# The Applicability of Equitable Estoppel

by Joel N. Kreizman

For most people the words "estopped" and "estoppel" do not become part of their vocabulary unless they spend some time in law school. Indeed, to Microsoft Outlook's spell checker they remain non-words, repeatedly underlined in red when inserted into an outgoing e-mail.

If the word "estoppel" is not recognized by Outlook, most assuredly the term "estoppel in *pais*" is deemed invalid as well. The latter, a synonym for equitable estoppel, is rarely used and generally not referenced in current opinions.

Equitable estoppel is one of several court-created doctrines designed to lead to a fair and just result at trial, rather than one based on the presentation of rigid and technical interpretation of the laws. As the Supreme Court said, equitable estoppel "is involved in the interest of justice, morality and common fairness."[1]

As such, in concept and sometimes in form, it is similar in nature to the doctrines of *laches*, and unclean hands. It is also a close cousin to the maxim, 'he who seeks equity must do equity,' as well as to the contractual covenant of good faith and fair dealing and the business torts concept of the "rules of the game."[2]

To borrow from a term often found in the covenant of good faith and fair dealing cases, the focus is on whether the conduct by the claimed offender complied with the reasonable expectations of the parties.[3]

The Supreme Court has defined the doctrine of equitable estoppel as:

> the affect of voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed…as against another person who in good faith relied upon such conduct and has thereby been led to change his position for the worse.[4]

Or, as stated by the Court in *Heuer v. Heuer*, "an individual is not permitted to 'blow both hot and cold,' taking a position inconsistent with prior conduct…."[5]

As noted, equitable estoppel is a defense that is available at both law and equity. The nature of the conduct that forms the basis of the estoppel defense may be either active (*e.g.*, a representation that is belied by later conduct)[6] or passive (*e.g.*, a defendant in a malpractice action allowing 14 months to pass from the time the plaintiff's affidavit of merit was due but not presented, then moving to dismiss on the eve of trial).[7]

The latter situation is very similar to *laches*, a defense whereby a party with a known right delays in asserting that right to the prejudice of an adverse party. Indeed, in *Knorr v. Smeal* the Supreme Court held that the defendant doctor was both equitably estopped to seek dismissal of the complaint based on the plaintiff's failure to comply with the affidavit of merit statute and was also barred from doing so by the doctrine of *laches*. By litigating for more than a year, engaging in discovery, conferences and trial preparation, the physician had both misled the plaintiff and the courts in proceeding with a case that should have been dismissed much earlier, and the delay was deemed prejudicial at the same time.[8]

Intent is not an element of equitable estoppel, but reliance is. It doesn't matter if the party sought to be equitably estopped intended his or her conduct to mislead, but only that the other party relied on that conduct to his or her detriment.[9] Thus, in the *Knorr v. Smeal* case discussed above, it didn't matter *why* the defendant doctor waited until the eve of trial to bring the motion to dismiss based on the plaintiff's violation of the affidavit of merit statute, but only that he *did* wait, and that the plaintiff, as a result, believed the case was going to trial.

Equitable estoppel is a defense rarely used for affirmative purposes.

*Hirsch v. Amper Financial,*[10] decided by the New Jersey Supreme Court in the summer of 2013, was one of those rare cases in which equitable estoppel had been used not as a defense, but rather as a basis for affirmative relief (*i.e.*, as the rationale to require the plaintiff to arbitrate with parties, even though no arbitration agreement existed between them).

In *Hirsch*, the plaintiffs had retained Amper Financial Services (AFS) to be their financial advisors. Because AFS was not a securities broker, it had the Hirsches sign a brokerage agreement with Securities America, Inc. (SAI). That agreement contained an arbitration clause, whereas there was no written agreement between the Hirsches and AFS.

The Hirsches invested $550,000 in Medical Capital notes through SAI, upon the recommendation of AFS. When Medical Capital was determined to be a Ponzi scheme and the Hirsches' entire investment was lost, they filed an arbitration complaint against SAI before the Financial Industry Regulatory Authority (FINRA) and a lawsuit in superior court against AFS.

