

# BLOWING HOT AND COLD ON THE FROZEN TUNDRA: A REVIEW OF ALASKA'S QUASI-ESTOPPEL DOCTRINE

MICHAEL D. MOBERLY\*  
LAURA L. FARLEY\*\*

*This Article takes a critical look at the quasi-estoppel doctrine as it operates in Alaska. First the Article compares the quasi-estoppel doctrine with the equitable estoppel and collateral estoppel doctrines. Next it examines Alaska cases that have interpreted the quasi-estoppel doctrine. The Article then makes suggestions for how the doctrine could be refined and argues that if the suggestions were adopted, the doctrine would be a more fair, valuable tool for both litigants and courts.*

## I. INTRODUCTION

Consider a case in which a dairy farmer, unable to meet his debt obligations to the state, files a Chapter 11 bankruptcy petition in federal court. Suppose that he cooperates as the state repossesses his chattels that secured the state's loans. Now suppose that immediately after his debts are discharged by a bankruptcy court, he files a lender liability suit, requesting cancellation of his indebtedness to the state, an injunction prohibiting the state's collection efforts, rescission of his contractual obligations to the state, and monetary damages based on claims of misrepresentation, negligence, and breach of fiduciary duty, among others. This is precisely the affront to the judicial system that the Alaska Supreme

---

Copyright © 1998 by Alaska Law Review

\* B.B.A., J.D., University of Iowa; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona.

\*\* B.A., Whitman College; J.D., University of Puget Sound; Shareholder, Le Gros, Buchanan & Paul, Anchorage, Alaska.

The authors wish to thank Andrea G. Lovell, a third-year law student at the University of Washington, for her assistance in the preparation of this article.

Court sought to prevent in *Wright v. State*<sup>1</sup> by invoking the doctrine of quasi-estoppel against a dairy farmer who attempted to take advantage of these contradictory positions.<sup>2</sup>

Quasi-estoppel is an equitable doctrine<sup>3</sup> that, where applicable, prevents litigants from taking positions inconsistent with those they have previously asserted.<sup>4</sup> As a general proposition, the doctrine<sup>5</sup> requires a party who has gained an advantage (or produced a disadvantage) by asserting a particular position<sup>6</sup> accept the burden of asserting that position in subsequent proceedings.<sup>7</sup> In essence, the doctrine protects the integrity of the judicial process<sup>8</sup> by preventing litigants from “blow[ing] both hot and cold”<sup>9</sup> where the as-

---

1. 824 P.2d 718 (Alaska 1992).

2. *See id.* at 721-22.

3. *See Bromley v. Mitchell*, 902 P.2d 797, 802 (Alaska 1995); *In re Lampert*, 896 P.2d 214, 220 (Alaska 1995).

4. *See Union Oil Co. of Calif. v. State*, 804 P.2d 62, 66 n.7 (Alaska 1990); *Sea Lion Corp. v. Air Logistics of Alaska*, 787 P.2d 109, 114 n.2 (Alaska 1990).

5. Alaska’s quasi-estoppel doctrine is similar to what other jurisdictions call “judicial estoppel.” *See Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990) (implicitly equating quasi-estoppel and judicial estoppel); *cf. Rosa v. CWJ Contractors, Ltd.*, 664 P.2d 745, 751 n.12 (Haw. Ct. App. 1983) (describing judicial estoppel as falling “[w]ithin quasi-estoppel”); *Woods v. Woods*, 638 S.W.2d 403, 405-06 (Tenn. Ct. App. 1982) (noting that judicial estoppel “has been termed a *quasi* estoppel”). Indeed, Alaska courts occasionally use the terms interchangeably. *See, e.g., Union Oil Co.*, 804 P.2d at 66 n.7; *Smith*, 791 P.2d at 356.

6. *See Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 (Alaska 1978) (“Among the many considerations which may indicate that . . . quasi-estoppel should be applied [is] whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position.”).

7. Noting that quasi-estoppel “springs from . . . [an] acceptance of benefits,” the Alaska Supreme Court has stated:

It is a long-established principle of equity that no person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit. It is a plain principle of justice, of right, and of law, that a man can not accept the benefits, and reject the burdens of a transaction.

*Dressel v. Weeks*, 779 P.2d 324, 332 (Alaska 1989) (citations and internal quotation marks omitted); *see also In re Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991) (“One form of estoppel, ‘quasi estoppel,’ forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects.”).

8. *See Smith*, 791 P.2d at 356, 358.

9. *Lampert*, 896 P.2d at 221 (quoting *Godoy v. County of Hawaii*, 354 P.2d 78, 82 (Haw. 1960)); *cf. Searfus v. Northern Gas Co.*, 472 P.2d 966, 970 n.13 (Alaska 1970).

sertion of inconsistent positions would be unconscionable.<sup>10</sup> "Unconscionable" generally is defined as grossly unfair, unjust, inequitable, oppressive, or unduly harsh.<sup>11</sup> This doctrine provides the practitioner a tool to appeal to the conscience of the court.<sup>12</sup>

Unfortunately, while quasi-estoppel can be useful to both litigants and courts, Alaska's fact-specific application of the doctrine offers relatively little guidance on how to use it as a defense. In applying the doctrine, the Alaska Supreme Court presently considers such factors as "whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and whether the first assertion was based on full knowledge of the facts."<sup>13</sup> Because the concept of unconscionability, in particular, is inherently vague, legal precedent is only moderately instructive.

This Article considers Alaska's view of the quasi-estoppel doctrine,<sup>14</sup> which has also been recognized in several other jurisdictions,<sup>15</sup> and argues that the Alaska Supreme Court should refine the test used in determining the proper application of the doctrine. Part II of the Article summarizes the relationship between quasi-estoppel and two other estoppel doctrines recognized in Alaska,<sup>16</sup>

---

10. See *Jamison*, 576 P.2d at 102 ("The essence of the doctrine of quasi-estoppel is the existence of facts and circumstances making the assertion of an inconsistent position unconscionable.").

11. See *id.* at 102-03.

12. See *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328, 1330 (Alaska 1995).

13. *Jamison*, 576 P.2d at 103.

14. The only previous academic consideration of this issue appears to be a brief discussion of *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354 (Alaska 1990) in Jayne E. Powell & Ellen L. Lyons, *Alaska Supreme Court Year in Review 1990*, 8 ALASKA L. REV. 71, 131-32 (1991).

15. See, e.g., *Smith v. Midland Brake, Inc.*, 911 F. Supp. 1351, 1360 (D. Kan. 1995) ("The Tenth Circuit has also approved the doctrine of quasi-estoppel.") (citation and internal quotation marks omitted), *aff'd*, 138 F.3d 1304 (10th Cir. 1998); *Deutz-Allis Credit Corp. v. Bakie Logging*, 824 P.2d 178, 187 (Idaho Ct. App. 1992) ("Idaho also recognizes the doctrine of quasi estoppel."); *Hensgen v. Silberman*, 197 P.2d 356, 358-59 (Cal. Dist. Ct. App. 1948) ("[O]ur courts have recognized [a] species of estoppel, called 'quasi-estoppel,' which is based upon the principle that one cannot blow both hot and cold."). However, the doctrine has also been rejected by some courts. See, e.g., *United States v. Rexach*, 482 F.2d 10, 19 n.7 (1st Cir. 1973) (noting the doctrine has been expressly rejected in the First Circuit).

16. See *infra* notes 23-61 and accompanying text.

equitable estoppel<sup>17</sup> and collateral estoppel.<sup>18</sup> Part III analyzes Alaska cases that have examined the quasi-estoppel doctrine.<sup>19</sup> Part IV discusses quasi-estoppel and judicial estoppel as they are applied in other jurisdictions.<sup>20</sup> Part V examines potential conflicts between the quasi-estoppel doctrine and Alaska's liberal pleading rules.<sup>21</sup> Part VI proposes certain refinements for Alaska courts to consider when identifying the circumstances in which quasi-estoppel should be invoked against a party asserting inconsistent positions.<sup>22</sup> The Article concludes that clarification of the doctrine would make quasi-estoppel a more useful tool for litigants as well as for the courts.

## II. THE RELATIONSHIP OF QUASI-ESTOPPEL TO OTHER ESTOPPEL DOCTRINES

Quasi-estoppel, like other estoppel doctrines, is equitable in nature.<sup>23</sup> It resembles other preclusion doctrines, such as equitable estoppel and collateral estoppel, insofar as each of these doctrines imbues the courts with authority to prevent parties from relitigating an established factual posture.<sup>24</sup> As the Alaska Supreme Court has stated, "[e]stoppel by any name is based primarily on considerations of justice and fair play."<sup>25</sup>

Despite the similarities between various types of estoppel, the policy considerations underlying quasi-estoppel are distinct from the other doctrines. Alaska's doctrine of quasi-estoppel is designed to prevent injustice by precluding a party from asserting a right inconsistent with a position previously taken, even where neither ignorance nor reliance on the part of the opposing party is present.<sup>26</sup> The intended beneficiary of this doctrine is the judicial

---

17. See *Wright v. State*, 824 P.2d 718, 721 (Alaska 1992).

18. See *Shepherd v. Bering Sea Originals*, 578 P.2d 587, 589 (Alaska 1978). A fourth estoppel doctrine – promissory estoppel – is also recognized in Alaska. See *James v. State*, 815 P.2d 352, 355-56 (Alaska 1991). For a general discussion of Alaska's view of promissory estoppel, see Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 304-09 (1996).

19. See *infra* notes 62-120 and accompanying text

20. See *infra* notes 121-35 and accompanying text.

21. See *infra* notes 136-74 and accompanying text.

22. See *infra* notes 175-234 and accompanying text.

23. See *supra* note 3 and accompanying text.

24. See Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 410 (1987).

25. In re *Lampert*, 896 P.2d 214, 221 (Alaska 1995) (citation omitted).

26. See *Batey v. Batey*, 933 P.2d 551, 554 (Alaska 1997) (Fabe, J., dissenting); *Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 & n.9 (Alaska 1978).

system itself, rather than the litigants involved in a particular case.<sup>27</sup> Quasi-estoppel protects the integrity of the judicial process by preventing litigants from casually adopting inconsistent positions for their own convenience.<sup>28</sup> While similar to equitable estoppel and collateral estoppel in some respects, quasi-estoppel can be distinguished from these doctrines in terms of the interests it protects.

#### A. Equitable Estoppel

Perhaps quasi-estoppel is most similar to equitable estoppel,<sup>29</sup> which also may prevent a party from asserting a position inconsistent with one it previously has taken.<sup>30</sup> Indeed, the Alaska Supreme Court has indicated that quasi-estoppel is a “species” of equitable estoppel.<sup>31</sup> Equitable estoppel precludes a person from asserting a right which he otherwise would have but for his previous acts or conduct proclaiming a contrary position and the reliance thereon by another party.<sup>32</sup> In Alaska, three essential elements are required for the application of the doctrine of equitable estoppel: (1) the assertion by conduct or word of a position, (2) reasonable reliance thereon by another party, and (3) resulting prejudice.<sup>33</sup>

Despite their similarities, quasi-estoppel and equitable estoppel differ in certain important respects.<sup>34</sup> In particular, equitable

---

27. See *infra* note 36 and accompanying text.

28. See *supra* notes 8-9 and accompanying text.

29. See *Smith v. Thompson*, 923 P.2d 101, 104 (Alaska 1996) (describing claims based on equitable estoppel and quasi-estoppel as “related arguments”); *Lakeside Mall, Ltd. v. Hill*, 826 P.2d 1137, 1142 n.12 (Alaska 1992) (discussing a fact pattern that “does not fit neatly under either the doctrine of equitable or quasi-estoppel but has elements of both”); see also *University of Hawaii Prof'l Assembly v. University of Hawaii*, 659 P.2d 720, 725 (Haw. 1983) (describing quasi-estoppel as a “close cousin to the doctrine of equitable estoppel”).

30. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970) (“Equitable estoppel prevents a party from assuming inconsistent positions to the detriment of another party.”) (citations omitted), *cited in Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 n.7 (Alaska 1978).

31. *Lampert*, 896 P.2d at 221 (quoting *Godoy v. County of Hawaii*, 354 P.2d 78, 82 (Haw. 1960)).

32. See *Jamison*, 576 P.2d at 102.

33. See *id.*

34. See *Lampert*, 896 P.2d at 221 & n.8; *Jamison*, 576 P.2d at 102. Equitable estoppel is, in turn, distinct from promissory estoppel, although the elements of those two doctrines also are similar. See *James v. State*, 815 P.2d 352, 355 n.9 (Alaska 1991). The principal difference lies in the fact that promissory estoppel, unlike equitable estoppel (or quasi-estoppel), can be applied “offensively.” See

estoppel focuses on the relationship between the parties,<sup>35</sup> while quasi-estoppel focuses on the interests of the court in promoting consistency when inconsistency would produce an unconscionable result.<sup>36</sup> Thus, the Alaska Supreme Court's present application of quasi-estoppel requires a finding that the assertion of inconsistent positions would be unconscionable.<sup>37</sup> In contrast, although unconscionability is a relevant consideration in analyzing equitable estoppel arguments,<sup>38</sup> it apparently is not a prerequisite to that doctrine's application.<sup>39</sup>

In addition, equitable estoppel typically applies only where the party asserting inconsistent positions willfully causes another to formulate a mistaken impression<sup>40</sup> in reliance on the first party's

---

*id.*; see also *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 380 n.7 (Alaska 1984). Ignoring this difference, litigants occasionally invoke equitable estoppel or quasi-estoppel when the potentially applicable doctrine is actually promissory estoppel. See, e.g., *Bubbel*, 682 P.2d at 380 n.7; see also *Holmes*, *supra* note 18, at 304 n.108 (observing that "attorneys may erroneously plead equitable estoppel or quasi-estoppel when the proper claim for relief is equitable promissory estoppel").

35. See *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980), *cited with approval in* *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990).

36. See, e.g., *Smith*, 791 P.2d at 356 (noting that because the quasi-estoppel doctrine is designed to protect the integrity of the judicial process, it focuses upon the "involvement of the courts in promoting or permitting inconsistent results"). The U.S. Court of Appeals for the Ninth Circuit has expressed the interest of the courts as it pertains to the closely related judicial estoppel doctrine:

The tribunal in which the litigant made the first statement could also be interested (there is no reason to think as a general proposition that one statement is more likely than the other to be true), but it is not in a position to do anything about its interest. Therefore, for all practical purposes, the interests of the second court are uniquely implicated and threatened by the taking of an incompatible position.

*Risotto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 603-04 (9th Cir. 1996).

37. See *Alaska Statebank v. Kirschbaum*, 662 P.2d 939, 943 (Alaska 1983); *Jamison*, 576 P.2d at 102.

38. See, e.g., *East River Sav. Bank v. Secretary of HUD*, 702 F. Supp. 448, 460 n.11 (S.D.N.Y. 1988) ("The purpose of the equitable estoppel doctrine is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another.").

39. See *Altman v. Alaska Truss & Mfg. Co.*, 677 P.2d 1215, 1223 (Alaska 1983); see also *Jamison*, 576 P.2d at 102 ("Quasi-estoppel differs from other forms of estoppel in that it appeals to the conscience of the court.") (quoting *Donaldson v. LeNore*, 540 P.2d 671, 674 (Ariz. 1975)).

40. See *In re Lampert*, 896 P.2d 214, 221 n.8 (Alaska 1995) (quoting *Maria v. Freitas*, 832 P.2d 259, 264 (Haw. 1992)).

## 1998] ALASKA'S QUASI-ESTOPPEL DOCTRINE 287

representation.<sup>41</sup> Quasi-estoppel, on the other hand, potentially is applicable in the absence of reliance<sup>42</sup> or intentional misrepresentation by the party asserting inconsistent positions.<sup>43</sup>

### B. Collateral Estoppel

Quasi-estoppel also is related to collateral estoppel,<sup>44</sup> which the Alaska courts occasionally refer to as “issue preclusion.”<sup>45</sup> Collateral estoppel “bars relitigation, even in an action on a different claim, of all ‘issues of fact or law that were actually litigated and necessarily decided’ in [a] prior proceeding.”<sup>46</sup> Specifically, collateral estoppel prevents a party from relitigating issues previously resolved against that party.<sup>47</sup>

---

41. See *Jamison*, 576 P.2d at 102; *Arctic Contractors, Inc. v. State*, 564 P.2d 30, 40 (Alaska 1977). See generally *Donaldson*, 540 P.2d at 674 (observing that reliance is “an element normally required of estoppels”), cited with approval in *Jamison*, 576 P.2d at 102 & nn.7 & 9.

42. See *Batey v. Batey*, 933 P.2d 551, 554 (Alaska 1997) (Fabe, J., dissenting) (“Quasi-estoppel does not require the injured party to have relied on the estopped party’s conduct or statements.”); *Alaska Statebank*, 662 P.2d at 942 (stating that “reliance is not an element of a claim based on quasi-estoppel”); *Jamison*, 576 P.2d at 102 (“Quasi-estoppel . . . does not require ignorance or reliance as essential elements.”) (quoting *Donaldson*, 540 P.2d at 674); but cf. *Jamison*, 576 P.2d at 102-03 (“Among the many considerations which may indicate that . . . the doctrine of quasi-estoppel should be applied [is] . . . whether the inconsistency was relied on by the party claiming estoppel to his detriment.”).

43. In *Jamison*, the Alaska Supreme Court cited with seeming approval *KTVB, Inc. v. Boise City*, 486 P.2d 992 (Idaho 1971) and *Fast v. Fast*, 496 P.2d 171 (Kan. 1972). See *Jamison*, 576 P.2d at 101 n.6, 102 & nn.7 & 10. In *KTVB*, the Idaho Supreme Court stated that “no concealment or misrepresentation of existing facts . . . is a necessary ingredient” to the application of quasi-estoppel. 486 P.2d at 994 (quoting *Clontz v. Fortner*, 399 P.2d 949, 954 (Idaho 1965)); see also *Record Steel & Constr., Inc. v. Martel Constr., Inc.*, 923 P.2d 995, 999 (Idaho Ct. App. 1996) (“Quasi-estoppel does not require a false representation.”). In *Fast*, the Kansas Supreme Court likewise indicated that quasi-estoppel may apply where there is “nothing to show active misrepresentation or concealment.” 496 P.2d at 175.

44. See generally *University of Hawaii Prof'l Assembly v. University of Hawaii*, 659 P.2d 720, 726 (Haw. 1983) (“Estoppel by any name is based primarily on considerations of justice and fair play.”), cited with approval in *In re Lampert*, 896 P.2d 214, 221 (Alaska 1995).

45. *Campion v. Department of Community & Reg'l Affairs*, 876 P.2d 1096, 1098 (Alaska 1994); *Boyles v. State*, 647 P.2d 1113, 1116 (Alaska Ct. App. 1982).

46. *Campion*, 876 P.2d at 1098 (citing *Americana Fabrics v. L & L Textiles*, 754 F.2d 1524, 1529 (9th Cir. 1985)).

47. See *State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 950 n.7 (Alaska 1995).

Collateral estoppel is similar to quasi-estoppel insofar as both doctrines protect the interests of the judicial system. However, whereas quasi-estoppel protects the integrity of the judicial process by preventing litigants from asserting inconsistent positions, the principal objective underlying collateral estoppel is to “ensure the finality of judgment, thereby ensuring a litigant’s peace of mind, and to promote judicial economy.”<sup>48</sup> Because these doctrines protect different interests, there are different prerequisites for their applications.

The Alaska Supreme Court has held that collateral estoppel should be applied only when three conditions have been met: (1) the plea of collateral estoppel is being asserted against a party or one in privity with a party to the first action; (2) the issue to be precluded from relitigation by operation of the doctrine is identical to that decided in the first action; and (3) the issue in the first action was resolved by a final judgment on the merits.<sup>49</sup> By contrast, litigation may not be required under Alaska’s present formulation of quasi-estoppel,<sup>50</sup> which typically prevents a party from asserting a position contrary to the one it successfully asserted previously.<sup>51</sup> Additionally, privity may not be a necessary precondition to the application of quasi-estoppel.<sup>52</sup> Despite these differences, the two doctrines are somewhat similar,<sup>53</sup> and the principles underlying

---

48. Plumer, *supra* note 24, at 415 (comparing collateral estoppel with judicial estoppel, a doctrine closely related to quasi-estoppel).

49. *See* McKean v. Municipality of Anchorage, 783 P.2d 1169, 1171 (Alaska 1989).

50. *See, e.g.*, Maynard v. State Farm Mut. Life Auto. Co., 902 P.2d 1328, 1330-31 (Alaska 1995) (suggesting that quasi-estoppel might preclude the assertion of a position inconsistent with one taken by the same party in pre-litigation correspondence).

51. While prior judicial success may not be a prerequisite to the application of quasi-estoppel (as it often is where the closely-related judicial estoppel doctrine is involved, *see* Moore v. United Servs. Auto. Ass’n, 808 F.2d 1147, 1153 n.6 (5th Cir. 1987)), the fact that a party was successful in asserting its initial position increases the likelihood that its subsequent assertion of an inconsistent position will be deemed unconscionable, which *is* a prerequisite to the application of quasi-estoppel. *See* Jamison, 576 P.2d at 102.

52. *See infra* notes 218-24 and accompanying text.

53. *See* Massaglia v. Commissioner, 33 T.C. 379, 387 (1959) (“[C]ollateral estoppel . . . [and] quasi-estoppel . . . have been urged on courts as different names for the bar which estoppel invokes.”). *See generally* Willard v. Ward, 875 P.2d 441, 444 (Okla. Ct. App. 1994) (“[T]he application of estoppel in any form is an issue of equitable cognizance.”).

collateral estoppel may be instructive in analyzing quasi-estoppel issues.<sup>54</sup>

### C. The Necessity of Three Preclusion Doctrines

The recent development of Alaska's quasi-estoppel doctrine raises the question: Does quasi-estoppel protect an interest that could not adequately be protected by either equitable estoppel or collateral estoppel? At least two courts have answered that question affirmatively. The Sixth Circuit recently stated that judicial estoppel, a doctrine closely related to quasi-estoppel, "may apply in contexts when other forms of estoppel do not."<sup>55</sup> In a much earlier case, *Scarano v. Central R. Co. of New Jersey*,<sup>56</sup> the Third Circuit indicated in greater detail that collateral estoppel and equitable estoppel would be ineffective in preventing a litigant from reversing his position in bad faith from one trial to another.<sup>57</sup> In that case, the plaintiff was an injured employee who brought suit against his employer under the Federal Employer's Liability Act, alleging that he was "totally disabled."<sup>58</sup> After a jury verdict was entered in his favor and the plaintiff settled with his employer, he demanded that he be reinstated in his former job pursuant to the terms of a collective bargaining agreement.<sup>59</sup> The Third Circuit ultimately held that the plaintiff would be estopped from relitigating the issue of his physical ability to perform the work in question.<sup>60</sup> Although the court did not specifically use the term "quasi-estoppel,"<sup>61</sup> it is clear the estoppel doctrine was utilized to protect the integrity of the courts.

