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EFFECT OF LOSS UPON WAIVER AND ESTOPPEL IN INSURANCE LAW

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Rising out of the mists of waiver and estoppel are certain clearly seen principles which seem to mark the limits of obscurity. At one end is the oft-repeated touchstone, *waiver and estoppel cannot be used to extend the scope of the policy*, and at the other extreme is the equally well-worn phrase, *the law frowns on forfeitures and leans toward waiver whenever the facts justify it*. In between, the fog is thick and the words "waiver" and "estoppel" are applied, frequently without discrimination, to achieve results which seem to be just in the particular case.

The purpose of this article is to test the reality of these boundaries, to see if the landmarks are what they seem, and to consider underlying fact situations in an effort to determine if there is not a more valid limitation on the area of waiver and estoppel than the apparently logical catch-phrases set forth above.

The courts have always used a limitation based upon the nature of the right. They have declared that a mere forfeiture or breach of condition inserted in the policy for the benefit of the insurer may be a proper subject of waiver or estoppel,¹ but that a right affecting the scope of the policy cannot be, because to allow waiver or estoppel of such a right would result in the creation of a new contract;² and new contracts require consideration. It is submitted that this limitation is the cause of much of the confusion that now exists. In its place we propose a limitation based, not upon the nature of the right, but upon the relationship of the time

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1. *State Life Ins. Co. v. Finney*, 216 Ala. 562, 114 So. 132 (1927); *Milton Ice Company, Inc. v. Travelers Indemnity Co.*, 320 Mass. 719, 71 N.E.2d 232 (1947); *Saucier v. Life & Casualty Ins. Co.*, 181 Miss. 887, 179 So. 851 (1938); *Miller v. Phoenix Assur. Co.*, 52 N.M. 68, 191 P.2d 993 (1948).

2. *United Pacific Ins. Co. v. Northwestern National Ins. Co.*, 185 F.2d 443 (10th Cir. 1950); *St. Louis Fire and Marine Ins. Co. v. Witney*, 95 F. Supp. 555 (M.D. Pa. 1951); *Ind. Life & Health Ins. Co. v. Cofield*, 110 Fla. 315, 148 So. 549 (1933); *Bower & Kaufman v. Bothwell*, 152 Md. 392, 136 Atl. 892 (1927); *Carew, Shaw & Bernasconi v. Gen. Cas. Co.*, 189 Wash. 329, 336, 65 P.2d 689, 692 (1937) ("One may not, by invoking the doctrine of estoppel or waiver, bring into existence a contract not made by the parties and create a liability contrary to the express

of breach and the time of waiver to the time of loss. Any right is a legitimate prey to waiver or estoppel if the equities are strong enough. The equities, in turn, depend upon the facts at the time the alleged waiver or estoppel is asserted to have taken place. The most important fact of all is the time of loss.

THE PRESENT CONFUSION

The application of the doctrines of waiver and estoppel by the courts is uneven and obscure to say the least.³ The law of insurance is to a considerable extent a one-way street, a result of the effort by the courts to equalize an inherent imbalance in the bargaining power of the parties to the insurance contract. Inevitably confusion results as the courts use the familiar rules of the common law to accomplish a purpose for which these rules were not designed. It must be borne in mind that waiver and estoppel as used in the insurance situation are devices to aid but one party to the contract, the insured. But the limitations applicable to their more general use are part and parcel of them and cannot be disregarded.

While it is true that an insurance policy is a contract, it gets special treatment when it is construed by a court. The rule of construction that all ambiguities are to be resolved in favor of the insured is an outgrowth of the logical requirement that a contract be most strictly construed against the party drafting it.⁴ But in insurance cases this rule of construction is so warped, in an effort to protect the insured, that ambiguities are found where none exist, and fictions used to aid the individual do violence to the laws of contract and agency.⁵ A Florida court quite frankly not content with resolving ambiguities of policy language in favor of the insured has also resolved disputed facts the same way.⁶

This solicitude for the insured is nowhere more evident than in the use made of waiver and estoppel. The courts have been so eager to invoke

provisions of the contract the parties did make. The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet, under no conditions, can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel") *But see*, Blumberg v. American Fire & Casualty Co., 51 So.2d 182 (Fla. 1951). For a discussion concerning this case see Kivin, *Insurance*, 8 *MIAMI L.Q.*, 340 (1954).

