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Waiver And Estoppel Used To Extend Insurance Coverage - Ebert v. Balter

Waiver And Estoppel Used To Extend Insurance Coverage

Ebert v. Balter[1]

Third-party plaintiff Balter was involved in a minor automobile accident and mistakenly reported it to the wrong insurance company, State Farm. The accident had occurred some eight hours before State Farm's policy became effective. State Farm undertook the investigation and defense of the resulting claim for thiry-one months before it discovered the mistake and withdrew from the case. During the course of the investigation, information was received which should have informed State Farm that there was a question as to the date of the accident; however, the carrier's only act in reservation of liability was

1. 83 N.J. Super. 545, 200 A.2d 532 (1964).

to have Balter sign a non-waiver agreement.[2] Also, there was evidence of conduct on the part of the insurer's representatives which could have reasonably led Balter to believe that they would continue to defend him.[3]

Subsequent to the insurer's withdrawal, judgment was entered against Balter for injuries arising from the accident. In the instant proceeding for a declaratory judgment, Balter contended that the third-party defendant, State Farm, was liable for the expenses of defending the suit and for the judgment, on the ground that the insurer was negligent in investigating and undertaking the defense and, therefore, was estopped to deny liability. State Farm contended that no insurance policy was in effect at the time of the accident and that it was not estopped to deny liability because of the reservation of rights in the non-waiver agreement.

The court first considered whether State Farm was negligent in its investigation and defense of the claim, and held that the carrier was negligent since it had sufficient information to put it on inquiry as to the date of the accident.[4] Having failed in its duty to promptly notify Balter of the non-coverage until it had assumed and continued the investigation and defense for thirty-one months, State Farm, absent a non-waiver agreement, was stopped to deny liability.

The court then faced the problem of the non-waiver agreement, holding that, from the facts of the case, neither the non-waiver agreement nor the surrounding conversation advised Balter that the carrier was reserving its rights concerning non-coverage on the ground that the date of the accident was in question.[5] The court went on to declare

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2. *Id.* at 535:

AUTHORIZATION FOR CLAIM SERVICE AND NON-WAIVER OF RIGHTS. The undersigned requests and authorizes STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY to investigate, negotiate, settle, deny or defend any claim arising out of an accident occurring on or about *(1/17/57)*.

It is agreed that such actions shall not waive any of the rights of the undersigned or of the Company under any contract of insurance.

Dated at *(4:00 P.M.)* this *(27)* day of *(Feb.)* 1957.

(Leon Balter)
Signature

Signature

3. *Ibid.* The insurer's general agent made such statements as, "Don't worry about that small claim. Nothing will come of it."

4. *Id.* at 535–36. The claimant reported the date of the accident in error, giving the correct day, but the wrong year. The attorney for State Farm corrected this error in his answer, and in later discovery proceedings he repeatedly stated the correct date of the accident.

5. *Id.* at 540. The cleansing effect of the non-waiver agreement is well established. Merchants Indem. Corp. of N.Y. v. Eggleston, 37 N.J. 114, 179 A.2d 505 (1962); Caiola v. Aetna Life Ins. Co., 13 N.J. Misc. 845, 181 A. 524 (1935). In Morris. *Waiver and Estoppel in Insurance Policy Litigation,* 105 U. PA. L. REV. 925, 941–42 (1957), it is stated:

> A liability insurer is put to a difficult choice when it thinks it may have a policy defense. If the company withdraws and the policyholder does a poor job of defending himself and the policy defense collapses, the company will pay out more than if it had given the policyholder a skillful, vigorous defense. On the other hand, if the company knows facts which may constitute a policy defense, but nevertheless undertakes to defend a suit against the policyholder, it may waive that defense.

