LOFARO & REISER
ATTORNEYS AT LAW

www.njlawconnect.com
www.new-jerseylawyers.com

Hackensack Office
20 Court Street, Suite 4 • Hackensack, NJ 07601
Tel: 201-498-0400 • Fax: 201-498-0016

Carmine LoFaro*
Glenn R. Reiser**

Eric D. Reiser**
Michael Kalmus**

*Admitted in New Jersey
**Admitted in New Jersey & New York

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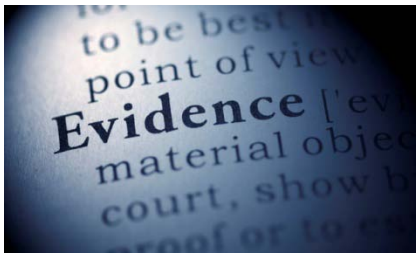
Does a Statement Made in a Party's Brief Constitute a Judicial Admission?
A Review of Federal Circuit Appellate Court Decisions. **© 2016 Glenn R. Reiser**[1]



The doctrine of judicial admissions recognizes that factual allegations made by litigants in their pleadings are binding in the case and on appeal. Examples of pleadings include a complaint, answer, counterclaim, third party complaint, affidavits, and motions. As this article demonstrates, there is a split among federal circuit courts on whether a brief or legal memorandum should be considered a "pleading" so as to come within the ambit of the doctrine. What is clear though is that district courts are given broad discretion in determining whether a written statement should be considered a judicial admission.

There are several excellent scholarly articles written on this subject, the most thorough being Ediberto Roman, "Your Honor What I Meant to State was . . .": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 Pepp. L. Rev. Iss. 3 (1995).

First Circuit

Our initial research has not disclosed a published decision issued by the First Circuit Court of Appeals addressing whether statements contained in a party's brief constitute a judicial admission.

There are several published opinions in the First Circuit generally discussing the doctrine of judicial admissions, however. Generally speaking, "[a] party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding." Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc., 976 F.2d 58, 61 (1st Cir.1992) (internal quotation marks omitted). And "an admission of counsel during trial is binding on the client" if, in context, it is "clear and unambiguous." Levinsky's, Inc. v. Wal–Mart Stores, Inc., 127 F.3d 122, 134 (1st Cir.1997). United States v. Belculfine, 527 F.2d 941, 944 (1st Cir. 1975)(". . . judicial admissions generally arise only from deliberate voluntary waivers that expressly concede for the purposes of trial the truth of an alleged fact. . . considerations of fairness and the policy of encouraging judicial admissions require that trial judges be given broad discretion to relieve parties from the consequences of judicial admission in appropriate cases.").

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Second Circuit

In Hub Floral Corp. v. Royal Brass Corp., 454 F.2d 1226 (2d Cir. 1972), a copyright infringement action, plaintiff, in a brief in support of a motion for summary judgment, admitted that he had failed to properly register the copyright. Defendants sought to use the admission to dismiss plaintiff's action. The Second Circuit refused to treat the statement as a judicial admission because the statement was not in a pleading and not part of the record. The Hub Floral court repeatedly described the statement as inadvertent as if to suggest that inadvertent statements should not be judicially admitted.

Subsequently, however, in Purgess v. Sharrock, 33 F.3d 134, 144 (2d Cir.1994), the Second Circuit held that "[a] court can appropriately treat statements in briefs as binding judicial admissions of fact." (citations omitted). In In re Ridgway, 325 B.R. 65 (Bankr. D.Conn. 2005), the bankruptcy court compared the two Second Circuit decisions of Purgess and Hub Floral and concluded that Hub Floral should be construed as being limited to its unique facts.

> The Court need not grapple with the question of whether the specific holding of *Hub Floral* has been superceded by the general authority of *Purgess*, since the two opinions can be harmonized if *Hub Floral* is, appropriately, limited to its unique facts. In *Hub Floral*, the subject *mis*-statement of counsel was found by the Second Circuit panel to have been *"inadvertent"*, and was "corrected" prior to the resolution of the subject motion by the affidavit of an individual with personal knowledge of the true facts. On that basis the panel concluded that the court below improperly deemed the statement to be a judicial admission. At most, *Hub Floral* recognizes a possible exception to the general rule that counsel statements should be treated as judicial admissions. Such an exception may be found where the affected party has (i) "corrected" its alleged mis-statement *prior to the court ruling on the subject matter*, and (ii) demonstrated that the statement was inadvertent, *i.e.* unintentional. In the instant proceeding, the Defendant has done neither.

Ridgeway, 325 B.R. at 267.

Other reported decisions from the Second Circuit on the subject of judicial admissions include Bergerson v. New York State Office of Mental Health, 652 F.3d 277, 289 (2d Cir. 2011) ("[A]ll litigants are bound by the concessions of freely retained counsel." (internal quotation marks omitted)); Haywood v. Bureau of Immigration, 372 Fed.Appx. 122, 124 (2d Cir.2010)("[A]bsent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission."); and Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F.2d 523, 528-29 (2d Cir. 1985) ("A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.").