3. PATTERSON, *ESSENTIALS OF INSURANCE LAW* § 93, 418 (1st ed. 1935), ". . . the law of waiver is so complex in its ramifications and so confused in its ideas as well as its terminology that even the legal expert is baffled by its manifold aspects."

4. *Mutual Life Ins. Co. v. Humi Packing Co.*, 263 U.S. 167 (1923); *Erickson v. Allstate Ins. Co.*, 126 F. Supp. 100 (N.D. Calif. 1954); *Delancy v. Rockingham Farmer's Mutual Fire Ins. Co.*, 52 N.H. 581, 590 (1873) "Whether it be reliance upon the representations of the companies' agents, or want of taste for literary pursuits in critical esegesis, or defect of legal attainments, or press of business, or fatigue of daily labor, or dislike of insurance typography,—whatever the cause may be, the fact is, that, under the ordinary circumstances of the present order of things, these documents are illegible and unintelligible to the generality of mankind . . ."

5. *Bowman v. Surety Fund Life Ins. Co.*, 149 Minn. 118, 182 N.W. 991 (1921) (An example of how far the courts will go to find implied authority to waive conditions after the loss has already occurred.); *Mears v. Farmers Co-op Fire Ins. Co.*, 112 Vt. 519, 28 A.2d 699 (1942) (clerk-typist working for insurer found by court to have implied authority to waive material conditions in the policy).

6. *Jefferson Standard Life Ins. Co. v. Lyons*, 122 Fla. 346, 165 So. 351 (1936).

these doctrines that generally both are seized upon at once and they are applied indiscriminately in aid of the insured; the same unfortunate act of the insurer being termed a waiver, an estoppel, or sometimes an election, depending upon the particular court's preference.⁷ Sometimes they are used interchangeably by the same court.⁸ Many courts, however, are aware of the distinction and are careful to point out that waiver is the voluntary relinquishment of a known right, and that estoppel is involuntary and based upon reliance by the insured upon a state of facts asserted by the insurer, estopping the latter to deny the facts asserted.⁹ We shall have more to say about these definitions later.

One of the difficulties with waiver has been that, although it is contractual in its essence, it lacks one principal element of contract. A waiver need not be supported by consideration.¹⁰ Therefore it cannot be a substitute for contract and cannot be used to "create new rights."¹¹ A great deal of confusion has resulted from this limitation on the power of waiver. If a clause in a particular policy is an "exclusion" it cannot be the subject of waiver by the reasoning of most courts, because to do so would be to extend the risk "beyond the scope of the policy."¹² But

7. *Dixon v. Standard Mutual Life Ins. Co.*, 206 S.C. 241, 33 S.E.2d 516 (1945); *Ellis v. Metropolitan Casualty Ins. Co. of N.Y.*, 187 S.C. 162, 167, 197 S.E. 510, 512 (1938) ("While there are distinguishing features between waiver and estoppel, waiver belongs to the family of estoppel, and the terms are frequently used as meaning the same thing in the law of contracts").

8. See *Sovereign Camp v. Heflin*, 59 Ga. App. 299, 200 S.E. 489 (1938); *Carter v. Old Faithful County Mutual Fire Ins. Co.*, 243 S.W.2d 218 (Tex. Civ. App. 1951) (a contention that the insured waived the provision in a fire policy requiring payment of premiums at the insurer's home office, and a contention that the insurer was estopped to claim as a defense the provision requiring payment of premiums at the home office raise essentially the same question, "there being no substantial distinction"). For general discussion see *Parsons, R. & Co. v. Lane*, 97 Minn. 98, 106 N.W. 485 (1906).

9. *Mitchell v. Hobbs*, 158 Kan. 320, 147 P.2d 721 (1944); *Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 41 N.W.2d 422 (1950); *Harvey v. Philadelphia Life Ins. Co.*, 131 S.C. 405, 127 S.E. 836 (1925); *Webster v. State Mutual Fire Ins. Co.*, 81 Vt. 75, 69 Atl. 319 (1908).

