Ct. 590 (1994). “Summary judgment will not lie if the dispute about a

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<sup>5</sup> Bulger and MONY raise numerous issues, in addition to their judicial estoppel claims, in their motions for summary judgment. Specifically, Bulger and MONY argue: plaintiffs' claims are barred by the “actual knowledge” statute of limitations; plaintiffs' claims are barred by ERISA's absolute six year statute of limitations; the “continuing violation” theory does not apply to plaintiffs' claims; the statute of limitations is not tolled based on fraud or concealment; the claims asserted on behalf of the independent contractors – the doctors, Donna Kerr, Eudora Bennett and beneficiaries – should be dismissed; MONY and Bulger were not fiduciaries because (a) they had no discretion over the Plan or its assets, and (b) they did not render investment advice for a fee; MONY is not vicariously liable; plaintiffs are not entitled to equitable relief against MONY; and MONY is entitled to summary judgment on Counts II and VI of the complaint. (MONY's Brf. In Supp. of its Mot'n for Summ. Judgment, Dkt. Entry 176 at i-ii.) An examination of the record in relation to these other grounds asserted as bases for summary judgment reveals material issues of fact that would militate against granting summary judgment. In light of the application of the doctrine of judicial estoppel to the ERISA claims that Montrose and the Plan assert against Bulger and MONY, these other issues, however, need not be addressed.

material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

Initially, the moving party must show the absence of a genuine issue concerning any material fact. Celotex Corp. v. Catrett, 477 U.S. 322, 329 (1986). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988); Continental Ins. Co. v. Bodie, 682 F.2d 436 (3d Cir. 1982). Once the moving party has satisfied its burden, the nonmoving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. at 256-57. The affirmative evidence must consist of verified or documented materials. Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for summary judgment once the moving party has presented evidentiary materials. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Rule 56 requires the entry of summary judgment, after adequate time for discovery, where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

#### **B. Judicial Estoppel**

Our Court of Appeals has stated that "[t]he doctrine of judicial estoppel serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts." McNemar v. Disney Stores, Inc., 91 F.3d 610, 616 (3d Cir.1996), cert. denied, 519 U.S. 1115 (1997). The Third Circuit first adopted the doctrine of judicial estoppel in Scarno v. Cent. R.R. Co. of New Jersey, 203 F.2d 510, 512-13 (3d Cir. 1953), where the court

noted “a general rule that a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits.” The Scarno court continued its analysis, adopting the following rule:

A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing ‘fast and loose with the courts’ which has been emphasized as an evil the courts should not tolerate.” Id. at 513. (Emphasis added.)

Since Scarno, our Court of Appeals has clarified the law of this Circuit on the theory of judicial estoppel, which is sometimes also referred to as the “doctrine against the assertion of inconsistent positions.” Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 357 (3d Cir. 1996). In McNemar, supra, the court restated the two part threshold inquiry stated in Ryan Operations, 81 F.3d at 361 as follows: “(1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith -- i.e., ‘with intent to play fast and loose’ with the court?” McNemar, 91 F.3d at 616. The Ryan Operations court further observed that “judicial estoppel is an extraordinary remed[y] to be invoked when a party’s inconsistent behavior will otherwise result in a miscarriage of justice . . . . It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts.” Ryan Operations, 81 F.3d at 364 (internal quotations and citations omitted).

MONY and Bulger assert that the doctrine of judicial estoppel prohibits Montrose

and the Plan from pursuing claims under ERISA in the present litigation. Specifically, defendants argue that judicial estoppel precludes Montrose and the Plan from asserting that the Plan is covered by ERISA and that their claims are timely when they had asserted that ERISA was not applicable and identical claims were untimely when defending the Hickok litigation.