---

54. See, e.g., *United States v. Rexach*, 482 F.2d 10, 19 n.7 (1st Cir. 1973) (rejecting defendant's quasi-estoppel argument as "nothing more than a restatement of his already rejected claim of collateral estoppel").

55. *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995).

56. 203 F.2d 510 (3d Cir. 1953).

57. See *id.* at 512-14.

58. *Id.* at 511.

59. See *id.*

60. See *id.* at 512.

61. See *id.* at 512-13 ("The 'estoppel' of which, for want of a more precise word, we here speak is but a particular limited application of what is sometimes said to be 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.'" (citation omitted)).

### III. ALASKA'S INTERPRETATION OF THE QUASI-ESTOPPEL DOCTRINE

Thus far, the Alaska courts have not developed a precise formula by which to determine the circumstances under which the quasi-estoppel doctrine should be applied.<sup>62</sup> In the two decades since the quasi-estoppel doctrine was adopted,<sup>63</sup> Alaska courts have applied or considered the doctrine in probate proceedings,<sup>64</sup> condemnation proceedings,<sup>65</sup> quiet title actions,<sup>66</sup> workers' compensation proceedings,<sup>67</sup> declaratory judgment actions,<sup>68</sup> tax appeals,<sup>69</sup>

---

62. See *In re Lampert*, 896 P.2d 214, 221 (Alaska 1995) (noting that the doctrine is "not rigidly applied").

63. See *Jamison v. Consolidated Util., Inc.*, 576 P.2d 97 (Alaska 1978).

64. See, e.g., *Lampert*, 896 P.2d 214 (discussed *infra* notes 96-116 and accompanying text).

65. See, e.g., *Keener v. State*, 889 P.2d 1063, 1067-68 (Alaska 1995) (holding that the state was not precluded by the quasi-estoppel doctrine from asserting a right-of-way over property owned by the appellants, primarily because the state neither had gained an advantage nor produced a disadvantage as the result of its prior representation).

66. See, e.g., *Dressel v. Weeks*, 779 P.2d 324, 331-33 (Alaska 1989) (applying quasi-estoppel to prevent a party who had benefited from an invalid sale of certain real property from subsequently asserting title to that property). In reaching its holding, the *Dressel* court noted that the quasi-estoppel doctrine "has frequently been applied to real property [matters]." *Id.* at 332.

67. See, e.g., *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356-59 (Alaska 1990) (declining to apply quasi-estoppel to bar employee's workers' compensation appeal where positions employee previously had asserted were not inconsistent); *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1245-46 (Alaska 1992) (holding that quasi-estoppel doctrine did not preclude employer's argument in workers' compensation appeal because employer's positions were consistent); see also *Wausau Ins. Cos. v. Van Biene*, 847 P.2d 584, 587-88 (Alaska 1993) (noting that quasi-estoppel can apply in workers' compensation proceedings).

68. See *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328 (Alaska 1995). In *Maynard*, an insured brought a declaratory judgment action against its insurer seeking a determination that the insurer had no right of subrogation against him. See *id.* at 1329. The Alaska Supreme Court held that the insurer was not barred by the quasi-estoppel doctrine from changing its theory of recovery to one premised upon a right to reimbursement, because its assertion of that position, while perhaps inconsistent with its previous assertion of a right to subrogation, was not unconscionable. See *id.* at 1330-31.

69. See *Union Oil Co. of Cal. v. State*, 804 P.2d 62, 66 n.7 (Alaska 1990) (holding that the state was not estopped from using a particular accounting method in computing exempt business income where its apparently inconsistent position in prior litigation actually resulted from it having "misspoke[n]" on that occasion).

## 1998] ALASKA'S QUASI-ESTOPPEL DOCTRINE 291

bankruptcy proceedings,<sup>70</sup> divorce actions,<sup>71</sup> and various breach of contract<sup>72</sup> and tort actions.<sup>73</sup> The application of quasi-estoppel in each of these cases appears to have turned on the specific facts. The Alaska Supreme Court also has concluded that the doctrine may apply in administrative and other quasi-judicial proceedings,<sup>74</sup> and presumably would hold that it can be applied in criminal proceedings as well.<sup>75</sup>

---

70. See, e.g., *Wright v. State*, 824 P.2d 718, 720-22 (Alaska 1992) (holding that the appellant was precluded by the quasi-estoppel doctrine from asserting claims he had failed to disclose in his previous bankruptcy proceedings).

71. See, e.g., *Batey v. Batey*, 933 P.2d 551, 554-55 (Alaska 1997) (Fabe, J. dissenting) (advocating the application of quasi-estoppel to prevent a party from denying the validity of a marriage after "reap[ing] the benefits of holding himself out as married . . . for more than twenty years").

72. See, e.g., *Bromley v. Mitchell*, 902 P.2d 797, 802-03 (Alaska 1995) (holding that quasi-estoppel did not preclude a defendant who had contracted to repair the plaintiffs' boat from asserting a *forum non conveniens* argument that was not inconsistent with the position it had taken in a previous motion for summary judgment).

73. See, e.g., *Smith v. Stratton*, 835 P.2d 1162, 1166 & n.9 (Alaska 1992) (holding that quasi-estoppel precluded the alleged tortfeasor in a personal injury action from asserting a statute of limitations defense where she had been instrumental in inducing the plaintiffs to postpone prosecution of the action); *Wright*, 824 P.2d at 720-22 (holding that appellant was precluded from asserting lender liability claims that were inconsistent with position he had taken in previous proceeding).

74. See *Wausau Ins. Cos. v. Van Biene*, 847 P.2d 584, 587-88 (Alaska 1993) (observing that "implicit in [*Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354 (Alaska 1990)] was this court's recognition that if all the elements [are] present, quasi-estoppel . . . [is] applicable to [a] workers' compensation proceeding," which is "quasi-judicial" in nature).

75. The Alaska Supreme Court has indicated that other estoppel doctrines may apply in criminal cases under appropriate circumstances. See, e.g., *Kott v. State*, 678 P.2d 386, 391-93 (Alaska 1984) (discussing collateral estoppel). In addition, other courts have held that quasi-estoppel's close analogue, judicial estoppel, can be applied against either the defendant or the government in criminal proceedings. See, e.g., *State v. Towery*, 920 P.2d 290, 304 (Ariz. 1996) (holding that "the doctrine of judicial estoppel is no less applicable in a criminal than in a civil trial [and a]ny other rule would permit absurd results"), *cert. denied*, 117 S. Ct. 485 (1997). *But cf.* *Thompson v. Calderon*, 120 F.3d 1045, 1070 (9th Cir. 1997) (Kozinski, J., dissenting) ("There is, in fact, a long line of cases that says, if only by way of dicta, that judicial estoppel will not apply against the government in criminal cases."). Nevertheless, criminal proceedings raise important due process concerns, and at least one court has refused to apply the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim based on innocence. See *Morris v. California*, 966 F.2d 448, 453 (9th Cir. 1991).

The application of quasi-estoppel is generally a fact-sensitive matter<sup>76</sup> in which legal precedent may offer courts relatively little guidance.<sup>77</sup> Nevertheless, in considering how the Alaska courts should apply the doctrine in the future,<sup>78</sup> it is undoubtedly useful to review the two Alaska cases in which the doctrine has been discussed in the most detail, *Jamison v. Consolidated Utilities, Inc.*<sup>79</sup> and *In re Lampert*.<sup>80</sup>

A. *Jamison v. Consolidated Utilities, Inc.*

The Alaska Supreme Court first adopted the quasi-estoppel doctrine<sup>81</sup> in *Jamison v. Consolidated Utilities, Inc.*<sup>82</sup> *Jamison* involved a claim by employees of a utility company for wages allegedly due under the terms of a collective bargaining agreement between the company and the employees' union.<sup>83</sup> The employees argued that the company was estopped from denying that wages were due under the agreement because it had asserted the validity of the agreement in prior agency hearings addressing its application for a rate increase.<sup>84</sup>

---

76. See *Wright*, 824 P.2d at 721 (Alaska 1992) (noting that "application of the doctrine of quasi estoppel rests on findings of fact" (citation omitted)); *Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 n.6 (Alaska 1978) ("[A]ccording to the doctrine of quasi-estoppel[, the court's] attention must be focused upon the specific facts and circumstances of the case before it." (citation omitted)); *id.* at 102 ("Th[e] determination is essentially a factual one."); cf. *KTVB, Inc. v. Boise City*, 486 P.2d 992, 995 (Idaho 1971) ("[T]he essence of the proper application of the doctrine of quasi estoppel is the focus of the Court's attention upon the specific facts and circumstances of the case at bar.").

77. See, e.g., *Searfus v. Northern Gas Co.* 472 P.2d 966, 970 n.13 (Alaska 1970) (finding, without elaboration, that the quasi-estoppel cases relied upon by the appellant were "inapposite"); *KTVB*, 486 P.2d at 995 (finding that prior cases were not persuasive in light of the fact-specific nature of quasi-estoppel issues).

78. See *infra* notes 136-234 and accompanying text.

79. 576 P.2d 97 (Alaska 1978).

80. 896 P.2d 214 (Alaska 1995).

81. See *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990).

82. 576 P.2d 97 (Alaska 1978). There is a passing reference to the doctrine in one earlier Alaska case. See *Searfus*, 472 P.2d at 970 n.13. The *Searfus* court did not analyze the quasi-estoppel doctrine in any depth, observing only that the appellant's reliance on the doctrine was without merit and that the authorities on which she had relied (which were not identified) were "inapposite." *Id.*

83. See *Jamison*, 576 P.2d at 98.

84. See *id.* at 101. In essence, the employees' position was that the company had based its request for a rate increase in part on the anticipated additional costs attributable to the wage increase provided for in the collective bargaining agree-

The Alaska Supreme Court began its analysis by recognizing “a species of estoppel, sometimes referred to as quasi-estoppel, which precludes a party from taking a position inconsistent with one he has previously taken where circumstances render assertion of the second position unconscionable.”<sup>85</sup> In determining whether the assertion of inconsistent positions would be unconscionable under this doctrine, the court identified a number of pertinent issues, such as whether an advantage had been gained or a disadvantage produced, the magnitude of the inconsistency, whether the changed circumstances tended to justify the inconsistency, whether the inconsistency was relied upon, and whether the first assertion was made with full knowledge of the facts.<sup>86</sup> Considerations of particular significance in *Jamison* were whether the utility company had obtained an advantage (or produced a disadvantage) as a result of its initial assertion, and whether the employees had relied on that assertion to their detriment.<sup>87</sup> According to the court’s analysis, an affirmative response to those inquiries would support a finding of unconscionability.<sup>88</sup>

In considering these issues, the Alaska Supreme Court concluded that the company’s position in the agency hearings and its litigation posture were inconsistent<sup>89</sup> because the company had neglected to inform the agency that the company considered the wage increase provided for in the collective bargaining agreement to be contingent upon approval of the company’s application for a rate increase.<sup>90</sup> The court nevertheless concluded that because the plaintiffs were aware of this omission, they could not reasonably have relied upon or been prejudiced by it.<sup>91</sup> Reliance can be an important factor though it is not an essential element to asserting quasi-estoppel analysis. However, in *Jamison*, the employees’ knowledge of the facts precluded them from claiming detrimental reliance.<sup>92</sup> In addition, the court concluded that the company had gained no advantage from its omission because the rate increase the company was granted at the conclusion of the agency hearings

---

ment. *See id.* at 99. The company, on the other hand, claimed that the anticipated wage increase was contingent upon the agency’s approval of its requested rate increase. *See id.* at 103.