10. *Insurance Co. v. Norton*, 96 U.S. 234 (1877); *Washburn v. Union Century Life Ins. Co.*, 143 Ala. 485, 38 So. 1011 (1905); *Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 41 N.W.2d 422 (1950); *Kiernan v. Dutchess Ins. Co.*, 150 N.Y. 190, 44 N.E. 698 (1896).

11. *Home Ins. Co. v. Campbell*, 227 Ala. 499, 503, 150 So. 486, 489 (1933) ("Waiver or estoppel can only have a field of operation when the subject matter is within the terms of the contract. No one, we assume, would argue that a policy of insurance, which protected one against loss by fire, could be extended or broadened, by application of the principle of waiver or estoppel, to cover loss by cyclone. The effect, in such a case, would be to create a new contract without a new consideration"); *Foote Lumber Co. v. Eves F. & L. Ins. Co.*, 179 La. 779, 155 So. 22 (1934); *McCabe v. Maryland Cas. Co.*, 209 N.C. 577, 183 S.E. 743 (1936).

12. The following cases have held that the "military service clause" results in an exclusion (excepted risk), and do not allow waiver: *New York Life Ins. Co. v. White*, 190 F.2d 424 (5th Cir. 1951); *Metropolitan Life Ins. Co. v. Stagg*, 215 Ark. 456, 221 S.W.2d 29 (1949); *Miller v. Ill. Bankers Life Ass'n*, 138 Ark. 442, 212 S.W. 310 (1919); *Mutual Life Insurance Co. v. Davis*, 79 Ga. App. 336, 53 S.E.2d 571 (1949); *Life & Casualty Ins. Co. v. McLeod*, 70 Ca. App. 181, 27 S.E.2d 871 (1943); *Railey v. United Life & Accident Ins. Co.*, 26 Ga. App. 269, 106 S. E. 203 (1921); *Marks v. Supreme Tribe, B. H.*, 191 Ky. 385, 230 S.W. 540 (1921); *Ruddock v. Detroit Life Ins. Co.*, 209 Mich. 638, 177 N.W. 242 (1920); *Olson v. Grand Lodge, A. O. U. W.*, 48 N.D. 285, 184 N.W. 7 (1921); *Parrino v. Prudential Ins. Co.*, 275

if the clause can be called a "condition" this difficulty is not so apparent and the waiver can be more readily applied.¹³ In most cases the distinction is a mere matter of terminology,¹⁴ and yet the word used controls.

WAIVER

As we have said, waiver is generally defined as the voluntary relinquishment of a known right.¹⁵ In its "pure" state it need not be supported by consideration nor need it induce reliance and change of position;¹⁶ yet once made it is irrevocable.¹⁷ But this definition does not help much. Usually the voluntary promise to give up a right is not irrevocable unless coupled with consideration. What kind of right then are we talking about? Specifically it is the right of an insurer given by the express terms of the policy or by operation of law to deny liability because of some breach or forfeiture on the part of the insured.

For instance, the terms of the policy in a recent case¹⁸ provided that there should be no liability unless proofs of loss were filed within a specified time. Within that period the company made an offer of settlement. After the period had expired the company in effect withdrew its offer and relied upon the insured's failure to file proofs of loss. It could not do so. By offering settlement without a time limit it waived the 60-day period for filing proofs of loss contained in the policy.

App. Div. 861, 89 N.Y.S.2d 245 (1949); *Harrmann v. Prudential Ins. Co.*, 192 Misc. 758, 81 N.Y.S.2d 218 (1948); *Rozdzielski v. Home Life Ins. Co.*, 57 Pa. D. & C. 591 (1946); *Laurendeau v. Metropolitan Life Ins. Co.*, 116 Vt. 183, 71 A.2d 588 (1950).

