No. 15-982

In The
Supreme Court of the United States

CARL McCAFFREE, et al.,

Petitioners,

v.

BANCINSURE, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly held that the district court did not abuse its discretion by rejecting the application of judicial estoppel.

PARTIES TO THE PROCEEDING

Petitioners did not provide the Court a list of all parties to the proceeding below, as required by Rule 14.1(b). Consequently, Respondent identifies the Parties, as follows:

Petitioners are Carl McCaffree, Sam McCaffree, and Jim Helvey who were Appellants in the court of appeals.

Respondent is BancInsure, Inc., which is now in receivership/liquidation in Oklahoma.

Intervenor-Respondent is the Kansas Insurance Guaranty Association. The court of appeals granted KIGA's motion to intervene.

Additionally, it must be noted that there were two separate, but consolidated, appeals from the district court's decision. (10th Circuit docket nos. 14-3063 and 14-3064.) The Federal Deposit Insurance Corporation, as receiver of The Columbian Bank and Trust Company, was the Appellant in the lead appeal (docket no. 14-3063).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Kansas Insurance Guaranty Association ("KIGA") is a statutory nonprofit unincorporated legal entity. K.S.A. §40-2904. KIGA does not issue stock or have a parent corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	3
REASONS FOR DENIAL OF PETITION	6
A. THIS PETITION SHOULD BE DISMISSED BECAUSE PETITIONERS LACK STANDING	7
B. PETITIONERS WAIVED THE PRIMARY ARGUMENT IN THE PETITION BY FAILING TO RAISE IT UNTIL ORAL ARGUMENT IN THE COURT OF APPEALS	9
C. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT	12
1. The Court of Appeals' Decision Does Not Conflict with *New Hampshire v. Maine*	12
2. The Court of Appeals' Decision Below is Consistent with *Sturm v. Boker*	15

TABLE OF CONTENTS – Continued

Page

3. The Court of Appeals' Decision Below is Consistent with *Cleveland v. Policy Mgmt. Sys. Corp.* 16

D. THE CONFLICT AMONG CIRCUITS IS NOT AS DEEP AS PETITIONER ARGUES 17

1. Third Circuit 19
2. Fifth Circuit 20
3. Seventh Circuit 21
4. Ninth Circuit 22
5. Tenth Circuit 23
6. Federal Circuit 24

E. THIS CASE IS NOT A SUITABLE VEHICLE TO RESOLVE A DISAGREEMENT AMONG CIRCUITS 25

1. The Issue of the Application of Judicial Estoppel Would Benefit from Further Percolation in the Lower Courts 25
2. National Uniformity on the Issue of the Application of Judicial Estoppel is Not Essential 29
3. The Procedural and Factual History of this Litigation is Unusually Complicated 30

TABLE OF CONTENTS – Continued

Page

F. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REJECTING JUDICIAL ESTOPPEL ON THE MERITS 35

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23 (1st Cir. 2004) 38, 39

Anderson v. Catholic Bishop of Chi., 759 F.3d 645 (7th Cir. 2014) 10, 17, 22

Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co., 617 F.3d 1040 (8th Cir. 2010) 38

Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 119 S. Ct. 1597 (1999) 16, 26

Coastal Plains, Inc. v. Mims, 179 F.3d 197 (5th Cir. 1999) 38

Columbian Fin. Corp. v. BancInsure, Inc., 650 F.3d 1372 (10th Cir. 2011) 3, 33, 34

Columbian Fin. Corp. v. BancInsure, Inc., 2009 U.S. Dist. LEXIS 111025, 2009 WL 4508576 (D. Kan. Nov. 30, 2009) 18

Data Gen. Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996) 38

Detz v. Greiner Indus., 346 F.3d 109 (3d Cir. 2003) 16

Gen. Elec. Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512 (1997) 38

Grochocinski v. Mayer Brown Rowe & Maw, LLP, 719 F.3d 785 (7th Cir. 2013) 22

Hancock v. Trammell, 798 F.3d 1002 (10th Cir. 2015) 12

TABLE OF AUTHORITIES – Continued

Page

Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) 14

Helfand v. Gerson, 105 F.3d 530 (9th Cir. 1997) 22, 23

Hicks v. Cadle, 436 Fed. Appx. 874 (10th Cir. 2011) 23, 24

Holly Farms Corp. v. Nat'l Labor Rels. Labor Bd., 517 U.S. 392 (1996) 11

In re Airadigm Communications, Inc., 616 F.3d 642 (7th Cir. 2010) 21

Johnson v. Lindon City Corp., 405 F.3d 1065 (10th Cir. 2005) 26

Jones v. Bob Evans Farms, Inc., 811 F.3d 1030 (8th Cir. 2016) 38

Kane v. Nat'l Union Fire Ins. Co., 535 F.3d 380 (5th Cir. 2008) 38

Karaha Bodas Co. v. Perusahaan Pertembangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004) 20, 21

Love v. Tyson Foods, Inc., 677 F.3d 258 (5th Cir. 2012) 38

Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367, 116 S. Ct. 873 (1996) 11

Matter of Cassidy, 892 F.2d 637 (7th Cir. 1990) 21

McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996) 38

Miller v. Fenton, 474 U.S. 104 (1985) 39

TABLE OF AUTHORITIES – Continued

Page

Mintze v. Am. Fin. Servs., Inc., 434 F.3d 222 (3d Cir. 2006) 17

Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773 (3d Cir. 2001) 38

Murray v. Silverstein, 882 F.2d 61 (3d Cir. 1989) 19, 20

Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976) 39

New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808 (2001) ..... *passim*

Palcsesz v. Midland Mut. Life. Ins. Co., 87 F. Supp. 2d 409 (D.N.J. 2000) 20

Republic of Ecuador v. Connor, 708 F.3d 651 (5th Cir. 2013) 20, 26

Royal Ins. Co. v. Quinn-L Capital Corp., 3 F.3d 877 (5th Cir. 1993) 10

Sturm v. Boker, 150 U.S. 312, 14 S. Ct. 99 (1893) 10, 15

Talavera v. Sch. Bd., 129 F.3d 1214 (11th Cir. 1997) 38

Transclean Corp. v. Jiffy Lube Int'l, Inc., 474 F.3d 1298 (Fed. Cir. 2007) 24, 25

United States ex rel. Long v. GSDMIdea City, L.L.C., 798 F.3d 265 (5th Cir. 2015) 38

United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994) 38

TABLE OF AUTHORITIES – Continued

Page

United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 73 S. Ct. 67 (1952) 14

United States v. Rivera-Nevarez, 418 F.3d 1104 (10th Cir. 2005) 12

Wagner v. Professional Engineers in California Government, 354 F.3d 1036 (9th Cir. 2004) 23

Webster v. Fall, 266 U.S. 507, 45 S. Ct. 148 (1925) 14

Wyoming v. Federated Serv. Ins. Co., 2000 U.S. App. LEXIS 8839 (10th Cir. 2000) 10

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1782 20

Kan. Stat. Ann. §40-2906(a)(1) 34

Kan. Stat. Ann. §40-2906(a)(2) 2, 34

Kan. Stat. Ann. §40-2906(a)(4) 34

RULES

Sup. Ct. R. 12.7 7

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Intervenor-Respondent Kansas Insurance Guaranty Association respectfully submits its brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 796 F.3d 1226. The opinion of the district court (Pet. App. 25a-47a) is reported at 3 F. Supp. 3d 904.

