

Insurance Estoppel and Waiver Amid Conflicting Case Law: Safeguarding Coverage, Navigating Insurer and Insured's Duties

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INSURANCE ESTOPPEL AND WAIVER

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ESTOPEL & WAIVER - IN GENERAL

- **waiver 1.** The voluntary relinquishment or abandonment — express or implied — of a legal right or advantage

- **estoppel 1.** A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. . . . **3.** An affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance.

Black's Law Dictionary (10th ed. 2014).

ESTOPPEL & WAIVER: BLURRED LINES

- The distinction between the two has been blurred by many courts; specifically, the prejudice/detrimental reliance element.
- See, e.g., Rapid Park Indus. v. Great N. Ins. Co., 502 F. App'x 40, 42 n. 2 (2d Cir. 2012) (noting that the lower court grouped waiver and estoppel claims together, and only analyzed waiver claims; “[t]his is incorrect, as [w]aiver and estoppel are distinct in New York Insurance law”) (internal quotation marks and citations omitted); Ray v. Prudential Ins. Co. of Am., No. C 09-05598 RS, 2010 WL 4704258, at *4 (N.D. Cal. Nov. 12, 2010) (“the distinction between [the two] in California has been blurred in the insurance context”), aff'd. 488 F. App'x 234 (9th Cir. 2012); Glass v. United of Omaha Life Ins. Co., 33 F.3d 1341, 1347, n. 5 (11th Cir. 1994) (“[t]he terms ‘waiver’ and ‘estoppel’ have been so frequently confused and abused in decisions on insurance law that it seems preferable to define those terms accurately in the inception of this discussion.”) (internal quotation marks and citation omitted); W. Cas. & Sur. Co. v. Brochu, 122 Ill. App. 3d 125, 134, 460 N.E.2d 832, 839 (1984) (“the two issues are frequently intertwined and confused”), aff'd. 105 Ill. 2d 486, 475 N.E.2d 872 (1985).

ESTOPPEL: ELEMENTS AND BURDEN OF PROOF

- Under New York law, estoppel arises “where an insurer acts in a manner inconsistent with a lack of coverage, and the insured reasonably relies on those actions to its detriment. Thus, estoppel requires a showing of prejudice to the insured.” Cont'l Cas. Co. v. Marshall Granger & Co., LLP, 6 F. Supp. 3d 380, 394 (S.D.N.Y. 2014) (internal quotation marks and citations omitted); see Sulner v. G.A. Ins. Co. of New York, 224 A.D.2d 205, 206, 637 N.Y.S.2d 144, 145 (1st Dept. 1996) (“estoppel is limited to those instances in which the insured has been prejudiced by the insurer’s conduct.”) (citations omitted), lv. denied 88 N.Y.2d 805 (1996).
- The burden of proof is also on the party claiming estoppel, usually the insured. Provencal, LLC v. Tower Ins. Co. of New York, 138 A.D.3d 732 (1st Dept. 2016) (“Because the plaintiff failed to make the requisite showing of prejudice, there was no basis to estop the defendants from relying on policy exclusions not detailed in their letter disclaiming coverage.”).

ESTOPPEL: ELEMENTS AND BURDEN OF PROOF

- Most other jurisdictions' elements of estoppel, including CA, FL, IL, and TX, are similar to New York, and also require the insured to prove estoppel.
- See, e.g., Guerrette v. Farmers Grp., Inc., No. B237819, 2012 WL 5936702, at *9 (Cal. Ct. App. Nov. 28, 2012) (proof of estoppel requires a showing of detrimental reliance by the injured party); City of Pleasanton v. Bd. of Admin. of the California Pub. Employees' Ret. Sys., 211 Cal. App. 4th 522, 543-44, 149 Cal. Rptr. 3d 729, 748 (2012) (party claiming estoppel bears the burden of proving it); United States Life Ins. Co. in the City of New York v. Logus Mfg. Corp., 845 F. Supp. 2d 1303, 1318 (S.D. Fla. 2012) (discussing elements of estoppel, and that the party claiming estoppel must prove it); Am. States Ins. Co. v. Nat'l Cycle, Inc., 260 Ill. App. 3d 299, 307-08, 631 N.E.2d 1292, 1298-99 (1994) (discussing elements of estoppel); Clarendon Nat. Ins. Co. v. All Modes, Inc., 2011 IL App (2d) 110302-U, ¶ 15 (2011) (burden of proof is in the party asserting estoppel); Texas Farmers Ins. Co. v. Kurosky, No. 02-13-00169-CV, 2015 WL 4043278, at *8 (Tex. App. July 2, 2015) (discussing elements of estoppel, and holding that the burden is on the party asserting estoppel).