13. The following cases have construed the "military service clause" as susceptible to waiver or estoppel: *Harmon v. State Mutual Ins. Co.*, 202 Ga. 265, 42 S.E.2d 761 (1947); *James v. Metropolitan Life Ins. Co.*, 331 Ill. App. 285, 73 N.E.2d 140 (1947); *Quinones v. Life & Casualty Ins. Co. of Tenn.*, 209 La. 76, 24 So.2d 270 (1946); *Cipson v. First Nat. Life Ins. Co.*, 25 So.2d 844 (La. App. 1946); *Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 41 N.W.2d 422 (1950); *Bowman v. Surety Fund Life Ins. Co.*, 149 Minn. 118, 182 N.W. 991 (1921); *Ellis v. Columbia Nat. Life Ins. Co.*, 270 App. Div. 143, 59 N.Y.S.2d 335 (1945) *aff'd without opinion* 296 N.Y. 594, 68 N.E.2d 879 (1945).

14. *ANDERSON, VANCE ON INSURANCE*, § 76, 427 (3rd ed. 1951) "For example, if the policy contains a warranted statement that the insured building is occupied, we have an undoubted warranty. If the policy declares that 'this entire policy shall be void if the insured building be or become vacant or unoccupied and so remain for more than ten days,' we have just as clearly a condition. If the provision is that 'this company shall not be liable for any loss while the insured building is vacant or unoccupied, we have an unmistakable exception. But the policy might be worded so as to leave the matter in doubt. Thus if the provision above given as creating an exception should declare that the insurer should not be liable if the building became vacant, a court might well be doubtful whether a condition or an exception was intended."

15. See note 9 *supra*.

16. *Draper v. Oswego County F.R. Ass'n*, 190 N.Y. 12, 17, 82 N.E. 755, 756 (1907) ("... it requires no consideration for a waiver, nor any prejudice or injury to the other party"); § *RICHARDS, INSURANCE*, § 434, 1456 (5th ed. 1952) "Such waiver neither requires the support of consideration or the presence of any element of a technical estoppel."

17. *Leonhard v. Providence Sav. Life Assur. Soc.*, 130 Fed. 287 (C.C.A. Mo. 1904); *State Life Ins. Co. v. Finney*, 216 Ala. 562, 114 So. 132 (1927); *Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 41 N.W.2d 422 (1950); *Roberts v. Ins. Co. of America*, 94 Mo. App. 142, 72 S.W. 144 (1902).

18. *City of Pittsburgh v. Firemen's Ins. Co. of Newark*, 366 Pa. 49, 76 A.2d 368 (1950).

However, it is generally held that a waiver may not be used to extend the scope of the policy.¹⁹ *But any waiver does, in fact, do just that.* If it be held that the company has given up its right to declare the policy void because the insured has failed to file proofs of loss within the time required, the policy now contains one less right belonging to the company, and one more right granted to the insured. And if such waiver is irrevocable a different contract has been created without consideration.

What then do the courts mean by “extending the scope of the policy”? Well, certainly if a policy of fire insurance specifically covers building A and the fire occurs in building B, the most express waiver would not be held to bind the company to pay the loss on building B. The right not to pay on building B exists *independent* of the policy and most courts would hold that this right can only be given up by an agreement with consideration. Such a waiver would be said to extend the scope of the policy with a vengeance and would undoubtedly not be enforced. But as both waivers in our hypotheticals do extend the scope of the policy to a degree, a limitation based upon the *nature* of the waiver common to both is devoid of meaning. A better limitation would depend upon the equities present at the *time* the waiver occurs.

None the less, waiver must be defined if we are to discuss it intelligently. Let us define it therefor as the voluntary relinquishment of a known defence affirmatively given by the terms of the contract, or of a known forfeiture arising by operation of law.

ESTOPPEL

Estoppel, although frequently arising out of the same facts as waiver, is quite a different affair. It is essentially involuntary. It is a denial of a right by operation of law and is grounded in an innate sense of equity which forbids the assertion of the right because to allow it would be unjust, one party having changed position to his detriment in reliance upon the activity of the party estopped.²⁰

Where a waiver is express, or at least known to the insured, his continued reliance upon the insurer's treating the policy as still in force may give rise to an estoppel, and thus the courts may be forgiven in many instances for confusing the two terms. But in the estoppel situation the equities are stronger in favor of the insured than in the case of a simple waiver.