Montrose and the Plan respond that the doctrine of judicial estoppel is not applicable to their position in the instant litigation for two reasons. First, plaintiffs assert their current position is not inconsistent with their position in Hickok because “while Plaintiffs contended that ERISA was not applicable to the Plan in their Answer to the complaint and their Pre-Trial Memorandum in Hickok, Plaintiffs simultaneously contended in the alternative that if the Plan were subject to ERISA,” MONY, Bulger and Garvey “would be solely liable or liable over inasmuch as they were fiduciaries as defined in [ERISA].” (Pl’s Memorandum in Opp. to Mot’n for Summ. Judgment, Dkt. Entry 199 at 36)(internal quotations omitted). Montrose and the Plan also contend that even if they did take inconsistent positions on the applicability of ERISA, they did not assert those inconsistent positions in bad faith. (Id. at 37.)

An analysis of the Hickok pleadings compels the conclusion that plaintiffs’ position in Hickok -- that the Plan is not subject to ERISA -- is wholly inconsistent with the positions they take in the instant action -- that the Plan is subject to the provisions of ERISA. Montrose and the Plan are now propounding virtually the same claims on behalf of Plan participants and beneficiaries that were asserted against them in the Hickok litigation. In that litigation, Montrose and the Plan denied that ERISA’s fiduciary obligations applied to them in order to defend claims asserted against them by those

whom Montrose and the Plan now concede were owed fiduciary duties. Now, Montrose and the Plan attempt to reverse course and embrace ERISA's fiduciary concepts to assert claims on behalf of other Plan participants and beneficiaries. Montrose and the Plan are now on record as asserting that ERISA applies to some, but not all, Plan participants and beneficiaries. Moreover, in the Hickok case, Montrose and the Plan asserted that the ERISA claims were untimely. (Pl's Exhibits in Opp. to Mot'n for Summ. Judgment, Exhibit 63 at 4.) They now contend, however, that the same claims are timely. Accordingly, the positions taken by Montrose and the Plan in this litigation are indeed inconsistent with the positions they asserted in Hickok.<sup>6</sup>

Because Plaintiffs' positions in the instant case are inconsistent with the positions they advanced in Hickok, the applicability of judicial estoppel hinges on whether Montrose and the Plan asserted those positions in bad faith. Montrose and the Plan primarily rely on Delmarva Power & Light Co. v. Public Service Enterprise Group, Inc., No. 96-1705, 1996 WL 526915 (E.D. Pa. Sept. 18, 1996), to support their

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<sup>6</sup> Plaintiffs contend that because they argued in the alternative that if ERISA was applicable in Hickok, MONY, Bulger and Garvey would be solely liable, their position in that litigation is consistent with their position in the instant case. Montrose and the Plan chose to defend the Hickok litigation by contesting the applicability of ERISA to the Plan. Because they raised an alternative defense does not constitute an abandonment of their primary position that ERISA should not apply in the context of the Hickok litigation. Montrose and the Plan were asserting that ERISA does not apply; but if the Court finds differently, then only MONY, Bulger and Garvey should be held liable. Obviously, had the Court ruled in the Hickok case that ERISA was inapplicable there would have been no need to reach the "fall back" position. Significantly, actual adjudication of the issue in the prior case is not an element of judicial estoppel. Ryan Operations, 81 F.3d at 360-61. Accordingly, Montrose and the Plan cannot deny the inconsistency of their assertions in the Hickok litigation simply because they advanced a "fall back" position. Moreover, Plaintiffs have not attempted to rationalize their prior assertion of the statute of limitations with their position on this issue in this case.

assertion that they have not acted in bad faith. In Delmarva, the district court found that the Philadelphia Electric Company (“PECO”) did not change its position because its economic interests had changed, but rather because PECO had undertaken an “honest, good faith reassessment of the position it held in the [prior] litigation.”

Delmarva, 1996 WL 526915 at \*4.

In this case, Montrose and the Plan assert:

As a defendant in Hickok, Plaintiffs asserted all defenses appropriate to protect their proprietary interests. By contrast, as a Plaintiff herein, MGH [Montrose] is not acting to protect its own interests, but rather is acting as a corporate fiduciary, obliged to vindicate the interests of all remaining Plan participants and beneficiaries whose interests were not addressed in the Hickok litigation. [¶ 34]. Far from attempting to manipulate, mislead, or play ‘fast and loose’ with the Court to gain unfair litigation advantage, Plaintiffs’ positions herein, that the Plan is subject to ERISA and that the ERISA statute of limitations does not bar Plaintiffs’ claims, are based upon an honest and good faith reevaluation of their position in Hickok, based upon the shift in MGH’s [Montrose’s] role into that of corporate fiduciary, bound to protect the interests of Plan participants and beneficiaries in the instant case.