JURISDICTION

This Court has jurisdiction of this petition pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on August 6, 2015. (Pet. App. 1a-24a). A petition for rehearing or rehearing *en banc* was denied on November 6, 2015. (Pet. App. 48a-49a).

STATEMENT

The sole issue raised by Petitioners is the application of judicial estoppel to a party's stated opinion about insurance coverage.

This case arises from an insurance coverage dispute between Petitioners, former directors and officers of a failed bank ("D&O"), and Respondent BancInsure, a now defunct insurance company. In the proceedings below, the FDIC was aligned with Petitioners, but did not file a petition for certiorari. During the course of the appeal below BancInsure was placed into liquidation in Oklahoma. At that time, Intervenor-Respondent Kansas Insurance Guaranty Association intervened to defend BancInsure's coverage position pursuant to Kan. Stat. Ann. § 40-2906(a)(2).

BancInsure issued a directors and officers liability insurance policy to Columbian Financial Corporation ("CFC") and its subsidiary, Columbian Bank and Trust Company ("Bank") ("the Policy"). The Policy

contains an "insured vs. insured" exclusion which provides, in relevant part, that there is no coverage for "a Claim by . . . any successor . . . or receiver of the Company."

The Bank was shut down on August 22, 2008 and the FDIC-R was appointed as receiver. On December 18, 2008, CFC preemptively filed suit against BancInsure seeking a declaration that coverage under the Policy did not cancel upon the appointment of the FDIC-R as receiver. The district court granted summary judgment, ruling that coverage under the Policy ceased upon appointment of a receiver, but the Policy itself did not automatically terminate or cancel.

The district court's decision granting summary judgment was appealed. On June 21, 2011, the Tenth Circuit directed the district court to dismiss CFC's suit for lack of jurisdiction. *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372 (10th Cir. 2011).

Shortly after the Tenth Circuit's decision in *Columbian*, the FDIC-R filed suit against Bank's former directors and officers. At approximately the same time, BancInsure filed this action for declaratory judgment against Bank's former directors and officers. The FDIC intervened as a defendant in the district court. BancInsure sought a declaration that coverage for the FDIC-R suit was excluded by the "insured vs. insured" exclusion, or alternatively, that the Policy was validly rescinded based on fraud.

The parties filed cross-motions for summary judgment concerning the "insured vs. insured" exclusion.[1] The district court granted summary judgment for BancInsure, ruling that the "insured vs. insured" exclusion excluded coverage for the underlying FDIC-R suit. Petitioners do not raise any issue in the Petition concerning the district court's interpretation of the "insured vs. insured" exclusion.

The only portion of the district court's ruling at issue in the Petition before this Court is the district court's discretionary ruling that BancInsure was not judicially estopped from denying coverage. (Pet. App. 43a-46a.) The district court rejected judicial estoppel based on its detailed evaluation of the three-factor analysis set forth in *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808 (2001).

A panel of the court of appeals affirmed the district court's ruling. (Pet. App. 2A-24A.) The court of appeals held that the district court did not abuse its discretion by declining to apply judicial estoppel. (Pet. App. 23A-24A.) The court of appeals' decision did not address the merits of the three-factor analysis set forth in *New Hampshire*. The court of appeals' decision was instead based on the alternative argument that judicial estoppel does not apply to a party's opinion

[1] BancInsure also argued that the Policy should be rescinded. However, the district court did not rule on this alternative argument. Rescission is not at issue in the Petition for Certiorari.

about the interpretation of an insurance policy because it is a question of law.

Petitioners misrepresent the court of appeals' decision as it pertains to judicial estoppel. Petitioners falsely state "[t]he Court of Appeals did not dispute that the case satisfied each of the elements of judicial estoppel." (Pet. at 6.) The court of appeals' decision explicitly set forth the Supreme Court's three-factor analysis for the application of judicial estoppel as well as case law providing that judicial estoppel is applied "both narrowly and cautiously." (Pet. App. 21a-23a.) The court of appeals concluded that "the district court did not abuse its discretion" in declining to apply judicial estoppel. (Pet. App. 24a.)

The stated basis for affirming the district court was that the court of appeals was bound by Tenth Circuit precedent holding that "judicial estoppel only applies when the position to be estopped is one of fact, not one of law." (Pet. App. 23a-24a.) Based on Tenth Circuit precedent, the court of appeals concluded "the doctrine of judicial estoppel is inapplicable, and the district court did not abuse its discretion in declining to apply it." (Pet. App. 24a.)

Unlike the court of appeals, the district court specifically analyzed each of the three-factors and concluded that BancInsure was not estopped from denying coverage. (Pet. App. 43a-46a.) Thus, while the court of appeals did not specifically analyze the merits of judicial estoppel under *New Hampshire*, it nevertheless affirmed the district court's decision rejecting judicial estoppel on the merits. The court of

appeals did not reverse or otherwise criticize the district court's discretionary ruling rejecting each of the three factors under the *New Hampshire* analysis. The fact that the court of appeals affirmed the district court on an alternative ground is not a repudiation of the district court's reasoning.

There is no reason for the Supreme Court to accept this petition for certiorari because the issue raised by Petitioners is not dispositive. Petitioners seek to focus the Court on the court of appeals' holding that "judicial estoppel only applies when the position to be estopped is one of fact, not one of law." However, the ultimate issue here is whether the district court abused its discretion by rejecting judicial estoppel. Petitioners ignore the fact that the court of appeals never criticized the district court's rejection of judicial estoppel under the *New Hampshire* analysis. The district court was well within its discretion to reject judicial estoppel based on the three-factor *New Hampshire* analysis. Further appellate review is unlikely to change the ultimate result because deference to the district court's findings is the hallmark of abuse of discretion review.