A non-waiver agreement reserves to the insurance company the right to deny coverage, while still enabling it to conduct the defense of the insured. However, it must

that even if it were to accept, *arguendo,* the assertion that the non-waiver agreement did reasonably notify Balter of the non-coverage later relied upon, State Farm had *waived*[6] its right to rely on the non-waiver agreement by its subsequent conduct in continuing to control the defense.[7]

The continued control of the defense was the principle object of the court's concern.[8] The underlying theory is that the control of the defense is coupled with the duty to pay the judgment;[9] that the carrier must seek the facts with reasonable diligence and make its determination to perform or withdraw from the defense within a reasonable time;[10] and that an insurer which, because of its own negligence, is ignorant of the facts constituting non-coverage and assumes and retains control of the defense, may not later claim non-coverage.[11] As the court stated, "An insurer who so undertakes a defense is estopped to deny liability even though the scope of the undertaking between the insurer and the insured is thereby extended beyond the policy. In this respect, the broad general doctrine that a loss not within the policy coverage may not be brought within the coverage under the principle of estoppel, does not apply."[12]

This "broad general doctrine" has often been cited and is generally thought to be supported by the great weight of authority.[13] The rule is that while a forfeiture of benefits contracted for may be waived,[14] the doctrine of waiver or estoppel cannot be invoked to extend the

inform the insured, seasonably and fairly, of the insurer's position. Merchants Indem. Corp. of N.Y. v. Eggleston, *supra.* See generally Annot. 81 A.L.R. 1327 (1929), supplemented in 38 A.L.R.2d 1148 (1954).

6. "Waiver" is an intentional or voluntary relinquishment of a known right. It involves both knowledge and intent, and cannot be given under mistake of fact. 200 A.2d at 540; Mancini v. Thomas, 113 Vt. 322, 34 A.2d 105, 109 (1943); Conner v. Union Auto. Ins. Co., 122 Cal. App. 105, 9 P.2d 863, 865 (1932); *cf.* CORBIN, CONTRACTS § 752 (1952).

7. 200 A.2d at 540–41.

8. *Id.* at 541–42. The court quoted at length from Merchants Indem. Corp. of N.Y. v. Eggleston, 37 N.J. 114, 179 A.2d 505 (1962).

9. 200 A.2d at 537 and cases cited. If the insured retains control of the defense and loses, the insurer would certainly not be expected to pay the judgment. Conversely, when the insurer retains control of the defense, the insured is at a disadvantage, since he cannot defend himself or make a private settlement. Such a settlement might well be to his benefit, especially if the plaintiff knows he is dealing solely with an individual defendant, rather than a wealthy and protected insurance company.

10. *Ibid.*

11. *Ibid,* citing O'Dowd v. United States Fidelity & Guaranty Co., 117 N.J.L. 444, 451, 189 Atl. 97 (1937). See Annot., 38 A.L.R.2d 1148 (1954), supplementing 81 A.L.R. 1327 (1929); 167 A.L.R. 243 (1947).

12. 200 A.2d at 537–38.

13. Peterson v. Woodmen of the World Life Ins. Co., 38 Ala. App. 328, 84 So. 2d 127, 130, *cert. denied,* 263 Ala. 700, 84 So.2d 130 (1955); Jacobs v. Metropolitan Life Ins. Co., 39 So.2d 346, 349 (La. App. 1949); 16 APPLEMAN, INSURANCE LAW & PRACTICE § 9090 (1944); 29A AM. JUR. *Insurance* § 1135 (1960); 45 C.J.S. *Insurance* § 674 (1946). See generally, Annot., 1 A.L.R.3d 1139 (1965).

14. It is well established that a forfeiture provision in a policy may be waived by the carrier. Royal Ins. Co. v. Drury, 150 Md. 211, 132 Atl. 635 (1926); Carew, Shaw & Bernasconi v. General Casualty Co. of America, 189 Wash. 329, 65 P.2d 689 (1937); McCoy v. Northwestern Mutual Relief Ass'n, 92 Wis. 577, 66 N.W. 697 (1896).

In a forfeiture provision the insurer is given, upon the happening of a condition, an option to declare the entire policy null and void as to any risk whatsoever. In contrast, a provision merely concerning the scope of coverage of a policy would exclude coverage only for certain risks, such as death occurring while the insured is in the armed forces. The policy in the latter case is fully operative to cover loss resulting from other risks. See Annot., 113 A.L.R. 857, 859 (1938).

coverage of the written contract.[15] But although the rule is often quoted by the courts, it is, in reality, no rule at all. It is apparently never applied where all the elements of an estoppel are found to exist.