WAIVER: ELEMENTS AND BURDEN OF PROOF

- Waiver is an equitable doctrine, it requires proof of a voluntary relinquishment of a known right. E.g., West Jersey Title v. Industrial Trust Co., 27 N.J. 144, 152 (1958).
- Waiver most often arises when an insurer does not demand strict compliance with the terms of its policy. E.g., Illinois Union Ins. Co. v. Intuitive Surgical, Inc., No. 13-cv-04863-JST (N.D. Cal. May 27, 2016).
- The doctrine is designed to preclude the waiving party from lulling the other party into a belief that compliance with a contractual duty is not required, and then later using the non-compliance for the purpose of avoiding the contract. E.g., Greenpoint Bank v. Sec. Mut. Ins. Co., 247 A.D.2d 583, 583-84 (N.Y. App. 1998).
- Waiver need not be stated expressly, it can be implied from an insurer's acts, words, conduct or knowledge, demonstrating the insurer knew of a right and then abandoned it either by design or indifference. E.g., Anderson v. Holy See, 878 F. Supp. 2d 923, 933 (N.D. Ill. 2012); Brown v. State Farm Mut. Auto Ins. Co., 776 S.W.2d 384 (Mo. 1989); Chen v. Vigilant Ins. Co., 2009 WL 2341444 (N.J. App. Div. July 31, 2009).
- Some courts have held that waiver can be implied as a result of the mere passage of time (akin to estoppel in pais). See, e.g., Gibraltar Ins. Co. v. Varkalis, 263 N.E.2d 823, 827 (Ill. 1970).

WAIVER: ELEMENTS AND BURDEN OF PROOF

- The party asserting waiver bears the burden of proof at trial. Where it moves for summary judgment, it bears the initial burden of producing evidence entitling it to summary judgment.
- Where the party moving for summary judgment would not bear the burden of proof at trial, it bears the initial burden of producing evidence that negates an essential element of the non-moving party's waiver claim. It must demonstrate that the party asserting waiver cannot carry its ultimate burden of persuasion at trial. If the moving party satisfies its initial burden of production, then the non-moving party must produce admissible evidence to show that a genuine issue of material fact exists as to its waiver claim.
- Many states require clear and convincing evidence of an intent to waive. E.g., Waller v. Truck Ins. Exchange, Inc., 900 P.2d 619, 636 (Cal. 1995).

WAIVER: ELEMENTS AND BURDEN OF PROOF

- Under New York law, “[t]o establish waiver, it is necessary to show that there has been an intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.” Intelligent Digital Sys., LLC v. Beazley Ins. Co., 962 F. Supp. 2d 451, 459 (E.D.N.Y. 2013) (internal quotation marks and citations omitted).
- The burden of proof is on the insured to show that there was a “clear manifestation of intent” by the insurer to abandon its right to assert a defense. Sulner v. G.A. Ins. Co. of New York, 224 A.D.2d 205, 206, 637 N.Y.S.2d 144, 145 (1st Dept. 1996) (internal quotation marks and citation omitted), lv. denied 88 N.Y.2d 805 (1996).
- The elements of waiver are similar in other jurisdictions, including CA, FL, IL, and TX, and also require the insured to prove waiver. See, e.g., Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co., 231 Cal. App. 4th 1131, 1148, 180 Cal. Rptr. 3d 683, 698 (2014) (discussing requirements of waiver and holding that the burden is on the party claiming waiver); Texas Farmers Ins. Co. v. Kurosky, No. 02-13-00169-CV, 2015 WL 4043278, at *7 (Tex. App. July 2, 2015) (same); Citizens Prop. Ins. Corp. v. Trapeo, 136 So. 3d 670, 677 n.1 (Fla. Dist. Ct. App. 2014) (same), reh'g denied (Apr. 1, 2014); State Farm Fire & Cas. Co. v. Kiszkan, 346 Ill. App. 3d 292, 299, 805 N.E.2d 292, 298 (2004) (discussing elements of waiver); Gen. Cas. Co. of Wisconsin v. Philadelphia Indem. Ins. Co., 2013 IL App (1st) 122532-U, ¶ 53 (2013) (the party claiming waiver has the burden of proof), app. denied 2 N.E.3d 1045 (2013).

