

▲ **JUDICIAL ESTOPPEL**

Though obscure, the common law affirmative defense of judicial estoppel can greatly impact employment discrimination claims. The doctrine can be used to bar claimants from taking litigation positions that are clearly contrary to positions taken in prior judicial or quasi-judicial proceedings. In employment litigation, defendants may use the affirmative defense when:

(1) a discrimination claimant has previously filed bankruptcy but did not list the known discrimination claims as assets on the petition; and, (2) an ADA disability claimant, who must be qualified to perform the job in question to have standing, has already filed for and received Social Security disability benefits—requiring certification that one effectively cannot work at all, due to disability. In

both instances, the claimants' inconsistent legal positions may be judged to "crash face first" against each other, requiring dismissal of the discrimination claim.

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▼ **FORUM-SELECTION CLAUSES**

When does a forum-selection clause referring to the courts "of" a state mean you have access to some of the courts located in that state, but not others?

A recent federal court decision out of the District of Minnesota considered this very issue, and clarified the circumstances when a court "in" a state is not a court "of" that state. The court's decision may come as a surprise.

In *Portfolio Management Group, LLC v. Bitach Funds I, LLC*, No. 09-CV-3193, 2010 WL 727293 (D. Minn. 03/02/10), the Hon. Patrick J. Schiltz declined to adopt a magistrate judge's report and recommendation and held that disputes arising from an agreement with a forum-selection clause that granted the "[c]ourts of Minnesota" sole jurisdiction could not be heard in Minnesota's federal courts because while a federal court "sits in Minnesota," it is not a "[c]ourt of Minnesota." In doing so, the court held that its decision was in agreement with the majority of the federal courts considering this issue.

So, the next time you need to decide where to bring a lawsuit, or would prefer to be in a different forum, compare the language in the forum-selection clause in your case to the one at issue in this decision, to determine if this decision impacts your choice of forum. Conversely, when you're drafting your next agreement, think about whether your client could garner an advantage by having access to either court or by limiting suits to state courts alone by simply turning an "in" into an "of."

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▼ **ERISA DISABILITY CLAIMS**

Claimants for long-term disability benefits under ERISA plans often run into problems, sometimes insurmountable, due to the discretion accorded plan administrators in denying their applications. Generally, when plans grant administrators broad discretion, the courts apply a lenient standard of review, usually upholding their denials. On other hand, the absence of such discretion can lead to a more exacting review of denied claims, often resulting in reversal of such denials.

The 8th Circuit Court of Appeals recently addressed the issue in an unusual context:

The formal plan description did not

grant any administrative discretion, but a summary of the plan did. Joining three other circuits, the appellate court held that the terms of the formal plan trumped the summary; the court therefore reversed denial of benefits under the administrator's discretion in *Jobe v. Medical Life Insurance Company*, 2010 WL 986642 (8th Cir. 2010) (unpublished).

The case underscores that claimants and their counsel should carefully check the degree of discretion granted to those administering disability claims in ERISA plans and compare the language of the terms of the ERISA instruments. They should, when applicable, stress that the formal documentation does not grant the type of discretion asserted by the plan administrator in denying claims, even if such discretion is set forth in summary documents describing the plan. Employers, on the other hand, should craft documents that grant maximum discretion to administrative decisions in all of the instruments surrounding the plan, which may make denials harder to challenge in litigation.

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