Estoppel is the equitable doctrine that a party should not be permitted to repudiate an act done or position assumed where that course would work an injustice to another who, having ample reason to do so, has relied thereon.[16] An estoppel may arise even where there is no intent to mislead, as long as one's conduct is sufficient to induce reasonable reliance on the part of the other.[17] The party estopped must have acted with knowledge of the facts,[18] which knowledge may be actual or constructive.[19] The final element, which must always be present in an

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15. Bankers Nat'l Ins. Co. v. Hembey, 217 Ark. 749, 233 S.W.2d 637 (1950). In other words, the doctrine of waiver or estoppel cannot be invoked to create liability beyond the terms of the contract. Carew, Shaw & Bernasconi v. General Cas. Co. of America, 189 Wash. 329, 65 P.2d 689, 692 (1937); McCoy v. Northwestern Mut. Relief Ass'n, 92 Wis. 577, 66 N.W. 697, 699 (1896).

The courts have often deemed it unnecessary or inadvisable to distinguish between "waiver" and "estoppel" in insurance law, and the terms are used interchangeably. Travelers Ins. Co. v. Eviston, 110 Ind. App. 143, 37 N.E.2d 310, 314 (1941); Draper v. Oswego County Fire Relief Ass'n, 190 N.Y. 12, 82 N.E. 755, 756 (1907); Mancini v. Thomas, 113 Vt. 322, 34 A.2d 105 (1943). The courts will sometimes actually define an estoppel when purporting to define a waiver. See Protective Life Ins. Co. v. Cole, 230 Ala. 450, 161 So. 818 (1935).

The eagerness of the courts to find a waiver or estoppel increases with the inequity of the forfeiture. Attempts have been made by statute to restrain the court's eagerness to protect the insured, *e.g.*, MD. CODE ANN. art. 48A, § 384 (1957), which states:

> Acts of Insurer not waiving policy provisions or defenses.
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> Without limitation of any right or defense of an insurer otherwise, none of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer thereunder:
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> 1. Acknowledgement of the receipt of notice of loss or claim under the policy.
> 2. Furnishing forms for reporting a loss or claim, for giving information relative thereto, or for making proof of loss, or receiving or acknowledging receipt of any such forms or proofs completed or uncompleted.
> 3. Investigating any loss or claim under any policy or engaging in negotiations looking towards a possible settlement of any such loss or claim.

Accord, N.J. STAT. ANN. tit. 17, ch. 38, § 13.5 (1963).

16. Ebert v. Balter, 83 N.J. Super. 545, 200 A.2d 532, 539 (1964); Insurance Co. v. Wilkinson, 13 Wall. (80 U.S.) 222 (1872); Turnbull v. Home Fire Ins. Co., 83 Md. 312, 322, 34 Atl. 875 (1896). "Equitable estoppel" and "estoppel in pais" are convertible terms. New Jersey Suburban Water Co. v. Town of Harrison, 122 N.J.L. 189, 3 A.2d 623 (1939); BLACK, LAW DICTIONARY at 633 (4th ed. 1951). We are not concerned here with "legal estoppels." See generally, BLACK, LAW DICTIONARY at 648-51 (4th ed. 1951). For the purpose of this discussion, "quasi-estoppel" and "promissory estoppel" should be considered as included in the definition of "equitable estoppel" since the differences are unimportant in this context. See, *e.g.*, BLACK, LAW DICTIONARY at 1410 (4th ed. 1951). In promissory estoppel, the conduct causing reliance is the promise of the acting party, while quasi-estoppel is said to be founded upon a previously inconsistent position. *Compare,* Protective Life Ins. Co. v. Cole, 230 Ala. 450, 161 So. 818, 819 (1935) (defining waiver), *with* WILLISTON, CONTRACTS § 679 (Rev. ed. 1938) (defining promissory estoppel), and BLACK, LAW DICTIONARY at 1379 (4th ed. 1951) (defining promissory estoppel).

17. Mancini v. Thomas, 113 Vt. 322, 34 A.2d 105 (1943). *But see,* Liberty Mut. Ins. Co. v. American Auto Ins. Co., 220 Md. 497, 154 A.2d 826 (1959) (wrongful or unconscientious conduct required).

18. Mooradian v. Canal Ins. Co., 272 Ala. 373, 130 So. 2d 915, 918 (1961); Jersey Ins. Co. v. Roddam, 256 Ala. 634, 56 So. 2d 631 (1951).