PREJUDICE TO THE INSURED

- Again, only estoppel requires a showing of prejudice, and does not require a showing of intentional relinquishment of a known right.
- Instead, the insurer must act inconsistent with its position of non-coverage (without regard to insurer's intent), and the insured must reasonably rely to its detriment on the insurer's actions or inactions.
- **Liability Policies**
 - prejudice is typically established where the insurer assumes the defense of the insured in the underlying action without reserving its rights, but later disclaims coverage.
 - In New York, “[p]rejudice is established only where the insurer's control of the defense is such that the character and strategy of the lawsuit can no longer be altered.” Federated Dep't Stores, Inc. v. Twin City Fire Ins. Co., 28 A.D.3d 32, 39, 807 N.Y.S.2d 62, 68 (1st Dept. 2006) (citations omitted); Williams v. New York Cent. Mut. Fire Ins. Co., 108 A.D.3d 1112, 1115, 969 N.Y.S.2d 292, 294 (4th Dept. 2013); see also Allied Framers, Inc. v. Golden Bear Ins. Co., No. A129733, 2011 WL 4337034, at *13 (Cal. Ct. App. Sept. 16, 2011) (similar standard under CA law); Standard Mut. Ins. Co. v. Lay, 2013 IL 114617, ¶ 19, 989 N.E.2d 591, 596 (2013) (similar under IL law); Pac. Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169 (5th Cir. 1973) (prejudice where insurer's conduct of the defense over a period of two and one-half years denied insured opportunity to fully investigate and conduct a defense and where specific prejudice appeared, inter alia, in insurer's failure to answer interrogatories), cert. denied 415 U.S. 921 (1974).
- **First-Party Property Policies**
 - No set standard of what constitutes prejudice to the insured; more difficult to show prejudice. See, e.g., Provencal, LLC, 138 A.D.3d 732 (no estoppel because insured failed to make the requisite showing of prejudice); Vecchiarelli v. Cont'l Ins. Co., 277 A.D.2d 992, 992, 716 N.Y.S.2d 524, 526 (2d Dept. 2000) (on SJ motion, insured failed to meet its burden of establishing prejudice as a matter of law).
 - One example of prejudice could be the fact that the insured made costly repairs to its damaged property in reliance on the insurer's action or inaction indicating that the loss was possibly covered. See Farokhpour v. Allstate Ins. Co., 101 A.D.3d 672, 674, 955 N.Y.S.2d 185, 186-87 (2d Dept. 2012) (question of fact whether plaintiff's expenditure of \$92,000 repairing the home was prejudice in reliance on the insurer's letter that the investigation was still ongoing, where the letter was in reference to a different claim but failed to so indicate); see also Lumbermen's Mut. Cas. Co. v. Sykes, 384 Ill. App. 3d 207, 890 N.E.2d 1086 (2008) (prejudice where insured acted to her detriment on the representation of coverage by authorizing contractor to begin remediation work).