(Pl’s Memorandum in Opp. to Mot’n for Summ. Judgment at 40, emphasis added.)

This articulated rationale for switching positions clearly shows that the decision was not based upon a re-evaluation of the appropriateness of their positions regarding ERISA and the statute of limitations in the Hickok litigation, or a change in the law, but on their status as a plaintiff -- or their shift into the role of corporate fiduciary -- in the current litigation. Stated differently, the above quoted passage indicates that plaintiffs’ “honest good faith reevaluation of their position” was predicated upon the change in their status in the litigation -- from defendant to plaintiff -- rather than an examination of the merits of their previous position. Economic interest is their sole motivation for advancing irreconcilable litigation positions.

Montrose and the Plan insist that whether they asserted an inconsistent position in bad faith is a question of fact that cannot be resolved on a summary judgment motion. (Pl's Br. In Opp. to Mot'n for Summ Judgment at 41, n.13.) Our Court of Appeals, however, has stated:

One need not read Ryan Operations' requirements for independent evidence of bad faith to mean . . . that a district court must conduct an evidentiary hearing to determine whether a litigant has acted in bad faith whenever the court is considering applying judicial estoppel. There is no question that Ryan Operations stands for the proposition that a district court must 'discern' intent, not 'infer' it. That does not mean that Ryan Operations requires a district court to discern intent by way of an evidentiary hearing."

Klein v. Stahl GMBH & Co., 185 F.3d 98, 108, n. 13 (3d Cir. 1999)(internal citations omitted). In light of the record presented in this case, an evidentiary hearing is not necessary to discern the intent of Montrose and the Plan.

"There is no bright line test for bad faith in the context of judicial estoppel."

Koppers Co. v. Certain Underwriters at Lloyds, London, 993 F. Supp. 358, 362-63 (W.D. Pa. 1998). In the well reasoned Koppers decision, the district court extrapolated three factors from Ryan Operations, 81 F.3d at 363-365, to be considered in determining whether a party acted with bad faith in the context of judicial estoppel. First, the district court should examine whether the initial assertion of the position could be characterized as "merely careless or inadvertent" – that is, did the party act with intent. Koppers, 993 F. Supp. at 363 (citing Ryan Operations, 81 F.3d at 364.) Second, did the party deliberately assert the inconsistent position in order to gain advantage? Koppers, 993 F. Supp. at 363 (citing Ryan Operations, 81 F.3d at 363.) Finally, did the inconsistent position have an effect on the outcome of the previous litigation? Koppers,

993 F. Supp. at 363 (citing Ryan Operations, 81 F.3d at 363).<sup>7</sup> An analysis of these factors militates in favor of finding “bad faith” in this case.

First, it is clear that Montrose and the Plan did not inadvertently assert the statute of limitations defense and that ERISA was inapplicable in the Hickok case. On the contrary, Montrose and the Plan made the deliberate strategic decision that, for the purposes of the Hickok litigation, they should defend against plaintiffs claims by asserting that ERISA was not applicable to the Plan and that the claims were untimely. Montrose and the Plan submitted the affidavit of C.H. Welles, IV, in an attempt to explain that their assertion that ERISA was not applicable to the Plan in Hickok was based on similar positions advanced by Bulger and MONY. (P’s Exhibits in Opp. to Mot’n for Summary Judgment, Dkt. Entry 200, Exhibit 4, Welles Affidavit, at ¶¶ 4-5.)