19. See notes 2 and 11 *supra*.

20. See *Provident Life & Accident Ins. Co. v. Hudgens*, 229 Ala. 552, 555, 158 So. 757, 758 (1935) (“Where a man, by his words or conduct, wilfully or by negligence causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from denying the existence of that state of facts”).

The language of the courts would imply that an estoppel is subject to the same limitation as is a waiver.²¹ Estoppel, like waiver, may not be used to extend the policy or create contractual rights. But where an estoppel is present there certainly are strong equities in favor of forbidding the insurer the right to deny liability even though the loss sought to be recovered was expressly excluded from the contract, or was not covered by its terms. Some courts have allowed recovery in such situations.²² It is submitted that if estoppel be deemed sufficient to enforce a gratuitous oral promise to make a gift of land,²³ it should be equally efficacious on behalf of an insured where the equities are the same.

THE TIME OF LOSS

The illusory boundaries of waiver and estoppel as we have said, are still being used to guide the courts deeper into confusion. We suggest that a more helpful guide as to the application of these doctrines is to be found in the relationship of the time of breach and waiver to the time of loss. Once a loss has occurred within the scope of the policy, as it exists at that time, certain changes take place in the legal and equitable relationships of the parties that should provide a more certain and more just application of the doctrines here considered.

At the inception of the contract of insurance and throughout its duration, prior to loss, the relationship of the parties is a confidential one which burdens both insured and insurer. It exists even before the policy is entered into. The insured owes the duty of *uberrima fides* and the insurer by virtue of his superior knowledge and comparatively vast resources, likewise owes the duty of utmost good faith towards the insured.²⁴ But once loss has occurred that relationship is ended, at least with regard to the risk itself. The parties are now either debtor and creditor or they are not, and the reasons for applying equitable doctrines in considering the effect of acts which took place prior to loss are, or should be, subject to complete re-appraisal. To attempt to apply the test of whether or not a waiver or estoppel would broaden the scope of the policy and to ignore the relationship of the parties to each other and the duties each owes to each can only result in adding to the mounting mass of confusion.

21. See *Ruddock v. Detroit Life Ins. Co.*, 209 Mich. 638, 177 N.W. 242 (1920); *McCoy v. Northwestern Mutual Benefit Ass'n*, 92 Wis. 577, 66 N.W. 697 (1896). But see *Gerka v. Fidelity & Cas. Co.*, 251 N.Y. 511, 167 N.E. 169 (1929); *Draper v. Oswego County Fire Relief Ass'n*, 190 N.Y. 12, 82 N.E. 755 (1907) (The New York Court of Appeals held that an insurance company may estop itself from denying that an excepted cause is not covered by the policy).

22. See *Sovereign Camp v. Richardson*, 151 Ark. 231, 236 S.W. 278 (1921); *Gerka v. Fidelity & Cas. Co.*, 251 N.Y. 511, 167 N.E. 169 (1929); *Draper v. Oswego County Fire Relief Ass'n*, 190 N.Y. 12, 82 N.E. 755 (1907).

23. *Irwin v. Dyke*, 114 Ill. 302, 1 N.E. 913 (1885); *Scavey v. Drake*, 62 N.H. 393 (1882).

24. *Government Employees Ins. Co. v. Powell*, 160 F.2d 89 (2d Cir. 1947); *Rishel v. Pacific Mut. Life Ins. Co.*, 78 F.2d 881 (10th Cir. 1937). See also Comment, 48 *YALE L.J.* 839 (1939).

BREACH AND WAIVER OR ESTOPPEL
BOTH BEFORE LOSS

In *Soverign Camp v. Richardson*²⁵ a declaration made at the inception of the policy by the agent of the insurer that a military exclusion clause would not be enforced was held to estop the insurer from relying on the clause after loss. This decision has caused certain commentators regret.²⁶ The decision is criticized on the ground that to permit parole evidence of the "preliminary parole agreement" is a violation of the parole evidence rule and that such may not be done under the guise of waiver or even estoppel. But it is submitted that this "preliminary parole agreement," if made by the agent knowing it to be unenforceable, or made recklessly, is certainly a breach of the confidential relationship existing at that crucial time, and that the parole evidence rule was never intended to apply to such a situation. The parole evidence rule was designed to prevent fraud, not to implement it.²⁷ The real difficulty with this case is that it refuses to conform to the idea that estoppel cannot be used to extend the scope of the contract.