PREJUDICE TO THE INSURED

BLURRING THE DISTINCTION BETWEEN WAIVER AND ESTOPPEL:

- Gordon v. Deloitte & Touche, LLP Grp. Long Term Disability Plan, 749 F.3d 746, 749 (9th Cir. 2014)
 - Plan participant employee brought an ERISA action against plan administrator insurance company challenging termination of long-term disability benefits. The lower court and the Ninth Circuit held that the suit was barred by statute of limitations.
- In its decision, the Ninth Circuit, while properly differentiating between elements of waiver and estoppel, in its analysis of the waiver argument held that “the availability of waiver in the insurance context is limited under California law.” Id. at 752. In citing Intel Corp. v. Hartford Acc. & Indem. Co., 952 F.2d 1551 (9th Cir. 1991) in support of its holding, the Court in Gordon held that “the distinction between waiver and estoppel has been blurred.” It went on to hold that “it is consistent with ERISA to require an element of detrimental reliance or some misconduct on the part of the insurance plan before finding that it has affirmatively waived a limitation defense.” Gordon, at 752-53.
- Thus, at least in the context of ERISA, the Ninth Circuit requires prejudice in order for waiver argument to apply, blurring the differences between estoppel and waiver.

PREJUDICE TO THE INSURED

THOUGHTS ON GORDON:

- The Gordon court's reliance on Intel Corp. is questionable.
- The Ninth Circuit itself has criticized Intel for its failure to recognize analytical differences between waiver and estoppel. Aceves v. Allstate Ins. Co., 827 F. Supp. 1473, 1478–81 (S.D. Cal. 1993), rev'd in part 68 F.3d 1160 (9th Cir. 1995).
- The Gordon court's decision can be read as limiting its holding to cases dealing only with ERISA.

PREJUDICE TO THE INSURED

- An insured's control its own defense is a significant right.
- When an insurer assumes control of the defense without fully or properly reserving its rights, the insured's lack of control of its defense may constitute prejudice. E.g., Williams v. New York Cent. Mut. Fire Ins. Co., 108 A.D.3d 1112, 1115, 969 N.Y.S.2d 292, 294 (4th Dept. 2013); Am. Country Ins. Co. v. Williams, No. 1-01-3642, 2003 Ill. App. LEXIS 79, at *24-25 (1st Dist. Jan. 24, 2003).
- This result often obtains because of the conflicts of interest arise when an insurer represents the insured in a lawsuit while simultaneously formulating its own non-coverage defenses against the insured. E.g., Pac. Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169 (5th Cir. 1973).
- In some jurisdictions, an insurer's delay or failure to promptly reserve its rights may give rise to a presumption of prejudice to the insured. E.g., Pendleton v. Pan Am. Fire & Cas. Co., 317 F.2d 96 (10th Cir.), cert. den. 375 U.S. 905 (1963), modified 326 F.2d 760 (1964); Collins v. Orange Mut. Cas. Co., 706 N.E.2d 856 (Ohio Ct. App. 1997).
- In other jurisdictions, an insured is required to demonstrate prejudice and/or detrimental reliance. E.g., Comm'l Union Ins. Co. v. Int'l Flavors & Frag., Inc., 822 F.2d 267 (2nd Cir. 1986).

ACTS BY THE INSURER THAT CONSTITUTE WAIVER AND/OR ESTOPPEL

- Intentional or knowing waiver can occur when the insurer ignores its policyholder's breach of contract, either because the breach is not significant enough to affect the handling of the claim, or the expense in denying coverage is more substantial than the cost of defending or settling the claim. In either event, the insurer's affirmative economic decision is a relinquishment of its right to later demand strict conformance with its policy's terms. E.g., Benjamin Shapiro Realty Co. v. Agric. Ins. Co., 287 A.D.2d 389, 389, 731 N.Y.S.2d 453, 454 (1st Dept. 2001).
- "An insurer may be deemed to waive any ground which would otherwise be entitle it to rescind a policy or treat it as forfeited when, despite knowledge of the facts giving it the option, it impliedly recognizes the continuing effect of the policy." Illinois Union Ins. Co. v. Intuitive Surgical, Inc., No. 13-cv-04863-JST (N.D. Cal. May 27, 2016) (waiver may be found based on issuance of "revised" policy after insurer becomes aware of material misrepresentations in the insured's application).
- An insurer's failure to return premiums, or pay them into court, may waive the insurer's rescission claim. Dodd v. American Family Mut. Ins. Co., 983 N.E.2d 568 (In. 2013).
- An insurer may waive its right to assert the application of a limitation period, including that for bringing suit, if it causes the delay or lulls the insured into failing to timely file. E.g., Greenpoint Bank v. Sec. Mut. Ins. Co., 247 A.D.2d 583 (N.Y. App. 1998) (insurer requested submission of successive proofs of loss).