REASONS FOR DENIAL OF PETITION

Petitioners seek review of the court of appeals' unanimous holding that the district court did not abuse its discretion by finding BancInsure was not judicially estopped from denying insurance coverage

for an FDIC suit against Petitioners. The Petition is not certworthy for the reasons set forth below.

A. THIS PETITION SHOULD BE DISMISSED BECAUSE PETITIONERS LACK STANDING.

Absent the participation of the FDIC (which did not file or otherwise join this petition for certiorari), the Petitioners lack standing. Petitioners' involvement in this litigation and appeal is governed and limited by a settlement agreement between BancInsure, the FDIC and the directors and officers of the Bank (Petitioners herein). (Record at Supp. App. 314-30.[2])

The agreement provides that the D&O Petitioners *assigned* to the FDIC-R "any and all rights, claims, causes of action, equitable remedies, statutory rights and damages which the D&Os have or may have against BancInsure arising out of or relating to . . . the FDIC's claims asserted in the . . . Coverage Litigation, and the BancInsure Policy." (Record at Supp. App. 316-17.) The assignment from the D&O Petitioners to the FDIC-R provided only two specific exceptions, as follows:

[2] Respondent cites to the record on appeal pursuant to Sup. Ct. R. 12.7.

D. Coverage Litigation

[. . .]

(5) In the event that the D&Os and FDIC prevail in the Coverage Litigation through Final Judgment, BancInsure, within thirty (30) days after entry of Final Judgment, shall pay to the D&Os the Unpaid Defense Costs of $1,052,810 and FDIC the Final Policy Limits of $2,758,920.70. BancInsure's payment of Final Policy Limits and Unpaid Defense Costs to the D&Os and FDIC shall exhaust its liability for any amount of the Confessed Judgment and for any attorneys' fees, litigation expenses, and expert witness fees incurred by the D&Os in defense of the D&O Action. Payment by BancInsure of the Unpaid Defense Costs and the Final Policy Limits shall satisfy any further obligation by BancInsure to the remaining Parties. In the event that the D&Os and FDIC prevail through Final Judgment in the Coverage Litigation, BancInsure shall have no right or claim to reimbursement, recoupment or payment against the D&Os or FDIC for any amounts that BancInsure has paid to the D&Os for attorneys' fees, litigation expenses or expert witness fees or has paid to FDIC under this Settlement Agreement.

[. . .]

(7) In the Coverage Litigation, all Parties shall retain all of their contractual, common law and statutory rights or claims, if any, as against each other for payment of attorneys'

> fees, costs, and litigation expenses incurred by each Party in the Coverage Litigation.

(Record at Supp. App. 317-20.)

The above quoted agreement contemplated that both the FDIC-R and D&O Petitioners would participate in the coverage litigation. The D&O Petitioners' rights were severely limited after the assignment. Pursuant to section D(5) of the agreement, the D&O Petitioners have no rights against BancInsure unless "the D&Os *and* FDIC prevail in the Coverage Litigation through Final Judgment. . . ." (emphasis added). The D&O Petitioners have no rights against BancInsure unless they and the FDIC both "prevail" in the appeal. The FDIC can no longer "prevail" because the FDIC-R did not file a petition for certiorari. As such, BancInsure prevailed as against the FDIC-R. Consequently, the D&O Petitioners have no further recourse against BancInsure and therefore lack standing to continue this appeal.

B. PETITIONERS WAIVED THE PRIMARY ARGUMENT IN THE PETITION BY FAILING TO RAISE IT UNTIL ORAL ARGUMENT IN THE COURT OF APPEALS.

Petitioners raised the argument that *New Hampshire* overruled Tenth Circuit precedent for the first time in oral argument. (Pet. App. at 23A n.9.) Petitioners had ample opportunity to raise this argument in their briefing, but failed to do so. In fact, Petitioners made the completely different argument

that BancInsure's opinion as to the meaning of a contract was an issue of fact, not one of law. (Petitioners' 10th Circuit Reply Br. at p. 15.[3])

In its answer brief on appeal, Respondent argued that judicial estoppel does not apply because the interpretation of a policy is a matter of law for the court. (Respondent's 10th Circuit Answer Br. at 57-59.) Respondent cited Supreme Court precedent holding that a party's "expression of an opinion as to the law of the contract" is "not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument." *Sturm v. Boker*, 150 U.S. 312, 336, 14 S. Ct. 99 (1893) ("a statement of opinion upon a question of law . . . do[es] not operate as an estoppel."). Respondent cited several circuit court decisions for the more general proposition that judicial estoppel does not apply to opinions or conclusions of law. *Anderson v. Catholic Bishop of Chi.*, 759 F.3d 645, 652 (7th Cir. 2014) ("Judicial estoppel applies to statements of fact and not to legal opinions or conclusions. . . ."); *Wyoming v. Federated Serv. Ins. Co.*, 2000 U.S. App. LEXIS 8839 (10th Cir. 2000) (unpublished) ("Judicial estoppel does not apply to legal conclusions based on undisputed facts."); *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 n.6 (5th Cir. 1993) ("a statement of opinion on the law does not create a judicial estoppel.").

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[3] Respondent cites to the reply brief filed by Petitioners on January 8, 2015 in the court of appeals, below.

Despite Respondent's argument in its answer brief, Petitioners did not use their reply brief to argue that *New Hampshire* supported the application of judicial estoppel to BancInsure's opinion as to the law of a contract. To the contrary, in their reply brief on appeal Petitioners made the argument that while the "existence of coverage" is a question of law, "the insurance company's position on the existence of coverage is a matter of fact fully capable of supporting an estoppel." (Petitioners' 10th Circuit Reply Br. at p. 15.) Petitioners' argument below thereby rejected the very premise that a party's opinion about insurance coverage is an opinion or conclusion of law. Petitioners' argument below was entirely different than the argument now made in their petition for certiorari.

The Supreme Court "generally do[es] not address arguments that were not the basis for the decision below." *Holly Farms Corp. v. Nat'l Labor Rels. Labor Bd.*, 517 U.S. 392, 400 (1996), *citing Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379, n.5, 116 S. Ct. 873 (1996). In this case, Petitioners were criticized by the court of appeals for raising this argument for the first time at oral argument. The court of appeals noted that "[d]espite failing to acknowledge any of the above-cited Tenth Circuit decisions in their briefing, Appellants at oral argument demonstrated great familiarity with the cases and argued that the Tenth Circuit's approach to judicial estoppel is inconsistent with *New Hampshire v. Maine*." (Pet. App. at 23A n.9.)