But as we have seen, every estoppel does, to some extent, extend the contract's scope, and to refuse to use this equitable doctrine in this instance could logically result in abolishing the doctrine itself. The important question to decide is not whether the waiver or estoppel extends the contract, but whether the equities involved are strong enough to justify invoking the doctrine. Here the misleading actions of insurer's agent occurred *before* loss and at a time when the insured was most in need of the utmost good faith on the part of the company. The act of the agent was a waiver, but it was also an estoppel in that there was reliance on the waiver and a change of position, *i.e.*, insured could have obtained a policy giving him express coverage. Whenever a waiver occurs *before* loss there is great likelihood of reliance by the insured. The company invites reliance, and

25. 151 Ark. 231, 236 S.W. 278 (1921).

26. ANDERSON, *VANCE ON INSURANCE*, § 82, 485 (3d ed. 1951).

27. *Union Mutual Life Ins. Co. v. Wilkinson*, 13 Wall 222 (U.S. 1872); Comment, 47 HARV. L. REV. 1010 (1934). "In the existing state of the law the parole evidence rule, strictly or liberally applied, does perform a necessary function in preventing fraud or mere inaccuracies of memory from introducing an undesirable degree of uncertainty into insurance contract relations. But the theoretical justification of the rule, based upon the 'integration' of prior negotiations into the final agreement, while applicable to ordinary contracts, is here quite unrealistic. In the commoner forms of insurance the assured accepts a policy which, being completely standardized except for a few options which are themselves standardized, is in many respects a commodity rather than a contract. The acceptance is ordinarily accompanied by only the vaguest knowledge of the policy's contents. Furthermore, although the formation of other kinds of contracts embodying such complicated terms and phraseology, both parties would normally participate by their attorneys, that is probably seldom done in this situation" *But see*, *American Potato Co. v. Genette Bros.*, 172 N.C. 1, 3, 89 S.E. 791, 792 (1916) ("The rules of law are and must needs be universal in their application, this being essential to certainty in business transactions and to the integrity of contracts; for otherwise 'commerce may degenerate into chicanery, and trade become another name for trick'").

therefor there should be little hesitancy by the courts in holding the company to the implications of its actions.

Likewise a waiver may also be more justifiably found *before* loss, because as a practical matter most waivers include the unstated intention of the company to keep the policy in force so that more premiums will be paid. For instance, if the agent of the company knows that the insured is unwittingly violating a condition of the policy and does not inform him, but continues to take the premiums, the agent is attempting to better the company at the insured's expense, and even though there is no reliance upon the waiver because the insured did not know of it, the company should be bound. If a reluctant insured may be kept as a paying policyholder by a waiver of prompt payment of premium, most salesmen would applaud the waiver. To allow the insurer to defend on the very acts that it initiated for its own benefit would be most unjust.

Generally the finding of a waiver or estoppel before loss has presented no difficulties to the courts. The reasoning is frequently faulty in that exclusions are called conditions in many cases, and fictions are employed.²⁸ But on a proper set of facts a waiver or estoppel aids the insured, as it should. However, a clear understanding of the reasons for applying the doctrines would simplify the problem.

WAIVER OR ESTOPPEL AFTER LOSS

When the alleged waiver or estoppel arises *after* loss an entirely different approach is indicated. Here we no longer have a trusting insured looking to a protecting company to indemnify him should a certain event occur. Instead we have an insured who either has or has not a right to receive payment from a concern which no longer has the pleasant prospect of premiums coming in. Now, the company is faced with payment of a loss which was expected on the basis of its experience and should be limited to the actual undertaking at the time of loss.

Two fact situations can arise when the waiver or estoppel arises after loss:

1. The breach or forfeiture by the insured occurred *after* loss.
2. The breach or forfeiture occurred *before* loss.

For the reasons hereinafter stated we feel that the doctrines of waiver or estoppel should be applied with modification in the first case and not at all in the second.