ACTS BY THE INSURER THAT CONSTITUTE WAIVER AND/OR ESTOPPEL

- If an insurer improperly refuses to defend an underlying suit against its insured, the insurer will generally be estopped from relying on any policy defenses to avoid coverage and/or payment of any settlement or judgment that results. E.g., State Farm Fire & Cas. Co. v. Martin, 710 N.E.2d 1228, 1231 (Ill. 1999); Owens Illinois, Inc. v. United Ins. Co., 624 A.2d (N.J. App. Div. 1993), aff'd as to this issue, 650 A.2d 974 (1994).
- Estoppel can be found against an insurer that improperly refuses to defend, even when another insurer undertakes the insured's defense. See, e.g., Northbrook Prop. & Cas. Ins. Co. v. United States Fid. & Guar. Co., 501 N.E.2d 817, 820-21 (Ill. 1st Dist. 1986).
- Statutes may impact waiver and estoppel
 - Failure to timely disclaim may waive exclusions and/or condition defenses
 - Statutes may set time frame for raising coverage defenses
 - Statutes may render a ROR ineffective
 - N.Y. Ins. Law § 3420(d)(2) - for claims of death and bodily injury
 - Fla. Stat. Ann. § 627.426
 - CA - CAL. CIV. CODE § 2860 - Requires that when a potential conflict of interest arises, the insurer must inform the policyholder of its right to independent counsel and must provide such independent counsel, unless the policyholder waives, in writing, its right; an insurer that fails to do so may be found to have waived its coverage defenses

ACTS BY THE INSURER THAT CONSTITUTE WAIVER AND/OR ESTOPPEL

- **EXAMPLES OF ACTIONS THAT CONSTITUTE WAIVER:**

- 151 E. 26th St. Associates v. QBE Ins. Co., 33 A.D.3d 452, 453, 823 N.Y.S.2d 24, 25 (1st Dept. 2006) (holding that insurer waived disclaimer predicated on untimely notice where the insurer never issued a disclaimer, never asserted the affirmative defense in its answer, and only raised it for the first time in its motion for summary judgment more than three years after receiving the notice of claim).
- Benjamin Shapiro Realty Co. v. Agric. Ins. Co., 287 A.D.2d 389, 389, 731 N.Y.S.2d 453, 454 (1st Dept. 2001) (holding insurer to have waived defense based on late notice where it was not included in the disclaimer letter but was asserted for the first time in the answer).
- Medina v. Liberty Mut. Fire Ins. Co., 243 A.D.2d 544, 545, 665 N.Y.S.2d 294 (2d Dept. 1997) (waiver where a supplemental disclaimer sent two years later including a ground not included in the initial disclaimer).
- Unexcused delay in issuing a disclaimer can constitute a waiver. See, e.g., First Fin. Ins. Co. v. Jetco Contracting Corp., 1 N.Y.3d 64, 69-70, 801 N.E.2d 835, 839-40 (2003) (48-day delay in issuing a disclaimer unreasonable as a matter of law); Morrisania Towers Hous. Co. P'ship v. Lexington Ins. Co., 104 A.D.3d 591, 592, 963 N.Y.S.2d 4, 5 (1st Dept. 2013) (13-month delay in issuing disclaimer unreasonable as a matter of law); Hunter Roberts Const. Grp., LLC v. Arch Ins. Co., 75 A.D.3d 404, 409, 904 N.Y.S.2d 52, 57-58 (1st Dept. 2010) (four-month delay unreasonable as a matter of law where a cursory review of the notice of claim would have put the insurer on notice that the notice was given late and no other explanation was provided for the delayed issuance of a disclaimer).
- Insurer's acceptance of premiums after learning of facts that entitles it to rescind the policy has waived its right to do so. U.S. Life Ins. Co. in City of New York v. Blumenfeld, 92 A.D.3d 487, 489, 938 N.Y.S.2d 84, 86 (1st Dept. 2012).
- An insurer waives information about material facts in an application where the insurer has actual knowledge that the facts presented in an application are untrue. Colony Ins. Co. v. Crusader Ins. Co., 188 Cal. App. 4th 743, 753-54, 115 Cal. Rptr. 3d 611, 619-20 (2010).
- Under Florida law, liability insurer waived right to rescind insurance policy as void based on insured's misrepresentation in application that maximum speed was 65 miles per hour, where it renewed policy and accepted and retained premiums after its agent acting as claims appraiser knew that boat could exceed 70 miles per hour. Wimberg v. Chandler, 986 F. Supp. 1447, 1455-56 (M.D. Fla. 1997).
- Under Illinois law, health insurer waived exclusion by voluntarily, and without lack of knowledge or mistake of fact, paying for treatment as result of inadvertent clerical or computer error. Cohn v. Anthem Life & Health Ins. Co., 965 F. Supp. 1119, 1123 (N.D. Ill. 1997).
- Insurer waived appraisal requirement by accepting and retaining insurance premiums with knowledge the insured had moved the property without obtaining a new appraisal. Farmers Mut. Protective Ass'n of Tex. v. Pack, 465 S.W.2d 228, 229-30 (Tex. Civ. App. 1971), writ refused NRE (July 21, 1971).