19. O'Dowd v. United States Fid. & Guar. Co., 117 N.J.L. 444, 451, 189 Atl. 97 (1937). See Roblee v. Masonic Life Ass'n of Western New York, 38 Misc. 481, 77 N.Y.S. 1098 (1902), *aff'd,* 95 App. Div. 620, 88 N.Y.S. 1115 (1904); BLACK, LAW DICTIONARY at 632-33 (4th ed. 1951).

estoppel, is a change of position by the relying party with prejudice or injury suffered as a proximate consequence of such reliance.[20]

The leading authority for the "general rule" is *McCoy v. Northwestern Mutual Relief Association.*[21] In *McCoy*, decedent obtained membership in a mutual benefit association, completing an application which provided, in part, that death by suicide would impose no liability upon the association. The certificate of insurance issued to decedent was ambiguous as to suicide, but did contain the provision that the by-laws of the association, as applied by its directors, would govern payment of benefits. At the date of issuance of the certificate, the by-laws did not exclude coverage for suicide, and during the course of his membership, insured was assessed several times for payment of benefits for such deaths. However, prior to insured's death, the by-laws were amended to exclude suicide, and all members were notified of this fact. Insured received several requests from defendant association asking that his old policy be returned for a new certificate which would clearly exclude coverage for suicide. Insured refused, and later committed suicide. Plaintiff beneficiary claimed that the defendant was estopped to deny liability because of the prior assessments for suicide benefits. The court held that the doctrine of waiver and estoppel could not be invoked to extend an insurance contract to cover benefits not contracted for.[22]

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20. Mooradian v. Canal Ins. Co., 272 Ala. 373, 130 So. 2d 915 (1961); Turnbull v. Home Fire Ins. Co., 83 Md. 312, 34 Atl. 875 (1896); Mancini v. Thomas, 113 Vt. 322, 34 A.2d 105 (1943).

21. 92 Wis. 577, 66 N.W. 697, 47 L.R.A. 681 (1896). Most of the cases stating the rule rely either directly or indirectly on this case. For cases involving life insurance, see, *e.g.,* Metropolitan Life Ins. Co. v. Stagg, 215 Ark. 456, 221 S.W.2d 29, 32 (1949); Kentucky Central Life & Accident Ins. Co. v. White, 106 Ind. App. 530, 19 N.E.2d 872, 875 (1939); Jacobs v. Metropolitan Life Ins. Co., 39 So. 2d 346, 349 (La. App. 1949); Hunter v. Jefferson Standard Life Ins. Co., 241 N.C. 593, 86 S.E.2d 78, 80 (1955).

For cases involving disability insurance, see, *e.g.,* John Hancock Mut. Life Ins. Co. v. Markowitz, 62 Cal. App. 2d 388, 144 P.2d 899, 905 (1944); Quillian v. Equitable Life Assur. Soc. of the United States, 61 Ga. App. 138, 6 S.E.2d 108, 112 (1939); Prudential Ins. Co. of America v. Brookman, 167 Md. 616, 620, 175 Atl. 838 (1934); Washington Nat'l Ins. Co. v. Craddock, 130 Tex. 251, 109 S.W.2d 165, 166 (1937).

For cases concerned with automobile liability, see Inland Mutual Ins. Co. v. Hightower, 274 Ala. 52, 145 So. 2d 422, 433 (1962) (per curiam) and Antone v. New Amsterdam Cas. Co., 335 Pa. 134, 6 A.2d 566, 568 (1939). For workmen's compensation indemnity, see Two Rivers Dredge & Dock Co. v. Maryland Cas. Co., 168 Wis. 96, 169 N.W. 291, 293 (1918).

For cases involving burglary, fire or automobile comprehensive insurance see, respectively, Rosenberg v. General Accident Fire and Life Assur. Co., 246 S.W. 1009, 1012 (Mo. App. 1923); Fidelity Phoenix Fire Ins. Co. of New York v. Raper, 242 Ala. 440, 6 So. 2d 513 (1942); Sowers v. Iowa Home Mut. Cas. Ins. Co., 359 P.2d 488 (Wyo. 1961).

But see, Draper v. Oswego County Fire Relief Ass'n, 190 N.Y. 12, 82 N.E. 755, 757 (1907) (*McCoy* criticized); Keistler Co. v. Aetna Life Ins. Co., 124 S.C. 32, 117 S.E. 70, 75 (1923) (dissenting opinion).