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<sup>7</sup> Although the district court in Koppers, 993 F. Supp. at 363, gave significant weight to whether the inconsistent position had an effect on the outcome, in Ryan Operations the Third Circuit specifically articulated that a party does not have to benefit from their prior position in order for judicial estoppel to apply. Ryan Operations, 81 F.3d at 360-61. The Ryan Operations court was not looking at whether the inconsistent position benefitted the asserting party, but at whether the assertion of the inconsistency was material. Id. at 363. Stated differently, the analysis of whether the prior inconsistent position had an effect on the prior litigation, in the context of judicial estoppel, does not examine whether that position was outcome determinative, but whether the prior inconsistent position affected the relevant issues in that case. Although Ryan failed to list the claims at issue in that case as contingent assets in the bankruptcy proceeding, he also failed to list the “corresponding claims of homeowners against Ryan resulting from allegedly defective wood trim as liabilities.” Id. Ryan’s failure to account for these assets and liabilities may not have affected the “balance of assets and liabilities before the court and creditors when the reorganization plan was approved . . . .” Id. Accordingly, because it did not change the relative position of the balance sheet, Ryan’s inconsistent position had no effect on the prior litigation. By contrast, the inconsistent positions asserted by Montrose and the Plan are relevant because their position in Hickok – that ERISA was not applicable to the Plan and the claims were time barred – were material to their defense to that action, while their claims in the instant action are predicated on the applicability of ERISA and the timeliness of their claims.

Welles states that the position advanced in the Hickok case “was guided by the same assertions then being made by” MONY and Bulger. (Id.) While Welles does assert that the positions advanced by Montrose and the Plan were consistent with similar assertions that Bulger and MONY submitted, his affidavit does not state that such a position was advanced without the benefit of legal research. Moreover, the fact that Montrose and the Plan asserted a position in the Hickok case in order to be consistent with their then co-defendants reinforces the conclusion that they have played “fast and loose” with the Courts. The assertion of Montrose and the Plan in the Hickok litigation is analogous to plaintiff’s decision to assert total and permanent disability in Motley v. New Jersey State Police, 196 F.3d 160, 167 (3d Cir. 1999), petition for cert. filed, (U.S. Jan 31, 2000)(No. 99-1395), in that the position asserted was not “merely a blanket assertion . . . checked on a block,” but a position that had to be considered, and then asserted with the proper supporting authority. “The smooth, efficient working of the judicial process depends heavily upon the assumption that such representations will be made after careful, deliberate evaluation by skilled attorneys who must ultimately accept responsibility for the consequences of their decisions.” EF Operations Corp. v. American Buildings, 993 F.2d 1046, 1050 (3d Cir.), cert. denied, 510 U.S. 686 (1993). Accordingly, as Montrose and the Plan made a deliberate, strategic decision to assert that the Plan was not subject to ERISA and that the claims were untimely, they cannot distance themselves from their previously asserted position simply because the other defendants in the Hickok litigation asserted the same position.

Montrose and the Plan advanced their position in Hickok in order to gain an advantage – if the court agreed with their position, then Montrose and the Plan would

not be held liable on the Hickok plaintiffs' claims. They did not embrace ERISA, but sought to avoid it. Now, they trumpet its applicability for their own benefit. Montrose and the Plan did not accept ERISA responsibility to the fourteen plaintiffs in Hickok. Instead, they participated in a settlement that indisputably paid the fourteen plaintiffs less than full value on claims that Montrose is now advancing on behalf of other Plan participants and beneficiaries. It is deeply disturbing that Montrose and the Plan would assert a position to disadvantage some Plan participants and beneficiaries, while then asserting the converse position to advantage other Plan participants and beneficiaries. An examination of the factors set forth in Ryan Operations, as explained in Koppers, mandates the conclusion that Montrose and the Plan did assert inconsistent positions in this litigation in bad faith.