ACTS BY THE INSURER THAT CONSTITUTE WAIVER AND/OR ESTOPPEL

- **EXAMPLES OF ACTIONS THAT CONSTITUTE ESTOPPEL:**

- Estoppel where the insurer had lulled the insured into forbearing from bringing suit by not disclaiming coverage until after the insured's time to file suit had expired. See N. Am. Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc., 499 F.Supp.2d 361 (S.D.N.Y. 2007), reversed in part on other grounds 292 Fed. Appx. 73 (2d Cir. 2008); John v. State Farm Mut. Auto. Ins. Co., 116 A.D.3d 1010, 1012, 983 N.Y.S.2d 883, 884 (2d Dept. 2014) (an insurer could be estopped from asserting a suit limitation provision of a policy if it engaged in conduct that “lulled [the insured] into inactivity based on a belief that [the insured’s] claim would ultimately be processed, or that [the insured] was induced by fraud, misrepresentation or deception to refrain from commencing a timely action.”) see also Syprasert v. Truck Ins. Exch., No. B260567, 2016 WL 1166257, at *5 (Cal. Ct. App. Mar. 23, 2016) (“An insurer can be estopped from relying on a suit limitations provision if it does not properly inform the insured of the provision when denying the insured's claim.”) (citations omitted).
- In the context of liability policies, where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense. Albert J. Schiff Associates, Inc. v. Flack, 51 N.Y.2d 692, 699, 417 N.E.2d 84, 87 (1980); Montpelier U.S. Ins. Co. v. 240 Mt. Hope Realty Co., No. 15-CV-1033 JMF, 2015 WL 6395949, at *3 (S.D.N.Y. Oct. 22, 2015); see also Allied Framers, Inc. v. Golden Bear Ins. Co., No. A129733, 2011 WL 4337034, at *13 (Cal. Ct. App. Sept. 16, 2011); Rainey v. Indiana Ins. Co., 2016 IL App (1st) 150862-U, ¶ 32 (2016) (“An insurer who undertakes an insured's defense without a reservation of rights will be estopped from denying coverage if doing so would result in prejudice.”) (citation omitted);
- In the context of property insurance, insurer was estopped from raising the defense of noncoverage with respect to insured's actions between date insurer represented to her that mold damage at her home was covered and date it sent her a letter purportedly retracting. Lumbermen's Mut. Cas. Co. v. Sykes, 384 Ill. App. 3d 207, 890 N.E.2d 1086 (2008).
- Insurer, which had issued liability insurance policy covering insured's commercial tractor-trailer, was estopped from resorting to insured's breach of garaging warranty provision of policy, requiring insured to garage or park tractor-trailer in particular manner, to deny insured's claim of loss due to theft, as insurer failed to provide insured a binder, a copy of policy, or any other notice of garaging warranty prior to the loss, as required by statute. Lloyds Underwriters at London v. Keystone Equip. Fin. Corp., 25 So. 3d 89, 93-94 (Fla. Dist. Ct. App. 2009), review dismissed 34 So.3d 2 (2010).
- Insurer's acceptance of premiums bank paid from escrow fund without cancelling policy, even though insured had notified bank that she was no longer residing in home and was merely renting home estopped insurer from using forfeiture clause as defense so as to allow denial of coverage based on fact that insured was not resident of house at time of fire. Union Nat. Bank of Little Rock v. Moriarty, 746 S.W.2d 249, 252-53 (Tex. App. 1987), writ denied (Sept. 14, 1988).