85. *Id.* at 101-02.

86. *See id.* at 102-03.

87. *See id.*

88. *See id.*

89. Inconsistency is a threshold requirement for the application of quasi-estoppel. *See infra* notes 136-74 and accompanying text.

90. *See Jamison*, 576 P.2d at 103.

91. *See id.*

92. *See id.*

did not reflect the wage increase provided for in the collective bargaining agreement.<sup>93</sup> Based on these findings, the court concluded that the company was not estopped from taking the position that approval of its request for a rate increase was necessary to effect the wage increase.<sup>94</sup> In essence, because full knowledge of the position taken by the company prevented disadvantage to the employees, it could not be considered unjust or unconscionable.<sup>95</sup>

B. *In re Lampert*

The only other case in which the Alaska Supreme Court has analyzed the quasi-estoppel doctrine in depth is *In re Lampert*.<sup>96</sup> Although *Lampert* actually arose under Hawaii law,<sup>97</sup> the case is instructive in analyzing Alaska's view of quasi-estoppel because the Alaska Supreme Court expressly relied on Hawaii law in adopting the doctrine.<sup>98</sup> In addition, the trial court in *Lampert* specifically indicated that the result in the case would have been the same under Alaska law.<sup>99</sup>

*Lampert* involved an action by an individual (and subsequently his estate)<sup>100</sup> to rescind an earlier estate plan, formulated by plaintiff and his wife, which conveyed a condominium to his stepdaughter.<sup>101</sup> The plaintiff's stepdaughter argued that while the conveyance technically may have been invalid,<sup>102</sup> the quasi-estoppel doctrine prohibited the plaintiff from contesting her ownership of the property.<sup>103</sup> The trial court agreed and granted the stepdaugh-

---

93. *See id.*

94. *See id.*

95. *See Jamison*, 576 P.2d at 103.

96. 896 P.2d 214 (Alaska 1995).

97. *See id.* at 220.

98. *See Jamison*, 576 P.2d at 102 n.7 (citing *Godoy v. County of Hawaii*, 354 P.2d 78 (Haw. 1960)).

99. *See Lampert*, 896 P.2d at 217. However, the Alaska Supreme Court did not reach that particular issue. *See id.*

100. The original plaintiff died a few months after commencing the litigation, and his estate was then substituted for him as a party. *See id.* at 216, 217-18.

101. *See id.* at 215-16.

102. Although the plaintiff had quitclaimed the condominium property to his stepdaughter, the plaintiff's wife had not executed the quitclaim deeds. *See id.* at 216. Because the property had been held by the plaintiff and his wife in a tenancy by the entirety, and neither spouse can unilaterally convey such an interest in property under Hawaii law, no legal interest had been transferred by the quitclaim deeds executed by the plaintiff in favor of the stepdaughter. *See id.* at 216, 220.

103. *See id.* at 217.

ter's motion for summary judgment.<sup>104</sup> The plaintiff then appealed.<sup>105</sup>

Citing *Godoy v. County of Hawaii*,<sup>106</sup> the *Lampert* court noted that quasi-estoppel is a variation of the equitable estoppel doctrine based on the maxim that "one cannot blow both hot and cold."<sup>107</sup> The court then articulated the following general principles that may provide guidance to future courts applying the doctrine:

Quasi-estoppel is based upon the broad equitable principle . . . that a person, with *full knowledge of the facts*, shall not be permitted to act in a manner *inconsistent with his former position or conduct* to the injury of another. To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have *gained some advantage for himself or produced some disadvantage to another*, or the person invoking the estoppel must have been induced to change his position, or by reason thereof the rights of other parties must have intervened.<sup>108</sup>

Applying these principles to the facts before it, the court noted that the plaintiff's litigation position was directly contrary to his original intent to convey his interest in the condominium to his stepdaughter.<sup>109</sup> The court also found that the plaintiff had executed the conveyance with full knowledge of the facts,<sup>110</sup> and that his conveyance of the property to his stepdaughter therefore must be deemed to have been informed and purposeful.<sup>111</sup>

The court also concluded that the plaintiff's change of positions would work to the stepdaughter's disadvantage.<sup>112</sup> In particular, the stepdaughter, who was in her late sixties and living on a fixed income, had relied on rental income from the property as the result of the plaintiff's acquiescence in her ownership of it.<sup>113</sup> In addition, because of the manner in which the estate plan had been structured, the stepdaughter stood to inherit very little unless the conveyance was upheld.<sup>114</sup> Under these circumstances, the court

---

104. See *id.* at 217, 220.

105. See *id.* at 217.

106. 354 P.2d 78 (Haw. 1960). The Alaska Supreme Court also had relied upon *Godoy* in *Jamison*. See *Jamison*, 576 P.2d at 102 n.7.

107. *Lampert*, 896 P.2d at 221 (quoting *Godoy*, 354 P.2d at 82).

108. *Id.* (bracketing omitted) (quoting *Godoy*, 354 P.2d at 82-83).

109. See *id.*

110. Among other things, the plaintiff had been advised by an attorney in connection with the transaction. See *id.* at 214.

111. See *id.* Indeed, the decision to convey the property had originated with the plaintiff and his attorney. See *id.* at 222.

112. See *id.* at 221.

113. See *id.* at 221-22.

114. See *id.* at 222.

concluded that estopping the plaintiff from claiming ownership in the property would serve notions of justice and fair play.<sup>115</sup> The court therefore affirmed the trial court's entry of summary judgment in favor of the stepdaughter.<sup>116</sup>

### C. An Analysis of Alaska's Leading Quasi-Estoppel Cases

A careful analysis of Alaska's quasi-estoppel doctrine, as best defined by the *Jamison* and *Lampert* courts, suggests that the appropriate test to be applied remains unclear. For example, neither court specified the degree to which the positions at issue must be inconsistent. Although the *Jamison* court stated that it would consider the magnitude of the inconsistency,<sup>117</sup> this formulation sheds little light on exactly where the line should be drawn. The prior inconsistent statement at issue in *Jamison* was made during an agency hearing,<sup>118</sup> whereas the prior "assertion" in *Lampert* was an earlier conveyance of property.<sup>119</sup> It is not clear from these factual nuances whether the courts give more weight to statements made in judicial or administrative proceedings when considering whether to invoke the quasi-estoppel doctrine. Furthermore, because the *Jamison* and *Lampert* courts were not required to decide whether privity between the parties was required, this may be an open issue as well.<sup>120</sup> Because so many questions surrounding the application of Alaska's quasi-estoppel doctrine remain unanswered, Alaska litigants should look to factors considered by other jurisdictions in analyzing which estoppel test likely will be applied.

## IV. COMPARING ALASKA'S QUASI-ESTOPPEL WITH JUDICIAL ESTOPPEL IN OTHER JURISDICTIONS

Because the Alaska Supreme Court essentially has equated quasi-estoppel with judicial estoppel,<sup>121</sup> it is instructive to review briefly case law from jurisdictions applying both doctrines. At least thirty-three states<sup>122</sup> thus far have adopted some form of

---

115. *See id.*; *see also* *Batey v. Batey*, 933 P.2d 551, 554 (Alaska 1997) (Fabe, J., dissenting) (observing that quasi-estoppel involves "[b]asic notions of equity, fairness, and justice").

116. *See Lampert*, 896 P.2d at 222.

117. *See Jamison*, 576 P.2d at 102-03.

118. *See id.* at 101.

119. *See Lampert*, 896 P.2d at 221.

120. *See infra* notes 218-24 and accompanying text.

121. *See Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990).

122. At least three states have rejected the doctrine of judicial estoppel outright, and various other states have not yet adopted the doctrine. *See, e.g.*,

quasi-estoppel or judicial estoppel.<sup>123</sup> Despite general acceptance of the doctrine, however, the specific criteria used by various jurisdictions in applying the doctrine varies considerably.<sup>124</sup>

A thorough review of judicial estoppel cases from other jurisdictions reveals that three principal factors are considered by most courts in applying the doctrine: prior success, privity, and reliance or prejudice.<sup>125</sup> However, even as far as these factors are concerned, the courts appear to be hopelessly split.<sup>126</sup> The only clear "majority" rule requires that a party's prior inconsistent assertion be judicially adopted before judicial estoppel can be invoked.<sup>127</sup> This requirement is sometimes referred to as the "prior success rule."<sup>128</sup> Prior success is measured not in terms of whether a party prevails in a lawsuit, but rather in terms of whether a court adopted the party's original assertion.<sup>129</sup> The policy underlying the

---

Douglas W. Henkin, *Judicial Estoppel – Beating Shields Into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1720 (1991) ("Massachusetts, South Carolina, and Louisiana have rejected judicial estoppel outright."); Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1268 (1986) (noting that "South Carolina has not adopted the doctrine of judicial estoppel").

123. See Henkin, *supra* note 122, app. at 1756-60.

124. See, e.g., Henkin, *supra* note 122, at 1713 ("Even those jurisdictions that accept the doctrine cannot agree on its purpose or requirements."); Plumer, *supra* note 24, at 410-11 ("Although several courts have defined judicial estoppel and have identified the doctrine's essential elements, each court tends to apply a different construction of the rule. Thus, no single formulation of the doctrine has gained widespread acceptance." (citations omitted)); Eric Schreiber, *The Judiciary Says You Can't Have It Both Ways: Judicial Estoppel – A Doctrine Precluding Inconsistent Positions*, 30 LOY. L.A. L. REV. 323, 324 (1996) ("Courts that apply judicial estoppel have interpreted its policies and elements variously, while other courts have rejected the doctrine outright.").

125. See Henkin, *supra* note 122, app. at 1756-60 (listing criteria used by various jurisdictions in applying judicial estoppel).

126. See *id.* at 1722-23 (discussing the federal circuits' inconsistent application of prerequisites to the judicial estoppel doctrine).

127. See, e.g., *Stevens Technical Servs., Inc., v. Steamship Brooklyn*, 885 F.2d 584, 588 (9th Cir. 1989); *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) (stating that it would apply judicial estoppel only "if a party *prevails* in Suit #1 on the basis of a position inconsistent with that latterly taken").

128. *Yanez v. United States*, 753 F.Supp. 309, 313 n.3 (N.D. Cal. 1990), *rev'd*, 989 F.2d 323 (9th Cir. 1993).