22. The court said, "What is here sought is not to prevent a forfeiture, but to make a new contract; to radically change the terms of the certificate so as to cover death by suicide, when by its terms that is expressly excluded from the contract. We do not understand that the doctrine of estoppel or waiver goes that far. After a loss accrues, an insurance company may, . . . waive a forfeiture; or . . . be estopped from setting up such violation as a forfeiture; but such conduct, though in conflict with the terms of the contract of insurance, and with the knowledge of the insured, and relied upon by him, will not have the effect to broaden out such contract so as to cover additional objects of insurance. . . . [T]he doctrine of waiver or estoppel cannot be

This statement was much broader than the facts of the case required. Since the evidence failed to establish the necessary elements of estoppel in the first instance, the statement could be regarded as dictum. In order for an estoppel to arise, the injured party must show that he *reasonably* relied on the conduct or promise of the insurer. In *McCoy,* insured's reliance was manifestly unreasonable. It is true that there were grounds for reliance upon the association's prior payment of benefits for suicidal death, but such reliance became unreasonable after the insured was notified that suicide would no longer be covered. He had agreed to abide by the by-laws and, more significantly, refused to turn in his old certificate before he committed suicide.

The "general rule," aided by over-simplification in the courts, seems to be self-generating. Thus, in a 1912 Michigan case,[23] the court, while holding that the knowledge of the agent was not imputed to the company and that there was no conduct on the part of the company upon which plaintiff could reasonably rely,[24] further stated that "there was no privity of contract between the plaintiff and the defendant, and the plaintiff cannot make a contract by estoppel *based simply on its own neglect.*"[25] Thirty years later the rule had grown to be, "This court has repeatedly held that membership in such companies cannot be acquired by estoppel."[26]

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successfully invoked to create a liability for benefits not contracted for at all." 66 N.W. at 699.

23. Kamm & Schellinger Brewing Co. v. St. Joseph County Village Fires Ins. Co., 168 Mich. 606, 134 N.W. 999 (1912). There, the charter of a mutual company provided that the Secretary must approve any assignment of the policy incident to a change of title to the insured property. Plaintiff, a stranger to the contract, claimed the company was estopped to deny liability after a loss by fire, due to the fact that the mutual company's local agent had knowledge of the change in title to the property.

24. *Id.* at 1004. The problem of when the knowledge or conduct of an agent is to be imputed to the company is a difficult one. In a later case, Equitable Trust Co. v. Eastern Michigan Farmers' Mut. Fire Ins. Co., 296 Mich. 392, 296 N.W. 301 (1941), the court specifically pointed out that the powers of an agent of a mutual company are different from those of a stock company agent. The general agent of a stock company can bind the company by his conduct, while the agent of a mutual company cannot. The theory seems to be that all employees of a stock company are presumed to be professional business men, while only the officers of a mutual company are likely to be well versed in the business of insurance. See, *e.g.,* Jacobs v. Metropolitan Life Ins. Co., 39 So. 2d 346 (La. App. 1949) (life ins., knowledge of agent not imputed); Continental Ins. Co. v. Thrash, 223 Miss. 344, 78 So. 2d 344 (1955) (fire ins., agent waived "iron safe clause"); Baum v. Massachusetts Mut. Life Ins. Co., 357 P.2d 960 (Okla. 1960) (group ins., knowledge of agent imputed); Donovan v. New York Cas. Co., 373 Pa. 145, 94 A.2d 570 (1953) (comprehensive personal liability ins., effect of knowledge of agent limited by the contract). *Compare,* Burns v. Prudential Ins. Co. of America, 162 Md. 228, 159 Atl. 606 (1932) (life ins., conduct of agent not imputed); *with* Baltimore Life Ins. Co. v. Howard, 95 Md. 244, 52 Atl. 397 (1902) (life ins., conduct of agent imputed, based upon constructive knowledge).

25. 134 N.W. 999 at 1004. (Emphasis added.)

26. Equitable Trust Co. v. Eastern Michigan Farmers Mut. Fire Ins. Co., 296 Mich. 392, 296 N.W. 301, 303 (1941). *Accord*: Engel v. State Mut. Rodded Fire Ins. Co., 281 Mich. 520, 275 N.W. 231, 234 (1937) (dictum); Kinne v. Farmers Mut. Fire Ins. Co., 241 Mich. 637, 217 N.W. 755 (1928).