EFFECT OF ESTOPPEL/WAIVER & CREATION OF COVERAGE

- Estoppel and waiver will operate to prevent a forfeiture of an existing policy coverage, such as when the insured breaches policy conditions.
- However, waiver and estoppel are generally not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom.
- See, e.g., *Albert J. Schiff Associates, Inc. v. Flack*, 51 N.Y.2d 692, 698-99, 417 N.E.2d 84, 87 (1980); *Lexington Park Realty LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 120 A.D.3d 413, 414, 992 N.Y.S.2d 1, 2 (1st Dept. 2014); *Federated Dep't Stores, Inc. v. Twin City Fire Ins. Co.*, 28 A.D.3d at 38, 807 N.Y.S.2d at 68; *Mike Rovner Constr., Inc. v. Liberty Surplus Ins. Corp.*, No. 2D CIV. B246877, 2014 WL 3752106, at *5 (Cal. Ct. App. July 31, 2014), as modified (Aug. 19, 2014); *Advanced Network, Inc. v. Peerless Ins. Co.*, 190 Cal. App. 4th 1054, 1066, 119 Cal. Rptr. 3d 17, 27 (2010); *Boyd v. Travelers Ins. Co.*, 421 S.W.2d 929, 932-33 (Tex. Civ. App. 1967), writ refused NRE (Apr. 10, 1968); *Shopping Ctr. Mgmt. v. Arch Specialty Ins. Co.*, No. 09-21426-CIV, 2010 WL 1302967, at *4 (S.D. Fla. Mar. 31, 2010).

EFFECT OF ESTOPPEL/WAIVER & CREATION OF COVERAGE

Ohio Cas. Ins. Co. v. Wellington Pl. Counsel of Co-Owners Homeowners Ass'n, 2014 WL 97395 (Ky. Jan. 10, 2014) - an insurer's failure to reserve rights for over two years waived all coverage defenses -- even it if the scope of coverage under its policy was thereby enlarged

During the pendency of a coverage case, the Supreme Court issued a decision finding that faulty workmanship is not an “occurrence.” Its attempt to avoid coverage based on that intervening decision was rejected, even though the waiver finding allegedly broadened the scope of available coverage:

[The insurer] makes a compelling argument that it could not have anticipated the need for a Reservation of Rights as it could not have known that Cincinnati Ins. Co. would be rendered during the course of litigation. While this is true, the burden rests solely with [the insurer], not the insured or 3rd party beneficiaries or assignees, to reserve the insurer's right to claim that coverage was not triggered. That is to say, [the insurer's] failure to anticipate all future contingencies and defenses, including the possibility of intervening appellate decisions, should not be imputed to the insured or 3rd party beneficiaries, and should not operate to remove the protection of the insured that the Reservation of Rights provides. The very purpose of a Reservation of Rights is to combat prejudice to the insured, and not to protect the insurer.

DUTIES IMPOSED ON THE INSURED

Waiver and estoppel issues often arise in the context of litigating the effect of Reservation of Rights letters and denials.