The application of judicial estoppel against Montrose and the Plan is appropriate in the instant action. "Unlike the concept of equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on the relationship between the litigant and the judicial system, and seeks to preserve the integrity of the system." DelGrosso v. Spang and Company, 903 F.2d 234, 241 (3d Cir.), cert. denied, 498 U.S. 967 (1990) (citing Oneida Motor Freight v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir.), cert. denied, 488 U.S. 967 (1988)). "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121 (3d Cir. 1992), cert. denied, Doughboy Recreational Inc. v. Fleck, 507 U.S. 1005 (1993). "It goes without saying

that one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so . . . .” EF Operating Corp, 993 F.2d 1046, 1050. This is exactly what the Plan and Montrose have done in this case. Concern for the integrity of the judicial process mandates that such litigation conduct not receive judicial approbation.

The appropriate relief in this case is to bar Montrose and the Plan from relying upon ERISA.<sup>8</sup> Montrose and the Plan previously took the position that fourteen Plan participants and beneficiaries had no rights under ERISA. It is contrary to the concepts of fairness and equity to allow the Plan and Montrose to assert that other indistinguishable Plan participants and beneficiaries do have ERISA rights. Notably, MONY asserts that a handful of the remaining Plan participants and beneficiaries – highly compensated non-employee physicians and Montrose officers and board of directors members, such as Eudora Bennett and Donna Kerr – account for 75% of the damages claimed in this case. (MONY Reply Brf. At 14.) Thus, if Montrose and the Plan were allowed to proceed with their ERISA claims, a handful of Plan participants and beneficiaries stand to gain substantially on the basis of a position that is contrary to how Montrose and the Plan treated other participants and beneficiaries. The Hickok plaintiffs, abandoned by Montrose and the Plan, had to proceed on their own. Under these circumstances, Montrose and the Plan should not be allowed to wear the mantle of ERISA on behalf of other Plan participants and beneficiaries. While this result may

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<sup>8</sup> In Klein v. Stahl GMBH & Co., 185 F.3d 98, 108 (3d Cir. 1999), the court cautioned that sanctions less drastic than dismissal be evaluated when applying the doctrine of judicial estoppel. A “sanction ‘tailored to address the harm identified’” is to be chosen. Id. at 111.

be harsh insofar as the remaining Plan participants and beneficiaries are concerned, it is a necessary consequence of Montrose and the Plan asserting in a court of law that no Plan participants and beneficiaries had ERISA rights. The other Plan participants and beneficiaries could have sought to join in the Hickok case or brought their own action. But when Montrose and the Plan aligned themselves with MONY and Bulger in the Hickok case, they effectively relinquished any right they had to champion the causes of Plan participants and beneficiaries. Having lost the ability to rely on ERISA, Montrose and the Plan should have to forfeit the claims brought in this action against MONY and Bulger. Accordingly, judgment will be entered in favor of MONY and Bulger.

**C. Bennett’s Motion for Summary Judgment**

In Bulger’s and MONY’s memorandum of law in opposition to Bennett’s motion for summary judgment, defendants note that their counterclaim against Bennett is an assertion that if Bulger and MONY are held to be fiduciaries of the Plan under ERISA, “they have standing under ERISA to sue Montrose on behalf of the Plan and its participants for Montrose’s violations of ERISA.” (Dkt. Entry 207 at 3, fn. 1.) In light of the decision to grant Bulger’s and MONY’s motions for summary judgment, which precludes a holding that Bulger and MONY were fiduciaries under the Plan, Bennett’s motion for summary judgment will be granted.

**III. CONCLUSION**

As the positions asserted by Montrose and the Plan in the instant litigation are inconsistent with the position they asserted in Hickok – that ERISA does not apply to the Plan and that the claims pursued here were untimely – the doctrine of judicial

estoppel plainly applies. Moreover, the record amply demonstrates that Montrose and the Plan have attempted to “play fast and loose with the courts.” Because Montrose and the Plan are willing to reject or embrace ERISA solely on the basis of economic self-interest, without regard to Plan participants and beneficiaries, Bulger’s and MONY’s motions for summary judgement must be granted. As Bulger and MONY cannot be held as fiduciaries of the Plan under ERISA in light of the decision to grant their motions for summary judgment, Bennett’s motion for summary judgment on the counterclaims of Bulger and MONY will be granted. An appropriate order follows.

March 20, 2000

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Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania

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