129. See *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982); see also Schreiber, *supra* note 124, at 327 ("It is important to note that prior success for the purposes of judicial estoppel does not mean that the party won the lawsuit, but rather, that the court in the first lawsuit accepted the questioned statement or assertion as true.").

prior success rule is that only when a party against whom judicial estoppel is asserted enjoyed some prior success “is there a risk of inconsistent results and a threat to the integrity of the judicial process.”<sup>130</sup> Only a small minority of courts permit the application of judicial estoppel in the absence of prior success.<sup>131</sup>

In terms of the other two factors generally considered by the courts, privity and reliance or prejudice, no clear rules have yet emerged. Some courts require that the party asserting judicial estoppel have been a party to the first suit in which the inconsistent position was asserted.<sup>132</sup> Others impose no such requirement.<sup>133</sup> Similarly, whereas some courts require demonstration of reliance by the party attempting to invoke the doctrine,<sup>134</sup> others will apply judicial estoppel in the absence of prejudice to the opposing party.<sup>135</sup> Despite the apparent confusion surrounding these issues, it may be useful for Alaska courts to consider the choices made in other jurisdictions in refining similar elements of Alaska’s quasi-estoppel test.

#### V. THE IMPACT OF ALASKA’S LIBERAL PLEADING RULES ON THE QUASI-ESTOPPEL DOCTRINE

Alaska Rule of Civil Procedure 8(e)(2),<sup>136</sup> which authorizes the pleading of alternative claims or defenses<sup>137</sup> “regardless of con-

---

130. *Morris v. California*, 966 F.2d 448, 452 (9th Cir. 1991).

131. *See, e.g., Stevens Technical Servs.*, 885 F.2d at 589 (holding that judicial estoppel may be invoked, even where the party was unsuccessful in asserting inconsistent positions, if the party engaged in “fast and loose” behavior that undermines the integrity of the court); *Patriot Cinemas Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987).

132. *See, e.g., Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1579 (Fed. Cir. 1984) (stating that it would not apply judicial estoppel “in favor of a total stranger to the first phase of the dispute”); *McClintock v. McCall*, 522 P.2d 343, 346 (Kan. 1974) (requiring same parties); *Norrell v. Electric & Water Plant Bd. of Frankfort*, 557 S.W.2d 900, 903 (Ky. Ct. App. 1977).

133. *See, e.g., Edwards*, 690 F.2d at 598 (“[J]udicial estoppel may be applied even if . . . privity does not exist.”).

134. *See, e.g., Young v. United States Dep’t of Justice*, 882 F.2d 633, 639 (2d Cir. 1989) (“The key ingredient, however, is reliance.”).

135. *See, e.g., Edwards*, 690 F.2d at 598 (“[J]udicial estoppel may be applied even if detrimental reliance . . . does not exist.”); *Tenneco Chems. v. Willam T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982) (“Reliance . . . is not a factor to be considered in judicial estoppel cases.” (citation omitted)).

136. *See* ALASKA R. CIV. P. 8(e)(2).

137. *See* *Colt Indus. Operating Co. v. Frank W. Murphy Mfr., Inc.*, 822 P.2d 925, 931 (Alaska 1991) (“Alaska Civil Rule 8(e)(2) permits parties to set forth arguments in the alternative.”); *Golden Valley Elec. Ass’n v. College Enters.*,

sistency,”<sup>138</sup> may limit judicial application of quasi-estoppel. In *Konstantinidis v. Chen*,<sup>139</sup> a federal appellate court concluded that the judicial estoppel doctrine is inconsistent with modern pleading rules.<sup>140</sup> In particular, the doctrine is inconsistent with Rule 8(e)(2) of the Federal Rules of Civil Procedure, the text of which is virtually identical to Alaska Rule 8(e)(2).<sup>141</sup> Because the Alaska Supreme Court essentially has equated quasi-estoppel with judicial estoppel,<sup>142</sup> and specifically relied on *Konstantinidis* in doing so,<sup>143</sup> there presumably are circumstances under which the application of quasi-estoppel likewise would be inconsistent with the federal rule’s Alaska counterpart.<sup>144</sup>

Both the federal and state procedural rules<sup>145</sup> are intended to discourage parties from selecting in advance and to their detriment

---

Inc., 455 P.2d 215, 216 (Alaska 1969) (citing Rule 8(e)(2) for the proposition that “a litigant may plead in the alternative”).

138. ALASKA R. CIV. P. 8(e)(2); see also *Golden Valley Elec. Ass’n*, 455 P.2d at 216 (“It is elementary . . . that a litigant may . . . advance inconsistent claims or defenses.”) (citing Rule 8(e)(2)); cf. *Earven v. Smith*, 621 P.2d 41, 43 (Ariz. Ct. App. 1980) (stating that comparable Arizona rule “specifically sanction[s] inconsistent pleading”).

139. 626 F.2d 933 (D.C. Cir. 1980).

140. See *id.* at 938.

141. FED. R. CIV. P. 8(e)(2). Although the *Konstantinidis* court did not specifically discuss Rule 8(e)(2), it adopted the analysis in *Parkinson v. California Co.*, where the court did rely upon the rule. See *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956).

142. See *supra* note 5.

143. See *Smith ex rel. Smith v. Marchant Enters., Inc.*, 791 P.2d 354, 356 (Alaska 1990) (stating that Alaska has adopted the judicial estoppel doctrine at issue in *Konstantinidis* under the “rubric” of quasi-estoppel).

144. ALASKA R. CIV. P. 8(e)(2). The Alaska rule is patterned after (and virtually identical to) the federal rule. See generally *Jonz v. Garrett/Airesearch Corp.*, 490 P.2d 1197, 1198 n.3 (Alaska 1971) (“The Alaska Rules of Civil Procedure . . . [were] modeled after the Federal Rules of Civil Procedure.”).

145. Numerous other states have rules similar to the Alaska and federal rules. See, e.g., *Glover v. Giraldo*, 824 P.2d 552, 556 (Wyo. 1992) (“The Wyoming Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure and Rule 8(e)(2) is identical in both.”); *Giron v. Housing Auth.*, 393 So.2d 1267, 1271 (La. 1981) (analyzing a Louisiana rule patterned after Federal Rule 8(e)); *McCormick v. Kopmann*, 161 N.E.2d 720, 727 (Ill. App. Ct. 1959) (discussing an Illinois rule “modeled after Rule 8(e)(2) of the Federal Rules”); *Shapiro v. Solomon*, 126 A.2d 654, 657 (N.J. Super. Ct. App. Div. 1956) (quoting a New Jersey rule “[m]odeled upon Federal Civil Rule 8(e)”). See generally *Henkin, supra* note 122, at 1716 (describing the “practice of permitting inconsistent and alternative pleading” as “now almost universally accepted”).

the factual or legal theories on which they will rely,<sup>146</sup> and to promote the full and final resolution of disputes in a single judicial proceeding.<sup>147</sup> While the Alaska courts have not adopted the *Konstantinidis* court's implicit conclusion that Rule 8(e)(2) precludes the application of quasi-estoppel,<sup>148</sup> the rule undoubtedly limits the circumstances under which the doctrine can apply.<sup>149</sup>

In *Wright v. Vickaryous*,<sup>150</sup> for example, the Alaska Supreme Court cited Rule 8(e)(2)<sup>151</sup> in rejecting the argument that an inconsistency between the plaintiffs' original complaint and a proposed amended complaint, standing alone, precluded the amendment.<sup>152</sup> The court noted that "[t]he fact that an amendment involves a departure from the facts previously alleged is no bar to its allowance, since consistency in pleadings is not required."<sup>153</sup> Instead, the court

---

146. *Cf.* Edward Greenband Enters. v. Pepper, 538 P.2d 389, 391 (Ariz. 1975) ("[T]he policy behind the rule . . . [is to] 'prevent [the pleading party's] being forced to elect in advance and at his peril which theory he will proceed upon.'") (quoting *Sligh v. Watson*, 214 P.2d 123, 125 (Ariz. 1950)) (construing Arizona rule). A similar rationale underlies the rule permitting plaintiffs to pursue alternative relief against multiple defendants in a single action. ALASKA R. CIV. P. 20(a). Both Rule 8(e)(2) and Rule 20(a) "[s]pecifically allow parties to pursue . . . inconsistent claims." *Brown v. United States*, 976 F.2d 1104, 1108 (7th Cir. 1992) (discussing the Alaska rules' federal counterparts).

147. *See* *Glover*, 824 P.2d at 556 ("Alternative and inconsistent pleading . . . articulates the philosophy that parties who are given the capacity to present their entire controversies should in fact do so."); *United States v. G & H Mach.*, 92 F.R.D. 465, 467 (S.D. Ill. 1981) (observing that the federal rule is "essential to a full presentation of all relevant facts and legal theories at trial and final settlement of disputes on their merits") (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1282, at 368 (1969)).

148. This conclusion is implicit in *Konstantinidis* (as opposed to being the express holding of the case) only in the sense that the court was considering judicial estoppel, rather than quasi-estoppel, *see* *Konstantinidis v. Chen*, 626 F.2d 933, 936-40 (D.C. Cir. 1980). The two doctrines may not be precisely the same. *See, e.g.,* *Sailes v. Jones*, 499 P.2d 721, 725-26 (Ariz. Ct. App. 1972) (analyzing quasi-estoppel and judicial estoppel somewhat differently); *see also* *Przybylski v. Otis Elevator Co.*, No. 05-92-02291-CV, 1994 WL 9113, at \*2 (Tex. Ct. App. Jan. 13, 1994) (describing the two doctrines as "related" concepts).

149. *Cf. Rosa v. CWJ Contractors, Ltd.*, 664 P.2d 745, 751 n.12, 752 (Haw. Ct. App. 1983) (characterizing judicial estoppel as a variation of quasi-estoppel, and concluding that those doctrines cannot be interpreted to preclude the inconsistent pleading authorized by Rule 8(e)(2)'s Hawaii counterpart).

150. 598 P.2d 490 (Alaska 1979).

151. *See id.* at 496 n.18.

152. *See id.* at 496.

153. *Id.* (quoting 3 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 15.08[2], at 15-71 (2d ed. 1948) (footnote omitted)); *cf. MacCollum v. Perkinson*,

suggested that a party is estopped from pleading inconsistently only if one of the positions was asserted in bad faith.<sup>154</sup>

Inconsistent statements authorized by Rule 8(e)(2) are, by the rule's express terms, subject to the requirements of Rule 11 of the Alaska Rules of Civil Procedure.<sup>155</sup> Alaska Rule 11 (which, like Rule 8(e)(2), is virtually identical to its federal counterpart)<sup>156</sup> prohibits taking any position for an improper purpose.<sup>157</sup> Rule 11 is violated by assertions made in bad faith.<sup>158</sup> Rule 8(e)(2)'s incorporation of Rule 11's "improper purpose" standard makes it clear that Rule 8(e)(2) does not authorize inconsistent assertions made in bad faith,<sup>159</sup> and suggests that the key to analyzing the interplay between Rule 8(e)(2) and the quasi-estoppel doctrine often will involve determining whether an inconsistent position would violate Rule 11.<sup>160</sup>

As an ancillary matter, this analysis may provide a basis for defining the quasi-estoppel doctrine's elusive unconscionability requirement.<sup>161</sup> Courts in other jurisdictions with variations of Rule

---

913 P.2d 1097, 1107 (Ariz. Ct. App. 1996) (rejecting the contention that "leave to file a second amended complaint should have been denied because the new claims asserted by [the plaintiff] were inconsistent with his previously asserted . . . theory" because parties can plead "alternatively and inconsistently" under Rule 8(e)(2)'s Arizona counterpart).