- Insureds should consider whether, when, and how to respond to an ROR letter.
- Many jurisdictions permit an insurer to unilaterally reserve rights and hold that no response is required. Some jurisdictions require a policyholder's assent to the insurer's ROR. Some insurers argue, and some courts find, RORs may create implied contracts, with new and adequate consideration as to defenses raised or conditions placed on the insurer's offer to defend.

DUTIES IMPOSED ON THE INSURED

- The most important source of the insured’s duties is the policy itself.
- Two of the most important duties of the insured, measured by their universal presence and volume of coverage disputes they generate are:
 - duty to notify the insurer of loss or claim; and
 - duty to cooperate with the insurer.
- The consequences of late notice and breach of the duty to cooperate vary with the type of policy at issue and the jurisdiction. Under occurrence-based liability policies and first-party property policies, the majority rule is that the insurer will be excused from its coverage obligation only when the insurer proves that the delay in notice or failure to cooperate resulted in prejudice to the insurer. Prejudice in this context means concrete harm to the insurer's ability to investigate the loss, defend a liability claim, or develop a defense to coverage. A minority of jurisdictions is less forgiving and require no showing of prejudice.
- In New York, in the cases of liability policies, the statute requires a showing of prejudice to the insurer. N.Y. Ins. Law § 3420 (a). Otherwise, a failure to comply with the notice provision vitiates the policy as a matter of law. See, e.g., Pfeiffer v. Harleystown Grp., Inc., No. 10-CV-1619 ALC, 2011 WL 6132693, at *3 (E.D.N.Y. Sept. 30, 2011) (“The insurance carrier does not need to show it was prejudiced by the lack of notice before it can deny coverage.”) (citations omitted), aff'd, 502 F. App'x 28 (2d Cir. 2012)
- In some of the other jurisdictions, the requirements vary. See Brenegan v. Fireman's Fund Ins. Co., No. 2D CIV. B254760, 2015 WL 1309638, at *2 (Cal. Ct. App. Mar. 23, 2015) (notice required in “occurrence policies; not in claims-made policies); LoBello v. State Farm Florida Ins. Co., 152 So. 3d 595, 599 (Fla. Dist. Ct. App. 2014) (prejudice is presumed from untimely notice, but may be rebutted); AMCO Ins. Co. v. Erie Ins. Exch., 2016 IL App (1st) 142660, ¶ 29 (2016) (prejudice is but one factor of reasonableness of the insured’s delay in giving notice); C.L. Thomas, Inc. v. Lexington Ins. Co., No. 13-13-00566-CV, 2014 WL 4494516, at *4 (Tex. App. Sept. 11, 2014) (“an insured's failure to notify the insurer of an occurrence does not absolve the insurer from coverage unless the lack of notice prejudices the insurer”).

REASONABLE EXPECTATIONS DOCTRINE

- The Doctrine:
 - “The objectively reasonable expectations of the applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provision would have negated those expectations.” Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 53, 664 N.W.2d 776, 782-83 (2003) (quoting Prof. Robert E. Keeton, Insurance Law Rights at Variance With Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970)).
- Approximately ten jurisdictions adopted the doctrine; seventeen jurisdictions adopted some form of the doctrine; ten jurisdictions have not adopted the rule; the remaining jurisdictions have not addressed the issue or managed to avoid ruling on it. See Prof. Roger C. Henderson, The Doctrine of Reasonable Expectations in Insurance Law After Two Decades, 51 Ohio St. L. J. 823, 827-38 (1990).
- New York has not adopted it; at least not in instances where the policy language is clear and not unfair. Slayko v. Sec. Mut. Ins. Co., 98 N.Y.2d 289, 296, 774 N.E.2d 208, 213 (2002) (“Some states have developed the ‘reasonable expectations’ doctrine to mitigate the rigors of policy exclusions when such exclusions operate in surprising and unfair ways. . . . [W]e will not lightly adopt it where, as here, the effect of the exclusion is neither surprising nor unfair.”) (citation omitted).