In Massie v. Washington Fid. Nat'l Ins. Co., 153 Miss. 433, 121 So. 125 (1929), another case often cited in support of the "general rule," plaintiff simply failed to show an estoppel. A more concise holding would have been that there was no change of position to plaintiff's injury, and that the plaintiff could not have reasonably relied upon the fact that defendant furnished forms for proof of loss. The coverage was a combination sick benefit and accident policy, which excluded payment of benefits for illness arising within thirty days of the date of issue. Plaintiff claimed benefits for illness arising within the thirty-day period, contending that insurer had waived the

The cases purporting to adhere to the "general rule" may be distinguished on their individual facts as well as upon the precedents they cite. If this is done, it becomes apparent that the "general rule" is a myth, since all the cases on point lack at least one of the essential elements of estoppel.[27] There appears to be no case showing all of the requirements of estoppel in which the court has held that the insured still could not recover since his loss was outside the coverage of the policy.[28] However, there is the very real possibility that a court which

non-coverage provision by furnishing forms of proof of loss, and therefore was estopped to deny liability. The court denied recovery, distinguishing between waiver of policy provisions giving rise to a forfeiture and those concerning non-coverage.

27. For a case in which the element of *knowledge* was absent, see Ruddock v. Detroit Life Ins. Co., 209 Mich. 638, 177 N.W. 242 (1920), where a life insurance policy excluded death while in military service. Plaintiff claimed that insurer had waived the exclusion by requiring proof of loss and the appointment of an administrator. The court remarked that defendant insurer "surely should not be estopped by these acts from making a defense of which it then had no knowledge or notice," but went on to cite the "general rule" as controlling. *Accord,* Fidelity Phoenix Fire Ins. Co. of N.Y. v. Raper, 242 Ala. 440, 6 So. 2d 513, 517 (1942); Prudential Ins. Co. v. Brookman, 167 Md. 616, 175 Atl. 838 (1934) (disability ins.); Frank Gardner Hardware & Supply Co. v. St. Paul Fire & Marine Ins. Co., 245 Miss. 320, 148 So. 2d 190 (1963); Donovan v. New York Cas. Co., 373 Pa. 145, 94 A.2d 570, 571 (1953).

For an example of a case where there was no *reasonable reliance,* see Carew, Shaw & Bernasconi, Inc. v. General Cas. Co. of America, 189 Wash. 329, 65 P.2d 689 (1937), in which a burglary insurance policy only covered a box in a safe and not the safe itself. Plaintiff claimed that he had been led to believe that the safe also was covered, but the evidence showed that he had failed to read his policy for more than one year. The court noted this fact, but went on to hold that "[U]nder no conditions can the coverage . . . be extended by the doctrine of waiver or estoppel." *Accord,* Mutual Sav. Life Ins. Co. v. Hall, 245 Ala. 668, 49 So. 2d 298 (1950); Quillian v. Equitable Life Assur, Soc. of United States, 61 Ga. App. 138, 6 S.E.2d 108 (1939); Foote Lumber Co., Inc. v. Svea Fire & Life Ins. Co., 179 La. 779, 155 So. 22 (1934); Sowers v. Iowa Home Mut. Cas. Ins. Co., 359 P.2d 488, 491 (Wyo. 1961).

As to cases in which the claimant failed to establish *prejudice,* see Antone v. New Amsterdam Cas. Co., 335 Pa. 134, 6 A.2d 566 (1939) (auto liability), where a father inherited his son's automobile but did not inform the insurer. Subsequently, the car was involved in an accident and insurer, after investigating and filing an affidavit of defense, denied liability and withdrew. The father hired the company lawyer after signing statements that he had sufficient notice of the withdrawal and agreeing that the appearance of the company's lawyer in no way involved the company. In granting the carrier's appeal from an execution rendered against it, the court held first, that an insurance contract cannot be created by estoppel; second, that a stranger to a company is in no position to invoke an estoppel against it; and, finally, that the father was in no way prejudiced by defendant's conduct. *Accord,* Kentucky Cent. Life & Acc. Ins. Co. v. White, 106 Ind. App. 530, 19 N.E.2d 872, 875 (1939); Zechar v. All Am. Cas. Co., 116 Ohio App. 41, 186 N.E.2d 500 (1961). *But see* Hartford Acc. & Indem. Co. v. Lockard, 239 Miss. 644, 124 So. 2d 849, 855 (1960).