The Petition should be denied because it is premised upon an argument wholly omitted from briefing before the district court and court of appeals, despite the clear opportunity to do so. Petitioners' attempt to raise the argument for the first time during oral argument before the court of appeals is insufficient to avoid waiver. *Hancock v. Trammell*, 798 F.3d 1002, 1017 (10th Cir. 2015) ("an issue is waived when it is presented for the first time in oral argument."); *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1112 n.12 (10th Cir. 2005) ("[I]ssues raised for the first time at oral argument are waived."). This Court should not grant review for an issue that was not properly raised in the lower courts.

C. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT.

1. The Court of Appeals' Decision Does Not Conflict with *New Hampshire v. Maine.*

Appellants argue that the Panel's decision in this case conflicts with *New Hampshire*, which was a boundary dispute between two states litigated under the original jurisdiction of the Supreme Court. *New Hampshire*, 532 U.S. at 745. This is an important procedural fact because the Supreme Court was essentially acting as the trial court.[4] Thus, the Supreme Court

[4] The Supreme Court in *New Hampshire* followed its practice of appointing a special master to hear evidence. *Id.* at 747 (referencing the Special Master's report).

was *not* called upon to evaluate whether an underlying district court decision on judicial estoppel was an abuse of discretion. *New Hampshire*, 532 U.S. at 750 (Judicial estoppel "is an equitable doctrine invoked by a court at its discretion."). Thus, the court of appeals' decision in this case, affirming the district court's rejection of judicial estoppel, is fundamentally different from the procedural posture in *New Hampshire*.

The boundary dispute at issue in *New Hampshire* began in the 1970's. *Id.* at 746. The States agreed that a 1740 decree fixed the boundary, but disagreed over the meaning of certain terms in the decree "essential to delineating the lateral marine boundary." *Id.* at 746-47. Ultimately, New Hampshire and Maine agreed upon the terms of a consent decree. *Id.* at 747. The final decree entered by the Supreme Court accepted the parties' agreement and defined the term "Middle of the River" as "the middle of the main channel of navigation of the Piscataqua River." *Id.*

In 2001, a dispute arose concerning the inland boundary along the Piscataqua River. New Hampshire argued that "'Middle of the River,' as those words were used in 1740, denotes the main branch of the river, not a mid-channel boundary . . . " *Id.* at 748. Maine argued New Hampshire was judicially estopped from contradicting the 1977 consent decree.

The Supreme Court applied judicial estoppel under a three-factor analysis. First, the Court found New Hampshire's claim was "clearly inconsistent" with its prior agreement in the 1977 consent decree.

Id. at 751. Second, the Court found it had previously "accepted New Hampshire's agreement with Maine that 'Middle of the River' means middle of the main navigable channel." *Id.* at 752. Third, the Court noted that "New Hampshire benefited from that interpretation," by enabling it "to settle the case. . . ." *Id.* Thus, with all three factors met, the Supreme Court applied judicial estoppel.

Petitioners contend that *New Hampshire* did not limit the application of judicial estoppel to contrary "factual positions" as distinguished from a party's position on a question of law. (Pet. at 8.) However, there is no indication that the parties in *New Hampshire* ever argued for a distinction between factual positions and legal opinions or conclusions. The *New Hampshire* decision itself certainly never addressed any distinction between factual positions and opinions on issues of law, as a basis for judicial estoppel. An "issue not raised in briefs or argument nor discussed in the opinion of the Court cannot be taken as a binding precedent on the point." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 118 (1993) (internal quotations omitted) *quoting United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S. Ct. 67 (1952); *see also Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents."). The distinction between factual and legal positions as a basis for judicial estoppel was not argued by the parties in *New*

Hampshire and cannot be interpreted as part of the Court's holding.

2. The Court of Appeals' Decision Below is Consistent with *Sturm v. Boker.*

Supreme Court precedent more directly on point than *New Hampshire* holds that an opinion concerning the interpretation of a contract does *not* form the basis for judicial estoppel:

> What the complainant said in his testimony was a statement of opinion upon a question of law. . . . ***Such statements of opinion do not operate as an estoppel***. If he had said, in express terms, that by that contract he was responsible for the loss, it would have been, under the circumstances, ***only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument***.

Sturm, 150 U.S. at 336 (emphasis added). Unlike *New Hampshire*, *Sturm* specifically addressed a distinction between estoppel based on a position of fact versus an opinion of law. *Sturm* holds that a party's opinion as to the meaning of a written contract does not form the basis for judicial estoppel. *New Hampshire* did not express an intent to overrule this long standing precedent. Therefore, *Sturm* has not been overruled and remains binding precedent.

3. **The Court** of Appeals' Decision Below is **Consistent** with *Cleveland v. Policy Mgmt. Sys. Corp.*

In *Cleveland*, the Supreme Court granted certiorari to evaluate "the legal effect upon an ADA suit of the application for, or receipt of, disability benefits." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 800, 119 S. Ct. 1597 (1999). The Court noted a circuit conflict as to whether the application for and/or receipt of SSDI benefits estops the plaintiff from bringing an ADA claim. *Id.* The Supreme Court made a clear distinction between "purely factual matters" and "a context-related legal conclusion." *Id.* at 802. The Court held that judicial estoppel is inappropriate if plaintiff proffers "a sufficient explanation" for plaintiff's "sworn assertion in an application for disability benefits that she is, for example, 'unable to work'. . . ." *Id.* at 806.

In *Cleveland*, the Supreme Court drew a distinction between factual and legal positions when it comes to the application of judicial estoppel. The "context-related legal conclusion" in *Cleveland* is the mid-ground between a pure factual statement and a pure legal conclusion. The implication of *Cleveland* is that legal conclusions do not merit the application of judicial estoppel. *See Detz v. Greiner Indus.*, 346 F.3d 109, 116 (3d Cir. 2003) (explaining that *Cleveland* "drew a distinction between conflicting legal positions and contradictory factual assertions" for purposes of judicial estoppel.).

D. THE CONFLICT AMONG CIRCUITS IS NOT AS DEEP AS PETITIONER ARGUES.

Petitioners argue that there is a circuit split as to whether judicial estoppel applies to inconsistent legal positions. Petitioners incorrectly argue that the Third, Fifth, Seventh, Ninth, and Federal Circuits support their argument. More recent authority from the Third and Seventh Circuits are in line with the position taken by the Tenth Circuit below.