AFS then brought a third-party complaint against SAI for contribution and indemnification. SAI thereupon moved to compel the entire matter to be arbitrated.

That motion was granted by the Law Division judge and affirmed by the Appellate Division. The Appellate Division, in an unreported opinion, held that the Hirsches were compelled to arbitrate their claims against AFS and the related accounting firm, EisnerAmper, LLP. The appellate panel held that because the claims against AFS and EisnerAmper were intertwined with the claims against SAI, the Hirsches were equitably estopped to resist the demand that all claims be presented in the arbitral forum.

In doing so the Appellate Division relied on a group of cases that held that a party may be equitably estopped to refuse to arbitrate with a non-signer of an arbitration agreement when the non-signer is closely related to a signer of an arbitration agreement with the plaintiff. Thus, for example, the plaintiff in *Alfano v. BDO Seidman*[11] brought a failed securities lawsuit against Deutsche Bank, A.G. (DB), the broker of the securities. The plaintiff did not have an arbitration agreement with DB but did have one with Deutsche Bank Securities, Inc. (DBSI), DB's subsidiary.

The court held the plaintiff was equitably estopped to resist a motion to compel arbitration, as the plaintiff had expected DBSI would be purchasing its securities, and all that happened was there was a change in corporate structure. In other words, the reasonable expectation of the parties was that any claims brought based on the purchase of securities were to be made in arbitration.

In *Hirsch,* the Supreme Court reversed the Appellate Division's ruling requiring the Hirsches to arbitrate their claims against EisnerAmper and AFS. The same close corporate relationships did not exist between them and SAI that existed between DB and DBSI.

There was neither a reasonable expectation that any claims the Hirsches may have against AFS and EisnerAmper would be arbitrated, nor, as the court pointed out, was there any indication that EisnerAmper and AFS relied upon any purported obligation by the Hirsches to submit their claims to arbitration. It was SAI, not AFS and EisnerAmper, which moved to compel arbitration.

There was, moreover, no evidence presented that the Hirsches blew both hot and cold, or, to use another expression applicable to many successful equitable estoppel defenses, that they 'played fast and loose.' In fact, they followed longstanding precedent, bringing an arbitration claim against an entity with which they had an arbitration agreement and filing a lawsuit against parties with which there was no agreement to arbitrate.[12]

Significantly, Justice Jaynee LaVecchia, the author of the opinion in *Hirsch,* at the outset noted: "Equitable estoppel is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration."[13]

Whether the use of equitable estoppel as a 'sword' in any context other than to compel arbitration has been limited by the above statement is unclear. What is clear from the opinion in *Hirsch,* however, is that equitable estoppel should not be applied as a matter of formula, as the Appellate Division did in *Hirsch,* but rather the facts of each case need to be analyzed. Did the party sought to be equitably estopped 'blow hot and cold' and did the party invoking the estoppel defense rely on that conduct to his or her detriment? ⚖

## Endnotes

1. *Knorr v. Smeal,* 178 N.J. 169, 180 (2003).
2. *Printing Mart-Morristown v. Sharp Electronic Corp.*, 116 N.J. 739, 757 (1989).
3. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 246 (2007).
4. *Highway Trailer Co. v. Donna Motor Lines, Inc.*, 46 N.J. 442, 449 (1966).
5. *Heuer v. Heuer*, 152 N.J. 226, 237 (1998).
6. *Carlsen v. Masters, Mates & Pilots Pension Trust*, 80 N.J. 334 (1979).
7. *Knorr*, *supra*.
8. *Id.*
9. *Id.,* at 180.
10. *Hirsch v. Amper Financial Services, LLC,* 215 N.J. 142 (2013).
11. *Alfano v. BDO Seidman*, 393 N.J. Super. 560 (App. Div. 2007).
12. *Angrisani v. Financial Technology Ventures, LP*, 402 N.J. Super. 138 (App. Div. 2008).
13. 215 N.J. at 180.

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