154. See *Wright*, 598 P.2d at 496.

155. See ALASKA R. CIV. P. 8(e)(2).

156. See *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1227-28 & n.6 (Alaska 1992).

157. ALASKA R. CIV. P. 11.

158. See *Keen v. Ruddy*, 784 P.2d 653, 658 (Alaska 1989) (noting that the pleading standards established by Rule 11 are more stringent than mere "good faith"); *Sanuita v. Common Laborer's & Hod Carriers Union of Am., Local 341*, 402 P.2d 199, 200 (Alaska 1965) (stating that "the overlying purpose of the rule has been to insure . . . good faith").

159. See *Plumer*, *supra* note 24, at 422 ("[R]ule 8(e)(2) does not endorse all inconsistencies; neither alternative, hypothetical, nor inconsistent assertions are permitted when they are interposed for an improper purpose under rule 11.").

160. "Specifically, the question is whether Rule 8(e)(2) . . . permits [the party] to plead as it did, and whether Rule 11 prevents such pleading." *City of Kingsport v. Steel & Roof Structure, Inc.*, 500 F.2d 617, 619 (6th Cir. 1974); *cf. Plumer*, *supra* note 24, at 422 ("Defining 'improper purpose' [within the meaning of Rule 11] . . . is the key to understanding why [Rule 8(e)(2)] undercuts judicial estoppel only in certain circumstances.").

161. See *Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 (Alaska 1978) (noting that the determination of whether the assertion of inconsistent positions would be unconscionable "is essentially a factual one").

11 have held that the rule is violated by unconscionable conduct,<sup>162</sup> and that this standard is satisfied where a party asserts a position inconsistent with a previously successful position asserted in a prior case.<sup>163</sup> Under this view, quasi-estoppel could be applied without running afoul of Rule 8(e)(2) where a party asserts a position inconsistent with one on which it was successful in a previous action<sup>164</sup> because Rule 11 would have been violated (and Rule 8(e)(2) therefore does not apply) under those circumstances.<sup>165</sup> In other words, the assertion of inconsistent positions appears to be unconscionable for purposes of both Rule 11<sup>166</sup> and the quasi-estoppel doctrine where the party has changed its position after succeeding on the first assertion.<sup>167</sup>

Whether there are other circumstances in which the application of quasi-estoppel can be reconciled with Rule 8(e)(2) is more problematic.<sup>168</sup> On one hand, there certainly would seem to be cir-

---

162. See *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59, 62 (Utah Ct. App. 1993); see also *Mitchell v. Carmichael*, 522 S.W.2d 869, 871 (Tenn. 1975) (“Rule 11 of the Tennessee Rules of Civil Procedure requires that no attorney engage in . . . unconscionable litigation.”).

163. See *Schoney*, 863 P.2d at 62; see also *In re Liberty Music & Video, Inc.*, 50 B.R. 379, 385 (S.D.N.Y. 1985) (concluding that Rule 11 was violated where a party’s assertion of inconsistent positions appeared to be based solely upon whether the first tribunal’s decisions “favored or hurt it”).

164. See *City of Kingsport*, 500 F.2d at 620 (“[C]ases where an estoppel has been found to bar a party from asserting a position contrary to that relied on in an earlier action, are cases where the party was successful in its initial reliance and tried to change positions in subsequent litigation.”).

165. See *Astor Chauffeured Limousine Co. v. Runnfeltd Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) (“Why should one be entitled to win the first suit by demonstrating A and the second suit by demonstrating *not-A*? One of these must be wrong; indeed, inconsistency [under these circumstances] probably demonstrates a violation of [Rule] 11.”). See generally Schreiber, *supra* note 124, at 335 (observing that “Rule 8(e)(2) *only* allows inconsistent pleadings if they are made in good faith,” and that a litigant “cannot in good faith ask a court to accept a position contrary to one asserted by the litigant and accepted by the court in a prior litigation”).

166. See *Schoney*, 863 P.2d at 62.

167. This conclusion is suggested by the analysis in *Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97 (Alaska 1978), where the court declined to apply quasi-estoppel primarily because the party against whom the doctrine had been invoked had not been successful in the proceeding in which the previous inconsistent position had been taken. See *id.* at 103.

168. On at least one occasion, the Alaska Supreme Court has indicated that, in order to establish a violation of Rule 11 (which would preclude the application of Rule 8(e)(2) and, correspondingly, permit the application of quasi-estoppel), a

## 1998] ALASKA'S QUASI-ESTOPPEL DOCTRINE 303

cumstances under which the assertion of inconsistent positions might violate Rule 11, in which case Rule 8(e)(2) would not preclude the application of quasi-estoppel, even though the party asserting inconsistent positions did not prevail on its initial assertion.<sup>169</sup> In addition, because Rule 8(e)(2)'s applicability may be limited to the assertion of inconsistent positions within a single proceeding,<sup>170</sup> there is some basis for concluding that quasi-estoppel would not conflict with the rule whenever the doctrine was being applied to preclude the assertion of inconsistent positions in separate or successive actions,<sup>171</sup> regardless of any Rule 11 violation.<sup>172</sup>

Nevertheless, it seems clear that quasi-estoppel is most easily reconciled with Rule 8(e)(2) in cases where the party attempting to assert inconsistent positions has prevailed as a result of its first assertion.<sup>173</sup> The extent to which there are other circumstances under which the assertion of inconsistent positions could be precluded by the quasi-estoppel doctrine without running afoul of Rule 8(e)(2)

---

party need not demonstrate "subjective bad faith." *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1228 (Alaska 1992).

169. *See, e.g.*, *American Auto. Ass'n v. Rothman*, 101 F. Supp. 193, 196 (E.D.N.Y. 1951) (indicating that a party's assertion of a position inconsistent with an allegation made in a pleading it filed less than six weeks earlier potentially violated Rule 11); *see also* *Plumer, supra* note 24, at 423 n.96 (observing that a party who was unsuccessful in asserting its initial position "does not necessarily controvert . . . [R]ule 11 by changing positions in a second proceeding" (emphasis added)); *cf.* *Walker v. Walker*, 854 F. Supp. 1443, 1463 (D. Neb. 1994) (concluding that Rule 11 was not violated by a "factually well founded" assertion that was inconsistent with a position the party had taken previously).

170. *See* *Fay v. Federal Nat'l Mortgage Ass'n*, 647 N.E.2d 422, 426 n.10 (Mass. 1995) (interpreting the federal rule).

171. *See, e.g.*, *Yanez v. United States*, 753 F. Supp. 309, 312 (N.D. Cal. 1990) ("[T]his court interprets Rule 8(e)(2) to mean that parties can plead alternative theories or claims in the same action, but not in separate actions."), *rev'd*, 989 F.2d 323 (9th Cir. 1993) (reversing on the ground that the "claims are not inconsistent"). *See generally* *AFN, Inc. v. Schlott, Inc.*, 798 F. Supp. 219, 227 n.12 (D.N.J. 1992) (distinguishing between "intentional self-contradiction in separate legal proceedings" and the "permissible practice" of pleading in the alternative).

172. In other words, Rule 8(e)(2)'s application may be limited to the assertion of inconsistent positions in a "single suit," irrespective of any limitations on the rule's applicability imposed by its express incorporation of Rule 11 standards. *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990).

173. *See* *Paschke v. Retool Indus.*, 519 N.W.2d 441, 444 n.4 (Mich. 1994) (observing that "[t]he 'prior success' model is more narrowly tailored to allow for alternative pleadings in the same or different proceedings").

is more difficult to predict, and probably must be resolved on a fact-specific, case-by-case basis.<sup>174</sup>

#### VI. A PROPOSAL FOR A MORE PREDICTABLE QUASI-ESTOPPEL TEST IN ALASKA

Due to the confusion and unpredictability caused by the Alaska Supreme Court's fact-specific analysis of such ambiguous factors as unconscionability,<sup>175</sup> the court should consider refining and clarifying its test in order to make the quasi-estoppel doctrine more useful to practitioners. First, Alaska courts should require that the two positions at issue necessarily and fully conflict in order to be considered inconsistent.<sup>176</sup> Second, Alaska courts should clarify that the inconsistent positions asserted need not be taken in separate judicial proceedings.<sup>177</sup> Third, the Alaska Supreme Court should formally reject any privity requirement, given that the courts, rather than individual litigants, are the intended beneficiaries of the quasi-estoppel doctrine.<sup>178</sup> Finally, consistent with the goal of protecting the integrity of the judicial system, Alaska courts should require those seeking quasi-estoppel to have acted in good faith.<sup>179</sup>

##### A. The Genuine Inconsistency Requirement

The first issue to be determined in analyzing any quasi-estoppel argument is whether the two positions at issue genuinely

---

174. See generally Plumer, *supra* note 24, at 422-23 ("[T]he circumstances accompanying a person's intertrial inconsistency will determine whether such inconsistency is proper or improper for rule 11 purposes.").

175. The courts generally recognize that quasi-estoppel is an amorphous doctrine. Indeed, one court has noted that "[a]s much as in any area of the law, quasi estoppel cases turn on the particular facts of each case." *Mayer v. Mayer*, 311 S.E.2d 659, 668 (N.C. App. 1984). The Alaska Supreme Court itself has noted that because quasi-estoppel is an equitable doctrine, one of its principal features is its flexibility. See *In re Lampert*, 896 P.2d 214, 221 (Alaska 1995). Nevertheless, certain fundamental tenets of the doctrine have begun to emerge. For example, the doctrine can be applied "defensively," either as an affirmative defense or to preclude the assertion of an otherwise valid defense, but it cannot be invoked "offensively" to support an independent claim for relief. See *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 380 n.7 (Alaska 1984).

176. See *infra* notes 180-205 and accompanying text.

177. See *infra* notes 206-17 and accompanying text.

178. See *infra* notes 218-24 and accompanying text.

179. See *infra* notes 225-34 and accompanying text.

are inconsistent.<sup>180</sup> In *Municipality of Anchorage v. Leigh*,<sup>181</sup> for example, the Alaska Supreme Court declined to apply quasi-estoppel because the position asserted by the petitioner actually was consistent with the previously asserted position alleged to be in conflict.<sup>182</sup> In an action arising out of an automobile accident,<sup>183</sup> the court in *Smith v. Thompson* likewise held that the doctrine did not preclude the defendant from asserting a statute of limitations defense because there was no basis for concluding that he had previously taken a position inconsistent with the assertion of that defense.<sup>184</sup>

As a practical matter, identifying genuine inconsistencies between two positions can be difficult. The Alaska Supreme Court has indicated that quasi-estoppel will apply only where it would be unconscionable to permit a party to assert inconsistent positions.<sup>185</sup> This “unconscionability” apparently may arise from the falsity of either the initial position<sup>186</sup> or the subsequent position,<sup>187</sup> because neither is, as a general proposition, necessarily more likely than the other to be true.<sup>188</sup>

---

180. See, e.g., *Smith v. Thompson*, 923 P.2d 101, 105 (Alaska 1996) (holding that quasi-estoppel applies only where a party is “asserting a position inconsistent with one he had previously taken”).