Petitioners highlight the Seventh Circuit as holding the judicial estoppel applies to legal positions. However, recent authority from the Seventh Circuit is consistent with Tenth Circuit precedent. *See Anderson v. Catholic Bishop of Chi.*, 759 F.3d 645, 652 (7th Cir. 2014) ("Judicial estoppel applies to statements of fact and not to legal opinions or conclusions, and [Plaintiff] has identified no conflicting statements of fact by the Catholic Bishop."). The Seventh Circuit in *Anderson* stated that the plaintiff's argument for judicial estoppel based on legal opinions was frivolous. *Id.* (Plaintiff "failed to raise any non-frivolous claim of judicial estoppel.")

Similarly, recent case law from the Third Circuit contradicts Petitioner's argument. *See Mintze v. Am. Fin. Servs., Inc.*, 434 F.3d 222, 232 (3d Cir. 2006) ("We choose, however, not to apply the doctrine of judicial estoppel here. As we have already stated, the stipulations of the parties were stipulations regarding questions of law. Because we are not bound by these stipulations, there is no need for us to consider judicial

estoppel."). Likewise, the district court below stated "the Court interprets the Policy as a matter of law. When a policy is not ambiguous, as this one is not, the Court enforces it according to its terms and will not consider extraneous evidence." (Pet. App. 46A.)

None of the court of appeals' decisions cited by Petitioner for the existence of a circuit split involve the interpretation of an insurance policy. Indeed, the majority of the cases involve a broadly inconsistent change in a party's litigation position. Moreover, none of Petitioner's cited cases involve the application of judicial estoppel based on a legal opinion stated in response to a hypothetical discovery question.

Additionally, the cases cited by Petitioner found judicial estoppel where a party successfully advanced a litigation position. Here, BancInsure did not advance a broad litigation position, rather, it simply answered interrogatories. Moreover, coverage for the FDIC's claims was not at issue when BancInsure answered those interrogatories because the FDIC had not filed suit. The prior case addressed whether the Policy automatically cancelled upon appointment of a receiver and whether Bank was entitled to tail coverage under the Policy. *Columbian Fin. Corp. v. BancInsure, Inc.*, 2009 U.S. Dist. LEXIS 111025 *13, 2009 WL 4508576 (D. Kan. Nov. 30, 2009). By contrast, the present case addresses whether there is coverage for specific claims asserted by the FDIC against Bank's directors. BancInsure's response to interrogatories concerning unfiled potential claims cannot estop BancInsure from taking a coverage

position when the FDIC-R filed suit more than two years later.

Thus, even if there are circumstances under which it is appropriate to apply judicial estoppel based on a party's position on a legal position, this is not that case.

The circuit court decisions relied upon by Petitioners are inapposite to the somewhat unusual facts of this case. Moreover, the relative paucity of circuit court opinions cited by Petitioner, none of which involve the interpretation of an insurance policy, demonstrates that this issue arises infrequently. Judicial estoppel also arises infrequently because a district court's decision is reviewed for an abuse of discretion.

1. Third Circuit

In *Murray v. Silverstein*, 882 F.2d 61 (3d Cir. 1989), the plaintiff obtained a preliminary injunction "arguing in the district court that a preliminary injunction should be entered because damages were unavailable. . . ." *Id.* at 66. The court of appeals held that plaintiff could not seek damages after successfully obtaining a preliminary injunction on the basis that damages were not available. *Id.* at 66-67. *Murray* did not address the distinction between estoppel based on a party's factual position versus opinions or conclusions of law. There is no indication that the parties raised the distinction before the court of appeals.

District courts within the Third Circuit have not read *Murray* to support judicial estoppel based on opinions or conclusions of law. *See, e.g.*, *Palcsesz v. Midland Mut. Life. Ins. Co.*, 87 F. Supp. 2d 409, 413 (D.N.J. 2000) ("courts have been reluctant to apply judicial estoppel where a statement contains a legal conclusion, as distinguished from a purely factual inconsistency.").

2. Fifth Circuit

The Fifth Circuit cases cited by Petitioners involve a party's conflicting position as to the applicable body of law. For example, *Republic of Ecuador v. Connor*, 708 F.3d 651 (5th Cir. 2013) involved a question of the application of a federal statute. "In numerous district courts, and on appeal in other circuits, Chevron asserted that the BIT arbitration is an international proceeding" in order to obtain discovery orders pursuant to 28 U.S.C. § 1782. *Id.* at 654. Nevertheless, Chevron's "current position on the arbitration's status [was] precisely contrary. . . ." *Id.*

Similarly, *Karaha Bodas Co. v. Perusahaan Pertembangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004) involved a party's change in position as to the applicable body of law that applied in an arbitration. The court of appeals held "[t]he district court did not abuse its discretion in imposing judicial estoppel to preclude [defendant] from arguing against the application of Swiss procedural law [because] [defendant] repeatedly represented to the

Tribunal and to the district court that Swiss procedural law controlled the arbitration." *Id.* at 293.

3. Seventh Circuit

Each of the cases Petitioner cites from the Seventh Circuit involve positions taken during bankruptcy proceedings. For example, *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990) involved a party who changed positions as to whether the court had jurisdiction to consider the dischargeability of debts. The court of appeals described the debtor's change in position as follows:

> [Debtor] unequivocally urged the [tax] court to consider the defense of discharge. His present position is that it was error for the court to give him what he then wanted. . . . [Debtor's] maneuverings were clearly intended to delay the inevitable day of reckoning, and in maneuvering he is trying to whipsaw this court. That is exactly the evil that the doctrine of judicial estoppel was meant to avoid.

Id. at 641.

In re Airadigm Communications, Inc., 616 F.3d 642, 662-63 (7th Cir. 2010) also involved a broadly inconsistent litigation position. TDS prevailed in bankruptcy court arguing that TDS was required to pay only $2 million under the "back up plan" instead of $49 million under the "primary plan" in bankruptcy. However, after [creditor's] claim was assigned to TDS, TDS then argued it had a $49 million claim,

despite having prevailed in limiting that very claim to $2 million. The court ruled "[n]ow that the bankruptcy is closed, not only would TDS be entitled to the value of the claim, it would be relieved from the burden of paying for the claim. Its inconsistent litigation position would yield a king's ransom."

Likewise, *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785 (7th Cir. 2013) did not involve judicial estoppel on the basis of a discreet legal opinion or conclusion. Rather, judicial estoppel was affirmed because it "would be inconsistent for the [bankruptcy] trustee to prevail in the [legal] malpractice case, for the benefit of [the judgment creditor], on the theory that [the judgment creditor] should never have obtained the judgment." 719 F.3d at 796. Again, this was a case of broadly inconsistent litigation positions.