Third Circuit

The majority of Third Circuit decisions hold that statements or arguments made by attorneys in legal memoranda and in open court do not constitute a judicial admission.

Specifically, in deciding summary judgment motions, the Third Circuit has held that unsubstantiated arguments made in briefs or at oral argument do not constitute evidence for purposes of consideration. See Versarge v. Township of Clinton N.J., 984 F.2d 1359, 1370 (3d Cir. 1993) ("we have repeatedly held that unsubstantiated arguments made in briefs or at oral argument are not evidence to be considered by this Court"); Bell v. United Princeton Properties, Inc., 884 F.2d 713, 720 (3d Cir. 1989) ("statements made in briefs are not evidence of the facts asserted); Jersey Cent. Power Light Co. v. Township of Lacey, 772 F.2d 1103, 1109-10 (3d Cir. 1985) ("[l]egal memoranda and oral argument are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion"). See also, In re Spring Ford Industries, Inc., 2005 WL 984180, at *6 (Bankr. E.D. Pa. Apr. 19, 2005)

("statements in briefs are not evidence); Clements v. Diamond State Port Corporation, 2004 WL 2223303, at *6 (D. Del. Sept. 30, 2004) ("[t]he Third Circuit has repeatedly held that unsubstantiated arguments made in briefs are not evidence to be considered by the Court"). "Vague" and "amorphous references" in the record "are insufficient to create a genuine issue of material fact on summary judgment." Bocobo v. Radiology Consultants of South Jersey, P.A., 2005 WL 3158053, at *3 (D.N.J. Nov. 21, 2005).

See also, City of Philadelphia v. Public Emp. Ben. Services, 842 F.Supp. 827 (E.D. Pa. 1994)(declining to find statement contained in plaintiff's memorandum of law as a judicial admission, because it was not made on the record or in a pleading)(citing Taylor v. Allis-Chalmers Mfg. Co., 320 F.Supp. 1381, 1385 (E.D. Pa. 1969), aff'd, 436 F.2d 416 (3d Cir. 1970)). The District Court in Taylor was confronted with statements made by a party's counsel in a pretrial memorandum. But see Feld v. Primus Technologies Corp., Civ. No. 4:12-cv-01492 (M.D. Pa. 2015)(holding that statements made in plaintiffs' pretrial memoranda were admissible as party admissions pursuant to Fed. R. Evid. 801(d)(2)(D) because they were made by their attorney acting within the scope of her authority).

But see, Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 235 (3rd Cir.1998)(affirming district court's dismissal of a Lanham Act complaint on the basis of admissions made in the plaintiff's brief in opposition to summary judgment that the parties were not in direct competition).

The Third Circuit has published several decisions addressing whether oral statements made by attorneys should be deemed a judicial admission. For instance, in Lightening Lube v. Witco Corp., 4 F.3d 1153, 1198 (3d Cir. 1993), the Third Circuit stressed that "not every out-of-court statement by an attorney constitutes an admission which may be used against his or her client. Rather, an attorney has authority to bind the client only with respect to statements directly related to the management of the litigation." Accord Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481 (3d Cir.1965)(holding that an admission of counsel during the trial is binding on the client); United States v. Butler, 496 F.Appx 158, 160-161 (3d Cir. 2012)(a district court may admit "previous statements made by counsel which ha[ve] been made on the record in the course of pretrial proceedings[.]"); EF Operating Corp. v. American Bldgs., 993 F.2d 1046, 1050 (3d Cir. 1993) (representations made during the course of litigation, whether oral or written, are binding), cert. denied, 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed.2d 151 (1993). See also, Glick v. White Motor Company, 458 F.2d 1287, 1291 (3d Cir. 1972), the court explained that "[T]he scope of judicial admissions is restricted to matters of fact which otherwise would require evidentiary proof, and does not include counsel's statement of his conception of the legal theory of the case." (internal citation omitted).

In Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (3d Cir. 1953), the Court carefully drew a rule of "estoppel" on the circumscribed canvass of the "particular facts and circumstances" of each case:

> The rule we apply here need be and is no broader than this: A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing `fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate.

Id. at 513.

Fourth Circuit

Our research has not revealed any published decisions issued by the Fourth Circuit addressing whether statements contained in a party's brief constitute a judicial admission.

The Fourth Circuit has addressed the issue in the context of statements of fact made by counsel during the course of the attorney-client representation. See United States v. Blood, 806 F.2d 1218, 1221 (4th Cir.

1986) (“[A] clear and unambiguous admission of fact made by a party’s attorney in an opening statement in a civil or criminal case is binding upon the party.”). But see New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24 (4th Cir.1963), cert. denied, 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964) ("a court, unquestionably, has the right to relieve a party of his judicial admission if it appears that the admitted fact is clearly untrue and that the party was laboring under a mistake when he made the admission.").