BREACH AND WAIVER OR ESTOPPEL BOTH OCCURRING AFTER LOSS

The happening of the loss terminates the confidential aspect of the relation of insurer-insured with regard to the scope of the risk. The

28. See notes 12 and 13 *supra*.

particular risk insured against must be limited to what it was at that time. After loss no risk exists. But although there may or may not be a debtor-creditor relationship after loss, depending upon the facts, certainly some sort of relationship does exist. It is based upon the interest of both parties in settling the claim. Here, without question a waiver or estoppel may arise against either party, but it should not affect the fundamental rights of either under the policy which have already been determined by the circumstances of the loss. It should be limited to the settlement of the debtor-creditor relationship. Thus the insurer may waive failure to file proof of loss²⁹ or any other obligation of the insured which arises *after* loss.³⁰

But even as to matters concerned with the winding up of the insurance contract there can be no waiver or estoppel unless the acts relied upon to invoke the doctrines occurred *before* the breach. A recent Massachusetts case³¹ states this principle well. After loss the insured failed to file proofs of loss within the period of sixty days as required by the policy. Some two months later the company advised the insured that it denied liability on another ground, namely that the property lost was not the property insured. The trial court found for the insured. The Supreme Judicial Court of Massachusetts, speaking through Justice Spalding said, "It is established law that the failure to file the required proofs of loss within the time limited bars recovery unless the failure is excused or has been waived . . . it is also the law that a denial of liability by an insurance company not predicated on the failure to furnish proofs is a waiver of any objection on that ground . . . Evidently the trial judge relying on this principle concluded that the letter of April 29 constituted a waiver. But this rule is subject to the qualification that the denial of liability on other grounds must occur *within the period* allowed for filing proofs of loss . . . where the denial of liability takes place *after* the expiration of the period for filing proofs, it cannot be said that the assured has been induced to forego steps to prevent a default under the policy, *for the default has already occurred.*" (Italics supplied).

BREACH OR FORFEITURE OCCURRING BEFORE LOSS

WAIVER OR ESTOPPEL OCCURRING AFTER LOSS

Where, by the terms of the contract or because of the insured's fraud or misrepresentation the insurer at the time of loss is under no liability to pay the claim and it has not waived the forfeiture or breach and has had no knowledge of it which could result in an estoppel, the rights of the parties are fixed by the happening of the loss.

29. Fidelity-Phenix Fire Ins. Co. v. Berry, 81 Ca. App. 209, 58 S.E.2d 492 (1950); Reynolds v. John Hancock Life Ins. Co., 117 Vt. 541, 97 A.2d 121 (1953).

30. Runner v. Colvert Fire Ins. Co., 76 S.E.2d 244 (W.Va. 1953).

31. Milton Ice Co. v. Travelers Indemnity Co., 320 Mass. 719, 720, 71 N.E.2d 232, 233 (1947).

Let us assume that a combination automobile policy contains the following language:

This policy does not apply while the automobile is used as a public livery conveyance unless such use is specifically declared and described in this policy and premium charged therefor.³²

The insured is using the automobile in violation of the terms of this clause at the time of the accident. The insurer has not, prior to loss, had notice of this use. Clearly, at the moment of loss there is no liability on the part of the insurer. The policy is mature; the loss has occurred and there is no coverage.

Can a recovery be allowed on the basis of acts by the insurer subsequent to loss on the grounds of waiver or estoppel? Many courts have answered in the affirmative.³³ They do so by finding that this clause is a "condition" and not an "exclusion," and that therefore a waiver or estoppel will not extend the scope of the policy. Other courts have denied a recovery on similar facts because a waiver or estoppel of an "exclusion" would extend the policy's scope.³⁴ But as we have said, all waivers or estoppels do extend the contract and therefore the limitation is meaningless. We would deny recovery on these facts, but for different reasons.