As noted above, more recent authority explicitly states that judicial estoppel "applies to statements of fact and not to legal opinions or conclusions. . . ." *Anderson*, 759 F.3d at 652. *Anderson* rejected the argument that defendant was estopped from asserting the statute of limitations defense on grounds that the defense had not been raised in previous similar litigation.

4. Ninth Circuit

Helfand v. Gerson, 105 F.3d 530 (9th Cir. 1997) involved a trust dispute wherein "the district court held the plaintiffs were judicially estopped from asserting their interpretation of [the settlor's] testamentary

documents because they had successfully advocated an inconsistent position in state court." *Id.* at 532. The court ruled Plaintiff was judicially estopped from arguing in the district court that the residence should have been distributed directly to the spouse because she "took the position at the state court hearing that the residence should be retained in the trust, and the state court adopted this position." *Id.* at 536. While the court of appeals did expressly reject the argument that judicial estoppel did not apply because the plaintiff's prior position was a legal opinion, the underlying facts of the case are far different than those in the present Petition.

Wagner v. Professional Engineers in California Government, 354 F.3d 1036 (9th Cir. 2004) is a labor law suit. The court of appeals upheld judicial estoppel because "Plaintiffs took a position before the district court that their litigation was grounded solely in a challenge to [defendant's] *Hudson* notice, but did not include a chargeability claim." *Id.* at 1038. Plaintiff was therefore estopped from later asserting a chargeability claim.

5. Tenth Circuit

Hicks v. Cadle, 436 Fed. Appx. 874 (10th Cir. 2011) (unpublished) involved a party who changed positions with respect to an arbitrator's jurisdiction. The court of appeals below distinguished *Hicks* and explained why it is not binding precedent in the Tenth Circuit:

> *Hicks* is an unpublished decision and thus not binding precedent. Moreover, the *Hicks* court's conclusion relied on the fact that the appellant "has not cited any authority undercutting the guidance we have drawn from the language and substance of the *New Hampshire* decision," 436 F. App'x at 879, and it is apparent from the appellant's briefing that the above-cited, binding Tenth Circuit authority was not brought to the court's attention.

(Pet. App. 24A.) The court of appeals correctly noted that the *Hicks* court was never asked to draw a distinction between judicial estoppel based on factual positions versus legal opinions.

6. Federal Circuit

Transclean Corp. v. Jiffy Lube Int'l, Inc., 474 F.3d 1298 (Fed. Cir. 2007) involved a party's "repeated admissions" of privity for claim preclusion purposes. The plaintiff later tried to get around its admission by arguing that "that privity cannot be admitted because it is a question of law. . . . " *Id.* at 1306. However, the court of appeals noted that "there is a split of authority as to whether privity is a question of law or fact." *Id.* The court "conclude[d] that judicial estoppel may be applied to the question of privity, whether considered a legal conclusion or a question of fact." *Id.* The court recognized that plaintiff's "litigation strategy" was to concede privity in the first litigation. *Id.* at 1307. The court held that plaintiff "should not be permitted to reverse course this late in the

proceedings simply because it now realizes its litigation strategy was unsuccessful." *Id.*

Transclean has no application to this case. In *Transclean*, Plaintiff's admission of privity was part of its litigation strategy, which proved unsuccessful. By contrast, the district court below recognized "the interrogatory answer had no bearing on the resolution of the *Columbian* case and the district court in no way relied on the information in the interrogatory answer." (Pet. App. 45A.) Similarly, the court of appeals in *Columbian* "vacated the judgment because the parties stipulated that coverage existed for [a different] claim, thereby removing any case or controversy and concomitantly stripping the district court of jurisdiction." (Pet. App. 45A.)

E. THIS CASE IS NOT A SUITABLE VEHICLE TO RESOLVE A DISAGREEMENT AMONG CIRCUITS.

Although Petitioners are correct that some disagreement exists among the circuits over the application of judicial estoppel to a party's position on a question of law, this case would be an unsuitable vehicle to resolve any such disagreement.

1. The Issue of the Application of Judicial Estoppel Would Benefit from Further Percolation in the Lower Courts.

Whether and under what circumstances judicial estoppel applies to a party's statements concerning

the interpretation of a contract should be left for further analysis by lower courts. As noted above, the circuit court decisions cited by Petitioners are not analogous to this case, which involves a party's statement in written discovery concerning coverage under an insurance policy.

The Court's recent decisions in *Cleveland* and *New Hampshire* establish that judicial estoppel is recognized under federal law. The Court recognizes that judicial estoppel is "not reducible to any general formulation of principle." *New Hampshire*, 532 U.S. at 750. Lower courts are only just beginning to address the impact of *New Hampshire*, on circuit precedent concerning judicial estoppel. For example, lower courts that categorically refused to apply judicial estoppel have now recognized judicial estoppel in light of *New Hampshire*. *See, e.g.*, *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1068-69 (10th Cir. 2005) ("Although this circuit has repeatedly refused to apply this principle, [citations], the Supreme Court's intervening decision in *New Hampshire* has altered the legal landscape.").

Only one of the circuit decisions cited by Petitioner addressed the specific argument advanced by Petitioners; that courts must recognize judicial estoppel based on a conflicting position on an issue of law. *See Republic of Ecuador*, 708 F.3d at 656 ("the Supreme Court did not limit judicial estoppel in *New Hampshire*, which refers to contrary 'positions,' not to contrary 'factual positions,' as the foundation of the doctrine."). Certiorari is not warranted where the

argument advanced by Petitioners has only been addressed with some particularity by one other Circuit.

The Tenth Circuit itself should be given the opportunity to further address the scope of judicial estoppel in light of *New Hampshire* when an appropriate case is presented. Here, the court of appeals rejected Petitioners' judicial estoppel as contrary to binding circuit precedent:

> Despite failing to acknowledge any of the above-cited Tenth Circuit decisions in their briefing, Appellants at oral argument demonstrated great familiarity with the cases and argued that the Tenth Circuit's approach to judicial estoppel is inconsistent with *New Hampshire v. Maine*. [. . .] [T]he above-cited decisions from this court post-date *New Hampshire*, and "[o]ne panel of this court cannot overrule the judgment of another panel absent *en banc* consideration or an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." [Citations.]

(Pet. App. at 23A n.9.) Thus, the court of appeals rejected Petitioners' argument, recognizing that Petitioners did not appropriately raise this argument in their briefing.

Petitioners later sought *en banc* review, which was denied. Petitioners argue that the refusal to grant *en banc* review demonstrates the court of appeal's unwillingness to consider the judicial estoppel

issue raised it their Petition. However, Petitioners' attempt to read a motivation into the court of appeals' rejection of *en banc* consideration rings hollow.