Fifth Circuit

According to the Fifth Circuit, the court may “appropriately treat statements in briefs as binding judicial admissions of fact." City Nat’l Bank v. United States, 907 F.2d 536, 544 (5th Cir. 1990); Young & Vann Supply Co. v. Gulf Florida & Alabama Ry. Co., 5 F.2d 421, 423 (5th Cir.1925).

Sixth Circuit

The Sixth Circuit recognizes that courts have the discretion to consider a statement made in a brief to be a judicial admission, binding on both the appellate court and the trial court. United States v. Burns, 109 F.Appx. 52, 58 (6th Cir. 2004) "[I]n order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous.'" Id. (citing MacDonald v. General Motors Corp., 110 F.3d 337, 340 (6th Cir. 1997)).

Seventh Circuit

The Seventh Circuit has concluded that a representation in a brief may be treated as a judicial admission even though it is "neither a pleading nor an affidavit." United States v. One Heckler-Koch Rifle, 629 F.2d 1250, 1253 (7th Cir.1980).

Additional published decisions from the Seventh Circuit on the subject include Soo Line R. Co. v. St. Louis Southwestern Ry. Co., 125 F.3d 481, 483 (7th Cir.1997); Keller v. United States, 58 F.3d 1194, 1198 n. 8 (7th Cir.1995) ("Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal."). Judicial admissions are limited to questions of fact. McCaskill v. SCI Management Corp., 298 F.3d 677, 682 (7th Cir. 2002). For purposes of summary judgment, the Seventh Circuit has treated representations of counsel in a brief as admissions even though not contained in a pleading or affidavit. United States v. One Heckler-Koch Rifle, 629 F.2d 1250, 1253 (7th Cir.1980);

Eighth Circuit

The Eighth Circuit treats statements by parties made in briefs as judicial admission. Holman v. Kemna, 212 F.3d 413 (8th Cir. 2000), citing Postscript Enter. v. City of Bridgeton, 905 F.2d 223, 227-28 (8th Cir. 1990).

Ninth Circuit

In American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226-227 (9th Cir. 1988), the Ninth Circuit held “that statements of fact contained in a brief *may* be considered admissions of the party in the discretion of the court.” But the court cautioned that the statement must be timely introduced into evidence. See also, Gospel Missions of America v. City of Los Angeles, 328 F.3d 548, 557 (9th Cir. 2003) (finding that party’s prior statement regarding privity was a judicial admission).

Tenth Circuit

Although the Tenth Circuit holds that briefs are not pleadings or part of the record, that court has held that statements in briefs may be considered admissions in the court's discretion. See Plastic Container Corp. v. Continental Plastics of Oklahoma, Inc., 607 F.2d 885, 906 (10th Cir.1979), cert. denied, 444 U.S. 1018, 100 S.Ct. 672, 62 L.Ed.2d 648 (1980); see also, Lockert v. Faulkner, 574 F.Supp. 606, 609 n. 3 (N.D.Ind. 1983).

Eleventh Circuit

Our research did not disclose any published opinions authored by the Eleventh Circuit that address the issue of whether statements contained in a party's legal memoranda constitute judicial admissions.

The general rule in the Eleventh Circuit is that "a party is bound by the admission in his pleadings." Best Canvas Products & Supplies, Inc. v. Proof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983). In Best Canvas, the court considered whether the defendant's cause of action alleged in its counterclaim arose in Georgia or Florida. Id. at 620. This determination was important because Georgia law would bar the defendant's counterclaim but Florida law would not. Id. In its pleadings, the defendant had alleged that "this action . . . is brought in the judicial district in which the cause of action arises," it being the Northern District of Georgia. Id. at 621. Both the district court and the Eleventh Circuit concluded that the defendant was bound by its judicial admissions, and summary judgment against the defendant was appropriate. The court noted, "judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." Id. (internal citation omitted). See also, Holiday Inns, Inc. v. Alberding, 683 F.2d 931, 935 (11th Cir.1982) (where the court held that in a dispute over "defendant's profits," a party was bound by its pretrial agreement stipulating its profits as "a defendant."). But see Nichols v. Barwick,792 F.2d 1520, 1523 (11th Cir. 1986) (stating that the general rule of judicial admissions does not apply when the defendant takes inconsistent positions in its pleadings "in order to lay a basis for establishing the contingent liability of [the plaintiff and third party defendant]");

U.S. Supreme Court

The United States Supreme Court has yet to address whether written statements appearing in a party's brief constitute a judicial admission.

In United States v. Fruehauf, 365 U.S. 146 (1961), the Supreme Court alluded to, but chose not to address, whether an admission in a memorandum of law should be treated as a judicial admission. To be binding, judicial admissions must be unequivocal. See Oscanyan v. Arms Co., 103 U.S. 261, 26 L.Ed. 539 (1880)(admission by counsel during trial is binding).