To create a liability after loss where none existed at the time of loss is an attempt to make an insurance contract retroactive and, with the exception of the "lost or not lost" clause in marine contracts, this has been considered to render the policy void as being in violation of sound public policy. *Mallard v. Hardware Indemnity Ins. Co. of Minnesota*³⁵ dealt with a situation in which there was no coverage at the time of loss. The company, however, subsequent to loss treated the policy as in force, required proofs of loss, and even held premiums up to the time of trial. But the court in denying recovery quoted from *Alliance Insurance Co. v. Continental Gin Co.*,³⁶ "Property in esse (with exceptions immaterial here) is the basis of a contract of or for fire insurance. A substantial element is the chance of loss. If either thing be absent (*i.e.*, if there be no property originally or chance of loss be precluded by the certainty incident to pre-occurring fire), the insurance company is in the absurd position of freely offering to pay a large and certain sum . . . if the insured will pay to it the comparatively insignificant amount of the premium . . . The

32. Specimen Combination Automobile Policy prepared by Association of Casualty Insurance Companies, Institute of Life Insurance and National Board of Fire Underwriters, in consultation with American Association of University Teachers of Insurance.

33. *Mattson v. Com. Mutual Fire Ins. Co.*, 80 F. Supp. 101 (D.Minn. 1949); *Farmers Union Mutual Ins. Co. v. Wyman*, 251 Ark. 1, 251 S.W.2d 819 (1953); *Bowman v. Surety Fund Life Ins. Co.*, 149 Minn. 118, 182 N.W. 991 (1921).

34. *Pothier v. New Amsterdam Cas. Co.*, 192 F.2d 425 (4th Cir. 1951); *Union Marine and General Ins. Co. v. Holmes*, 249 Ala. 294, 31 So.2d 303 (1947); *Booker v. Motor Ins. Co.*, 228 S.W.2d 694 (Springfield Ct. of Appeals, Mo. 1950).

35. 216 S.W.2d 263, 266 (Ct. of Civ. App. Tex. 1948).

36. 285 S.W. 257, 258 (Tex. Com. App. 1926).

business of fire insurance has acquired quasi public aspects. Rate regulation has proceeded to the point where improper payment of losses substantially affects the well-nigh common burden. And, because of these things, it is our opinion that the public policy would inhibit the making or enforcement of an insurance contract in relation to imaginary property, even where both parties so intend.

“‘A fortiori, ratification (rather, adoption) after destruction of the property of that which before disaster was not a contract of or for insurance is an attempt to do by indirection that which cannot be directly done.’

“One of the bases for the holdings above set out is that of public policy. It follows that no contract contrary to public policy can be enforced by way of estoppel.”

If the company in our hypothetical case, on learning of the circumstances of the accident, should promise nevertheless to assume liability, such a promise should be unenforceable even if coupled with consideration.

However, let us say that the company adjuster, having knowledge of the circumstances which negative liability, none the less takes the car to a garage and obtains estimates of the cost of repair. This is inconvenient to the insured and delays repair of the automobile causing him to lose several days' use of it. Does the reliance of the insured, at this point, upon the company's treating the loss as covered give rise to an estoppel which will bind the company? Many courts have held that it does, but others have held that it does not.³⁷

It seems obvious that any estoppel claimed to arise by acts of the company after loss cannot be said to have induced any reliance by the insured prior to loss. Therefore, the insured could not have changed his position in regard to the *risk* and the company should be allowed to defend as to the terms and conditions of risk. True the insurer may be estopped to demand proofs of loss and similar matters, but these do not relate to the *risk*, only to the settlement, as discussed above.

CONCLUSION

It is not to be expected that the ideas herein expressed will make application of the doctrines of waiver and estoppel a mere matter of fitting the facts to the form. We have not considered the impact of the law of agency on our fact situations and in many cases it might control.³⁸ These views are put forth primarily in the hope that the underlying equities present in the insurance situation may be considered in a realistic light and that the catch phrase, *waiver and estoppel cannot be used to extend the scope of the policy*, be someday relegated to the limbo where it belongs.

37. See notes 33 and 34 *supra*.

38. PATTERSON, *ESSENTIALS OF INSURANCE LAW*, §92, 413 (1st ed. 1935) “The law of agency permeates the law of the insurance contract like a thick London fog. One can find one's way about in this fog if one moves slowly, but cannot rely upon the maps and guides that lawyers have provided in the general doctrines of agency law.”