Petitioners omit the fact that it was not until oral argument that Petitioners first argued *New Hampshire* overruled Tenth Circuit precedent prohibiting the application of judicial estoppel based on a party's inconsistent legal opinions or conclusions. Indeed, this fact was tersely noted in the court of appeals' decision. If this argument was so important to Petitioners, they would have raised it in the district court and in briefing to the court of appeals. At minimum, Petitioners would have made the argument in their reply brief in response to Respondent's argument that judicial estoppel cannot apply to conflicting legal positions. It seems likely that *en banc* consideration was declined based on Petitioners' failure to appropriately raise the argument before the district court or in briefing to the court of appeals. Alternatively, the court of appeals may have agreed with Respondent that *en banc* consideration was not merited because the district court addressed judicial estoppel on the merits. While the court of appeal's decision rested on Tenth Circuit precedent holding that judicial estoppel does not apply to a party's legal opinions or conclusions, the district court rejected judicial estoppel on the merits. The district court's decision would be affirmed under an abuse of discretion standard.

2. National Uniformity on the Issue of the Application of Judicial Estoppel is Not Essential.

The purpose of judicial estoppel is "to protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at 749. Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *Id.* at 750. The circumstances in which judicial estoppel applies are "not reducible to any general formulation of principle." *Id.* The Court noted "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *Id.* at 751. Thus, *New Hampshire* recognizes that the lower courts are best suited to address the application of judicial estoppel based on the facts and circumstances presented.

The Court's treatment of judicial estoppel in *New Hampshire* recognizes that its application is best left to the court tasked with protecting its integrity. The effort taken in *New Hampshire* to eliminate hard and fast rules for the application of judicial estoppel necessarily requires rejecting Petitioners' argument. *New Hampshire* recognizes that the lower courts are in the best position to decide the types of circumstances under which it will apply judicial estoppel. Some variation among courts in the discretionary application of a flexible doctrine is inevitable and does not detract from the Court's approval of judicial estoppel in *New Hampshire*.

3. The Procedural and Factual History of this Litigation is Unusually Complicated.

The court of appeals provided a succinct recitation of the complicated factual history of this litigation. (Pet. App. 3A-7A.) A lengthy portion of the court of appeals' discussion is provided herein to highlight some of the procedural and factual oddities of this litigation. The court of appeals stated:

> On August 22, 2008, the Kansas State Bank Commissioner declared Columbian insolvent and appointed the FDIC as receiver. By operation of law, the FDIC-R succeeded to "all rights, titles, powers, and privileges of [Columbian], and of any stockholder, member, accountholder, depositor, officer, or director" of Columbian. 12 U.S.C. § 1821(d)(2)(A). In early September 2008, BancInsure received notice of potential claims the FDIC-R intended to file against the bank's officers and directors. Aplt. App. 456-57, 680-89.
>
> In anticipation of such a suit, CFC and director-defendant Carl McCaffree brought suit against BancInsure seeking a declaratory judgment that the policy covered claims made after August 22, 2008 – the date Columbian was declared insolvent – but before the expiration of the policy. As part of this litigation (the Columbian litigation), CFC issued a series of interrogatories to BancInsure regarding coverage of certain claims, including claims by deposit insurance organizations acting as receiver of Columbian. BancInsure

indicated that such claims would be covered under the policy so long as BancInsure was given proper notice. App. 409, 411. These responses were purely hypothetical, as the FDIC-R had not yet brought any such claims and did not bring them until over two years later. Aplee. Supp. App. 38.

The district court ultimately held that the policy remained in effect until May 11, 2010, relying in part on its finding that the regulatory endorsement "provides coverage for actions brought by deposit insurance organizations as receivers during the policy year," which would be meaningless if the policy terminated upon appointment of a receiver. *Columbian Fin. Corp. v. BancInsure, Inc.*, No. 08-2642-CM, 2009 WL 4508576 (D. Kan. Nov. 30, 2009). On appeal, we *sua sponte* determined that no case or controversy existed at the time of the district court's judgment and remanded with instructions to vacate the judgment for lack of subject matter jurisdiction. *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1385 (10th Cir. 2011).

BancInsure filed the instant action against the director-defendants in Kansas state court in August 2011, seeking a declaratory judgment that it owes no duty of coverage to the director-defendants for claims brought against them by the FDIC-R. The FDIC-R joined and removed the action to the federal district court in Kansas. At approximately the same time, the FDIC-R brought claims against several of Columbian's former

directors and officers alleging negligence, gross negligence, and breach of fiduciary duty. The FDIC-R explicitly stated that it brought suit "in its capacity as Receiver of The Columbian Bank and Trust Company." Aplee. Supp. App. 38. BancInsure, the director-defendants, and the FDIC-R reached a settlement in February 2013 pursuant to which the director-defendants confessed judgment in favor of the FDIC-R for $5,000,000, and both BancInsure and the director-defendants have made payments in partial satisfaction of this judgment. The settlement allows BancInsure to seek reimbursement if it succeeds in this litigation.

The parties filed cross-motions for summary judgment on the issue of coverage. On February 27, 2014, the district court granted BancInsure's motion, finding that the insured v. insured exclusion unambiguously excluded from coverage claims by the FDIC-R against director-defendants. *BancInsure*, 3 F. Supp. 3d at 910-15. Further, the district court held that BancInsure was not judicially estopped from denying coverage based on its answers to CFC's interrogatories in earlier litigation. *Id.* at 915-16. The FDIC-R and director-defendants (collectively, Appellants) timely appealed. In the interim, BancInsure was placed into receivership and liquidated, and the Kansas Insurance Guaranty Association (KIGA) intervened to defend BancInsure's

rights pursuant to Kan. Stat. Ann. § 40-2906(a)(2).

(Pet. App. 3A-7A.)

The foregoing discussion of the relevant procedural history of this litigation and the prior *Columbian* litigation demonstrates that this is not a clean example for the application of judicial estoppel. The *Columbian* litigation was an anticipatory declaratory judgment action filed by the FDIC-R years before the FDIC-R even brought suit against BancInsure. The *Columbian* suit sought "a declaratory judgment that the policy covered claims made after August 22, 2008 – the date Columbian was declared insolvent – but before the expiration of the policy." (Pet. App. at 6A.)