181. 823 P.2d 1241 (Alaska 1992).

182. See *id.* at 1245-46. The respondent argued that the petitioner was estopped from opposing a resolution of the constitutionality of a definitional provision in Alaska’s workers’ compensation laws on the basis of hypothetical facts because the petitioner had asserted in its petition for appellate review that “an important constitutional question” was implicated by the provision. *Id.* The Alaska Supreme Court rejected the respondent’s argument; because the petition for review apparently included an assertion that the lower court’s decision improperly was based on hypothetical facts, the court concluded that the petitioner’s position had not changed. See *id.* at 1246.

183. See *Smith*, 923 P.2d at 102-03.

184. See *id.* at 104-05.

185. See *Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 (Alaska 1978) (citation omitted).

186. See *Union Oil Co. v. Alaska*, 804 P.2d 62, 66 n.7 (Alaska 1990) (observing that the doctrine applies “where the circumstances of the new position would render the previous position unconscionable”).

187. See *Jamison*, 576 P.2d at 102 (observing that the doctrine applies where the “assertion of the second position [would be] unconscionable”).

188. See *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir. 1996) (discussing judicial estoppel). However, as a practical matter, it is the assertion of the second position that is typically precluded by the doctrine’s application. See, e.g., *Russell v. Rolfs*, 893 F.2d 1033, 1043 (9th Cir. 1990) (Kozinski, J., dissenting) (“Estoppel operates forward, not backward. If there . . . [is] an incon-

Unfortunately, as of yet, there are no clear cut indications of when an inconsistency will be deemed unconscionable.<sup>189</sup> An Oklahoma court has stated that “it is enough that the party plays fast and loose with the courts by intentional self-contradiction as a means of obtaining an unfair advantage.”<sup>190</sup> Among other things, the magnitude of the inconsistency between two positions has been an important consideration in determining whether this standard has been met, because the inconsistency clearly must be significant before the doctrine will apply.<sup>191</sup>

As defining inconsistency on a case-by-case basis can be difficult and unpredictable, the Alaska Supreme Court should consider adopting the bright line rule set forth by the Ninth Circuit in *Arizona v. Shamrock Foods Co.*<sup>192</sup> In that case, the court held that the two positions asserted by a litigant must “necessarily” conflict in order to be inconsistent.<sup>193</sup> The adoption of such a rule would benefit Alaska courts and litigants in two significant ways. First, as a practical matter, the rule would be predictable and much easier to apply than the present fact-specific “unconscionability” test. Second, as a matter of policy, a bright line rule would be consistent with the truth-seeking function of the judicial process.

As the United States Supreme Court has stated, “[c]ourt proceedings are held for the solemn purpose of endeavoring to ascer-

---

sistency between [a party’s] initial representation . . . and its later assertions . . . , the first argument could estop the second, but the second could not estop the first.”). *Cf. Rissetto*, 94 F.3d at 603 (“The tribunal in which the litigant made the first statement . . . is not in a position to do anything about it[.]”).

189. Whether the assertion of inconsistent positions would be unconscionable is essentially a factual question to be determined on a case-by-case basis. *See Jamison*, 576 P.2d at 101-02 & n.6.

190. *Willard v. Ward*, 875 P.2d 441, 443 (Okla. Ct. App. 1994) (quoting *Coleman v. Southern Pac. Co.*, 296 P.2d 386, 392 (Cal. Ct. App. 1956)); *see also Woods v. Woods*, 638 S.W.2d 403, 406 (Tenn. Ct. App. 1982) (observing that “*quasi estoppel* . . . estops a party from playing fast and loose with the courts”). Not surprisingly, this standard has also been applied in evaluating the closely related judicial estoppel doctrine. *See, e.g., Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-67 (4th Cir. 1982).

191. *See Jamison*, 576 P.2d at 102 (discussing the “importance of significant inconsistency”).

192. 729 F.2d 1208 (9th Cir. 1984).

193. *See id.* at 1215 (holding that plaintiffs were not estopped from alleging a retail price-fixing conspiracy because the existence of a conspiracy at the wholesale level did not preclude the existence of an independent conspiracy at the retail level).

tain the truth which is the *sine qua non* of a fair trial.”<sup>194</sup> Several federal appellate courts have warned that the doctrine of judicial estoppel is “at odds with the truth-seeking function of courts of law.”<sup>195</sup> This is because the application of the doctrine may prevent a litigant from asserting facts even where they are true. Presumably, Alaska’s doctrine of quasi-estoppel potentially could pose the same danger.

By requiring that a party’s positions necessarily conflict before invoking quasi-estoppel, the Alaska Supreme Court would avoid jeopardizing the truth-seeking goal of the judicial process (because two positions that necessarily conflict cannot possibly both be true), while still protecting the integrity of the courts. Furthermore, Alaska courts should allow exceptions where a new discovery or material change of circumstances indicates that a litigant had no knowledge of the falsity of a previously asserted position.<sup>196</sup> This balancing of interests best would serve the policy objectives underlying the quasi-estoppel doctrine without permitting litigants to “blow hot and cold.”

A litigant’s full knowledge of the facts when asserting the initial position is characterized as a prerequisite to the doctrine’s application, rather than simply as a factor to be considered in making

---

194. *Estes v. Texas*, 381 U.S. 532, 540 (1965); *see also* *United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) (“Truth is the essential objective of our adversary system of justice.”).

195. *American Methyl Corp. v. E.P.A.*, 749 F.2d 826, 833 n.44 (D.C. Cir. 1984) (citation omitted), *vacated on other grounds*, 768 F.2d 385 (D.C. Cir. 1985); *see also* *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986) (“[A]doption of judicial estoppel . . . would discourage the determination of cases on the basis of the true facts as they might be established ultimately.” (authority and internal quotation marks omitted)); *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990) (indicating that the application of judicial estoppel can “imping[e] on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement”).

196. *See* *Mohamed v. Marriott Int’l, Inc.*, 944 F. Supp. 277, 281 (S.D.N.Y. 1996). *See also* *Henkin*, *supra* note 122, at 1714 (observing that “there are certain cases in which a litigant cannot help but assert inconsistent positions”). A change in circumstances is perhaps the most obvious example. *See* *Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 (Alaska 1978) (observing that “changed circumstances [may] tend to justify . . . [an] inconsistency”). Indeed, there actually may be no inconsistency between two different positions where there has been a “material change in circumstances in the interim.” *Russell v. Rolfs*, 893 F.2d 1033, 1043 (9th Cir. 1990) (Kozinski, J., dissenting).

the unconscionability determination.<sup>197</sup> In order to satisfy this requirement, the first assertion must have been informed and purposeful,<sup>198</sup> and not merely the result of a mistake on the part of the party making it.<sup>199</sup> This in turn suggests that the party must have been cognizant of the ramifications of its representations and been apprised of its legal rights in that regard.<sup>200</sup> Whether the party acted on the advice of counsel is an important consideration in analyzing this issue because such advice indicates that the party was fully apprised of the particulars.<sup>201</sup>

The Alaska Supreme Court has discussed certain circumstances in which the integrity of the court might be threatened where parties have full knowledge that their assertions of inconsistent positions constitute abuse of the judicial process. In *Maynard v. State Farm Mutual Automobile Insurance Co.*,<sup>202</sup> the court indicated that the assertion of a position at trial might be precluded by the doctrine of quasi-estoppel where that position is inconsistent with pre-litigation correspondence drafted by that party.<sup>203</sup> Along similar lines, the court in *Smith v. Stratton*<sup>204</sup> estopped the defendant from raising a statute of limitations defense where she had requested and received two extensions of time to answer the complaint.<sup>205</sup> Although these cases do not apply to positions taken in a

---

197. See *Jamison*, 576 P.2d at 102 (“It is necessary . . . that any representation made to the party claiming quasi-estoppel must have been based with [sic] full knowledge of the facts.”) (citing *Donaldson v. LeNore*, 540 P.2d 671, 674 (Ariz. 1975)).

198. See *In re Lampert*, 896 P.2d 214, 221 (Alaska 1995). The Alaska Supreme Court has left open the question of whether constructive knowledge is sufficient to satisfy this requirement. See *Keener v. State*, 889 P.2d 1063, 1068 (Alaska 1995).

199. See *Lampert*, 896 P.2d at 221.

200. See *Anderson v. Anderson*, 585 P.2d 938, 946 (Haw. 1978).

201. See, e.g., *Lampert*, 896 P.2d at 221.

202. 902 P.2d 1328 (Alaska 1995).

203. See *id.* at 1330-31. However, in its most recent analysis of quasi-estoppel, the Alaska Supreme Court refused to apply the doctrine where the alleged inconsistency was contained in a memorandum, prepared by an attorney, estimating a company's damages in a particular case. See *Power Constructors, Inc. v. Taylor & Hintze*, Nos. S-7033, 7123, 7124, 1998 Alas. LEXIS 117, 10-11 (Alaska June 18, 1998). Although the attorney's assessment of damages was inconsistent with the position adopted by the company at trial, the court held that the memorandum was merely a tentative, “best case scenario” estimate, particularly given that the memorandum explicitly reserved the company's right to change its position on damages. See *id.*

204. 835 P.2d 1162 (Alaska 1992).

205. See *id.* at 1166.

formal judicial proceeding, these decisions suggest that where a party attempts to improve his litigation position by asserting inconsistent positions with full knowledge of the facts, it would be unconscionable to allow him to prevail.

#### B. The Prior Judicial Success Requirement

In addition to requiring genuine inconsistency, it would be useful for Alaska courts to specify whether the inconsistent position at issue in a given case must have been successfully asserted in a prior judicial proceeding. As noted above, the majority of jurisdictions adopting judicial estoppel require a party's prior inconsistent position to be judicially adopted before invoking the doctrine.<sup>206</sup> Alaska courts do not appear to require such judicial success. For example, in the *Lampert* case discussed above, the plaintiff was estopped from contesting his conveyance of property to his stepdaughter, despite the fact that there was no prior court proceeding.<sup>207</sup>

Consistent with prior Alaska case law, the Alaska courts should not require prior judicial success before invoking quasi-estoppel. Rather, because unconscionability lies at the heart of the doctrine, the courts should consider whether the integrity of the judicial system would be jeopardized if quasi-estoppel were not invoked. An analysis of whether unconscionability exists should turn on whether the party asserting inconsistent positions gained an advantage or produced a disadvantage by doing so.<sup>208</sup>

Alaska courts do not appear to require that an inconsistent position have been asserted in a prior judicial proceeding, but, an important consideration in analyzing the unconscionability issue is whether the party asserting inconsistent positions gained an advantage through the assertion of the first position,<sup>209</sup> and whether the party invoking quasi-estoppel relied on the inconsistency to its detriment.<sup>210</sup> In *KTVB, Inc. v. Boise City*,<sup>211</sup> for example, the Idaho Su-

---

206. See, e.g., *Stevens Technical Servs., Inc. v. Steamship Brooklyn*, 885 F.2d 584, 588 (9th Cir. 1989); *Yanez v. United States*, 753 F.Supp. 309, 313 n.3 (N.D. Cal. 1990), *rev'd*, 989 F.2d 323 (9th Cir. 1993).