It was in this context, years before the FDIC-R filed suit against the D&O Petitioners, that interrogatories were posed to BancInsure inquiring about coverage for hypothetical future claims brought by a deposit insurance organization. In response, BancInsure indicated that such claims would be covered under the policy so long as BancInsure was given proper notice. BancInsure's responses were purely hypothetical because no claims had been brought against the Bank. Indeed, the FDIC did not bring any claims for over two years. Moreover, the interrogatories were brought in the context of the *Columbian* suit, where the issue was whether the BancInsure policy automatically cancelled upon appointment of a receiver for the Bank. Thus, BancInsure's response was reasonably construed in terms of whether there was potential

coverage for claims made in the future despite the fact that the Bank was in receivership.

The *Columbian* suit was dismissed *sua sponte* by the court of appeals as premature. This further complicates the judicial estoppel issue because the application of judicial estoppel generally requires that a party "succeeded in persuading a court to accept that party's earlier position." *New Hampshire*, 532 U.S. at 750. Given the *Columbian* suit was dismissed as premature, it cannot be said that BancInsure "succeeded" in any sense of the word. Moreover, it must be noted that the subject interrogatory responses were not advanced by BancInsure as grounds for dismissal of the *Columbian* suit.

Finally, the insolvency of BancInsure adds further complication to the judicial estoppel analysis. After BancInsure was placed into receivership, the Kansas Insurance Guaranty Association ("KIGA") intervened to protect its interest in the resolution of insurance coverage. KIGA exists and functions pursuant to the Kansas Insurance Guaranty Act. KIGA is only obligated to pay "covered claims" within its limit of liability. K.S.A. §40-2906(a)(1)-(2). Nothing in the Act provides that KIGA is bound by an insolvent insurer's prior statements concerning insurance coverage. To the contrary, the Act provides that KIGA is entitled to investigate and contest agreements by the insolvent insurer. K.S.A. §40-2906(a)(4).

F. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REJECTING JUDICIAL ESTOPPEL ON THE MERITS.

Petitioners misleadingly fail to acknowledge that the district court rejected the application of judicial estoppel *on the merits*. The court of appeals' decision was based on its agreement with respondent's alternative argument that judicial estoppel does not apply to a party's opinion about a question of law, including the interpretation of an insurance policy. As such, the court of appeals appropriately decided not to address the district court's decision rejecting judicial estoppel on the merits.

The district court's decision on the merits was based on a three-factor analysis, as described by *New Hampshire*:

> Generally, courts consider the following three factors to determine whether judicial estoppel should apply: (1) whether the party's later position was clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the party's earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that one of the courts was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. [Citation.] These factors are neither exhaustive nor exclusive, as matters in equity require a court to consider all of the equities

> of a particular case. [Citation.] Finally, judicial estoppel should be applied narrowly and cautiously. [Citation.]

(Pet. App. at 44A.) The three-factor analysis set forth by the district court is consistent with *New Hampshire.* The District Court evaluated and resolved each of the three-factors against Appellants. (Pet. App. at 44A-46A.)

The first factor in the judicial estoppel inquiry, as set forth in *New Hampshire*, provides that "a party's later position must be 'clearly inconsistent' with its earlier position." *New Hampshire*, 532 U.S. at 750. Here, the District Court determined the position taken by BancInsure was not clearly inconsistent when placed in context because "[t]he *Columbian* case contained no issue with respect to the underlying D&O action, the "insured vs. insured" exclusion or the regulatory exclusion endorsement." (Pet. App. at 44A-45A.)

The second consideration set forth in *New Hampshire* is "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal citations and quotations omitted). "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *Id.* at 750-51. Here, the district

court determined that BancInsure did not mislead the prior court because "the interrogatory answer had no bearing on the resolution of the *Columbian* case and the district court in no way relied on the information in the interrogatory answer." (Pet. App. at 45A.)

The third consideration set forth in *New Hampshire* "is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751. Here, the district court determined that no unfair advantage inured to BancInsure. (Pet. App. at 45A-46A.) The district court noted "the *Columbian* case (filed four years earlier) had nothing to do with the FDIC claims." (Pet. App. at 45A-46A.)

The district court acted within its discretion by rejecting judicial estoppel on the merits. The court of appeals did not discuss the merits, but alternatively affirmed the district court's decision because judicial estoppel does not apply to a party's opinion about coverage under an insurance policy. Nevertheless, the court of appeals recognized that the district court's decision was discretionary and that "the district court did not abuse its discretion in declining to apply" judicial estoppel. (Pet. App. 24A.)

"[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire*, 532 U.S. at 750 (emphasis added) (internal quotations and citation omitted). Most circuits agree that a

district court's decision with respect to judicial estoppel is reviewed for an abuse of discretion. *See, e.g.*, *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012); *Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co.*, 617 F.3d 1040, 1051 (8th Cir. 2010); *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384 (5th Cir. 2008); *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 31 (1st Cir. 2004); *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 780 (3d Cir. 2001); *Coastal Plains, Inc. v. Mims*, 179 F.3d 197, 205 (5th Cir. 1999); *Talavera v. Sch. Bd.*, 129 F.3d 1214, 1216 (11th Cir. 1997); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616-17 (3d Cir. 1996); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996); *United States v. Garcia*, 37 F.3d 1359, 1367 (9th Cir. 1994). Indeed, "[b]ecause judicial estoppel is equitable in nature, trial courts are not required to apply it in every instance that they determine its elements have been met." *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271 (5th Cir. 2015).

"[D]eference . . . is the hallmark of abuse-of-discretion review." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512 (1997). Deference is particularly important with regard to the application of judicial estoppel. The factors set forth by the Supreme Court for judicial estoppel are not "inflexible prerequisites or an exhaustive formula . . . [a]dditional considerations may inform the doctrine's application

in specific factual contexts." *New Hampshire*, 532 U.S. at 751.

Judicial estoppel is a matter for which the district court is "better positioned . . . to decide the issue." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 31 (1st Cir. 2004), *quoting Miller v. Fenton*, 474 U.S. 104, 114 (1985). Indeed, "abuse of discretion is a flexible standard, and the amorphous nature of judicial estoppel places a high premium on such flexibility." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 31 (1st Cir. 2004) (internal citation omitted). "Determining whether a litigant is playing fast and loose with the courts has a subjective element. Its resolution draws upon the trier's intimate knowledge of the case at bar and his or her first-hand observations of the lawyers and their litigation strategies." *Id.* The ultimate question is whether the district court abused its discretion, not whether the appellate court "would as an original matter have" made a different decision. *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

Here, the district court did not abuse its discretion by finding judicial estoppel inapplicable on the merits. The district court's decision was based on factual and legal findings consistent with the three-factor analysis set forth in *New Hampshire*. The district court's decision would be affirmed on the merits regardless of whether the court of appeals' alternative basis for affirming was correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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