207. See *In re Lampert*, 896 P.2d 214, 221 (Alaska 1995).

208. See, e.g., *id.*

209. See *id.* However, it apparently is "not necessary for the estopped party to have gained any tangible advantage from the transaction. Rather, it is sufficient to show that the party seeking estoppel would suffer a distinct *disadvantage* from the change in position." *Id.* at 221 n.9.

210. See *Jamison*, 576 P.2d at 102-03. While reliance is not a prerequisite to the application of quasi-estoppel, it is a factor to be considered in analyzing the unconscionability issue. See *id.* at 102.

preme Court indicated that prejudice to the person invoking quasi-estoppel is a prerequisite to the doctrine's application.<sup>212</sup> The Alaska Supreme Court subsequently cited *KTVB* with approval<sup>213</sup> in declining to apply quasi-estoppel where the invoking parties had not been prejudiced by the inconsistency.<sup>214</sup> In short, not only is prejudice to the party invoking quasi-estoppel relevant to a determination of whether the assertion of inconsistent positions would be unconscionable,<sup>215</sup> it may well be the single most important consideration in analyzing that issue.<sup>216</sup>

As noted above, Alaska courts should also require that the party attempting to assert inconsistent positions do so with full knowledge of all the facts, before applying quasi-estoppel.<sup>217</sup> Prior judicial success should not be an absolute requirement for adopting quasi-estoppel; yet it should be a factor in whether the doctrine is applied.

### C. The "Mutuality" or "Privity" Requirement

In an effort to clear up any remaining confusion, Alaska courts formally should reject any "mutuality" or "privity" requirement in connection with the quasi-estoppel doctrine. In the estoppel context, "mutuality" or "privity" refers to a requirement that "both the party asserting estoppel and the party against whom estoppel was asserted in the second action had to have been parties

---

211. 486 P.2d 992 (Idaho 1971).

212. See *id.* at 995 (describing "detriment . . . [to] the person seeking application of the doctrine" as a "requirement[] for proper application of quasi estoppel").

213. See *Jamison*, 576 P.2d at 101-02 n.6. The *KTVB* court in turn had quoted from *Godoy v. County of Hawaii*, 354 P.2d 78 (Haw. 1960), a case upon which the Alaska Supreme Court has relied in analyzing the quasi-estoppel doctrine. See *KTVB*, 486 P.2d at 994; see also *supra* notes 97-107 and accompanying text.

214. See *Jamison*, 576 P.2d at 103.

215. See *Alaska Statebank v. Kirschbaum*, 662 P.2d 939, 943 (Alaska 1983).

216. See *Jamison*, 576 P.2d at 102 n.6 ("The requirements for proper application of quasi-estoppel are . . . that the person against whom it is sought to be applied has previously taken an inconsistent position . . . to the detriment of the person seeking application of the doctrine." (quoting *KTVB*, 486 P.2d at 995)); see also *University of Hawaii Prof'l Assembly v. University of Hawaii*, 659 P.2d 720, 725 (Haw. 1983) ("[Q]uasi estoppel is grounded on the equitable principle that one should not be permitted to take a position inconsistent with a previous position if the result is to harm another."), cited with approval in *In re Lampert*, 896 P.2d 214, 221 (Alaska 1995).

217. See *supra* notes 196-205 and accompanying text.

to the first action.”<sup>218</sup> The Alaska appellate courts have not considered specifically whether the requirement applies to the application of quasi-estoppel.<sup>219</sup> However, the Alaska Supreme Court generally has abandoned any mutuality requirement in other estoppel contexts,<sup>220</sup> and there is little basis for concluding that its analysis of the quasi-estoppel doctrine would differ.<sup>221</sup> Thus, at a minimum, Alaska courts should hold that the doctrine can be invoked by a litigant who was not a party to the prior proceedings<sup>222</sup> (although perhaps not *against* such a litigant),<sup>223</sup> which is typically the result reached in cases applying the closely related judicial estoppel doctrine.<sup>224</sup> This result would be consistent with the doctrine’s goal of protecting the integrity of the courts rather than promoting fairness between individual litigants.

#### D. The Clean Hands Doctrine

Finally, Alaska courts should invoke the doctrine of quasi-estoppel only when the parties seeking the estoppel have not engaged in any wrongdoing in connection with the matters being liti-

---

218. State v. Kott, 636 P.2d 622, 625 (Alaska Ct. App. 1981), *aff’d*, 678 P.2d 386 (Alaska 1984).

219. This issue also has rarely arisen in other jurisdictions. However, at least one court has concluded that a party who lacks privity cannot invoke the doctrine. See Aetna Cas. & Sur. Co. v. Moore, 386 S.W.2d 639, 641 (Tex. Civ. App. 1964).

220. See, e.g., State v. United Cook Inlet Drift Ass’n, 895 P.2d 947, 951-52 (Alaska 1995) (declining to adopt an exception to the applicability of nonmutual collateral estoppel for the state government).

221. *But see* Pennington v. Snow, 471 P.2d 370, 377 (Alaska 1970) (“If the particular circumstances of the prior adjudication would make it unfair to allow a person who was not a party to the first [proceeding] to invoke . . . estoppel then the requirement of mutuality must still be applied.”).

222. *But cf.* Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964) (holding that “[q]uasi-estoppel . . . arises only in favor of the parties to the first suit and those in privity with them”).

223. *Cf.* Murray v. Feight, 741 P.2d 1148, 1153 (Alaska 1987) (holding that related collateral estoppel doctrine “must be asserted against a party or one in privity with a party to the first action”).

224. See, e.g., Lillo v. Thee, 676 S.W.2d 77, 81 (Mo. Ct. App. 1984) (“The doctrine of judicial estoppel, which is grounded in public policy, holds that a person who states facts under oath, during the course of a trial, is estopped to deny such facts in a second suit, even though the parties in the second suit may not be the same as those in the first.”). However, the court in *Swilley* held that only parties to the initial proceeding (and their privies) can invoke quasi-estoppel, even though judicial estoppel generally can be invoked “by strangers to the record in the former proceeding.” *Swilley*, 374 S.W.2d at 875.

gated. "Clean hands" is an equitable doctrine<sup>225</sup> requiring those seeking equitable relief, such as that provided by quasi estoppel, to have acted in good faith.<sup>226</sup> Although the Alaska Supreme Court indicated in *In re Lampert*<sup>227</sup> that the doctrine of clean hands may limit the application of quasi-estoppel, the Court was not required to decide that issue because wrongdoing on the part of the party invoking quasi-estoppel was not present in the case.<sup>228</sup>

Nevertheless, the Alaska Supreme Court has applied the clean hands doctrine to preclude the application of other forms of estoppel.<sup>229</sup> It also has observed that quasi-estoppel is an equitable doctrine,<sup>230</sup> and that a party "seeking to invoke equitable principles must come before the court with clean hands"<sup>231</sup> – that is, "[e]quity requires that those who seek it shall have acted fairly and without fraud or deceit as to the controversy in issue."<sup>232</sup> This analysis certainly suggests that the clean hands doctrine should be applied to limit the application of quasi-estoppel,<sup>233</sup> although technically this still may be an open question in Alaska.<sup>234</sup>

## VII. CONCLUSION

In summary, quasi-estoppel is an equitable doctrine that may preclude a party from taking a position that is inconsistent with one it previously asserted.<sup>235</sup> Quasi-estoppel differs in certain important respects from other related estoppel doctrines recognized

---

225. See *Wirum & Cash Architects v. Cash*, 837 P.2d 692, 708 n.24 (Alaska 1992).

226. See *Knaebel v. Heiner*, 663 P.2d 551, 554 (Alaska 1983).

227. 896 P.2d 214 (Alaska 1995).

228. See *id.* at 222 n.11.

229. See, e.g., *Alaska Continental Bank v. Anchorage Commercial Land Assocs.*, 781 P.2d 562, 565 n.6 (Alaska 1989) (discussing equitable estoppel).

230. See *Bromley v. Mitchell*, 902 P.2d 797, 802 (Alaska 1995); *Lampert*, 896 P.2d at 220.

231. *Alaska Continental*, 781 P.2d at 565 n.6.

232. *Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d 109, 114 n.2 (Alaska 1990). This is the standard the Alaska Supreme Court had previously articulated in defining the clean hands doctrine. See *Knaebel v. Heiner*, 663 P.2d 551, 554 (Alaska 1983).

233. See *Merdes v. Underwood*, 742 P.2d 245, 248-49 & n.4 (Alaska 1987) (stating, in a case involving both equitable estoppel and quasi-estoppel, that "[u]sually a person cannot claim the benefit of estoppel if he himself has acted unfairly").

234. See *generally Stuebner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 166 (Tex. App. 1991) (discussing the apparent dearth of "case law holding that 'clean hands' are required to assert the defense of quasi estoppel").

235. See *supra* notes 3-4 and accompanying text.

in Alaska,<sup>236</sup> principally by focusing on whether the assertion of inconsistent positions would be unconscionable.<sup>237</sup> Unfortunately, present case law offers relatively little guidance with respect to when the assertion of inconsistent positions will be deemed unconscionable.<sup>238</sup> While unconscionability presumably will be found where the assertion of inconsistent positions would be grossly unfair, unjust, inequitable, oppressive, or unduly harsh, the term has not been more specifically defined by the Alaska courts.<sup>239</sup> Because the term has not been defined, the issue ordinarily must be resolved on a fact-specific, case-by-case basis, as borne out by the Alaska cases that have analyzed the quasi-estoppel doctrine.<sup>240</sup>

Because confusion and unpredictability may result from Alaska's present formulation of the quasi-estoppel doctrine, the Alaska Supreme Court should consider refining its test. Specifically, the court should consider imposing a requirement that the inconsistent positions at issue "necessarily conflict."<sup>241</sup> While the inconsistent positions probably need not be taken in separate judicial proceedings,<sup>242</sup> Alaska courts should continue to require that the party against whom quasi-estoppel is invoked have gained an advantage or produced a disadvantage<sup>243</sup> with full knowledge of the facts.<sup>244</sup> Finally, while Alaska courts should reject any privity requirement with respect to quasi-estoppel,<sup>245</sup> the courts should consider the identity of the party seeking to invoke the doctrine and ensure that the party has acted in good faith.<sup>246</sup> These requirements would further the principal goal of quasi-estoppel, which is to protect the integrity of the judicial process.<sup>247</sup> Furthermore, clarification of the prerequisites for application of quasi-estoppel would make the doctrine a more valuable tool for everyone involved in litigation.

---

236. See *supra* notes 23-61 and accompanying text.

237. See *Jamison v. Consolidated Utils., Inc.*, 576 P.2d 97, 102 (Alaska 1978).

238. See *supra* notes 161-63 and accompanying text.

239. See *Jamison*, 576 P.2d at 102 n.7 (citing cases from other jurisdictions construing unconscionability).

240. See *supra* notes 79-116 and accompanying text.

241. See *supra* notes 180-205 and accompanying text.

242. See *supra* notes 206-07 and accompanying text.

243. See *supra* notes 208-16 and accompanying text.

244. See *supra* note 217 and accompanying text.

245. See *supra* notes 218-24 and accompanying text.

246. See *supra* notes 225-34 and accompanying text.

247. See *supra* note 8 and accompanying text.