28. Emergency Aid Ins. Co. v. Plummer, 35 Ala. 520, 49 So. 2d 680 (1950), involved a group life insurance policy which provided that notice be given insurer before additional employees were added to the policy, and that an agent was not empowered to change the terms of said policy. Plaintiff claimed insurer was estopped because, by usage and course of dealing with the agent, additions and deletions to the payroll were to establish coverage under the policy. The court held that primary rights may not be created by estoppel. It would seem that the court could have held that the insurance company had no knowledge of the addition to the payroll and therefore was not estopped. Similarly, in Inland Mut. Ins. Co. v. Hightower, 274 Ala. 52, 145 So. 2d 422 (1962), an automobile liability case, an estoppel was found by the lower court, and the Supreme Court of Alabama reversed, citing the "general rule." The case turned on the question of when the investigating agent of the insurer learned, or was put on notice, of the non-coverage. The court apparently found it safer to rely upon the "general rule," than to make an affirmative holding that the defendant was without knowledge of the non-coverage. See also Massie v. Washington Fid. Nat'l Ins. Co., 153 Miss. 433, 121 So. 125 (1929). In Washington Nat'l Ins. Co. v. Craddock, 130 Tex. 251, 109 S.W.2d 165 (1937), plaintiff suffered injury from a gunshot wound, a type of injury specifically excluded from the accident

constantly reiterates the "general rule" may eventually apply it literally; this would deny relief to an insured, even though he had proved all of the necessary elements of estoppel. While it may be true that the law does not favor estoppels, nor extend them beyond the requirements of the transaction in which they originate,[29] it is also true that "the doctrines of waiver and estoppel extend to practically every ground upon which an insurer may deny liability."[30] The better rule would seem to be that "where the elements of an estoppel exist, an insurer may be precluded from asserting that the loss is not within the terms of the policy."[31] Whether or not an estoppel exists is a question of fact to be determined in each case.[32]

Some courts have been using this suggested rule, and have either disregarded the "general rule" or merely given it lip service. The instant case of *Ebert v. Balter* is an excellent example. It is in the area of automobile liability insurance that these courts most often use an estoppel to extend the coverage of a policy. Thus, conduct sufficient to raise an estoppel has been found where there was failure to deny liability within a reasonable time, along with repeated efforts to obtain a settlement;[33] where there was silence despite a duty to speak;[34] and where there was a withdrawal after an adverse verdict.[35] The non-

policy. Defendant insurer made disability payments for eleven (of 104) weeks before denying liability. Plaintiff claimed a waiver of the policy exclusion and estoppel, alleging expenses in filing proof of loss and preparing the claim. The court held that the doctrine of waiver may not create a liability not contracted for. The better holding would seem to have been that plaintiff failed to show a change of position to his prejudice. Prejudice could hardly be established, since he had received eleven weeks of payments to which he was not entitled in the first place.

There are many other similar cases. See, *e.g.*, Bankers Nat'l Ins. Co. v. Hembey, 217 Ark. 749, 233 S.W.2d 637 (1950); Reserve Life Ins. Co. v. Ramsey, 98 Ga. App. 732, 106 S.E.2d 820 (1958); Pierce v. Homesteaders Life Ass'n, 233 Iowa 211, 272 N.W. 543 (1937).

29. Tracey v. Lincoln, 145 Mass. 357, 14 N.E. 122, 124 (1887).

30. Travelers Ins. Co. v. Eviston, 110 Ind. App. 143, 37 N.E.2d 310, 316 (1941). See also Annot., 1 A.L.R.3d 1139, 1144 (1965).

31. Ellis v. Metropolitan Cas. Ins. Co. of N.Y., 187 S.C. 162, 197 S.E. 510, 512 (1938).

32. Liberty Mut. Ins. Co. v. American Auto. Ins. Co., 230 Md. 497, 500, 154 A.2d 826, 828 (1959).

33. Mancini v. Thomas, 113 Vt. 322, 34 A.2d 105 (1943). But the courts have consistently held that mere furnishing of forms for, and submission of, "proof of loss" is not sufficient to create an estoppel. Queen Ins. Co. v. Patterson Drug Co., 73 Fla. 665, 74 So. 807 (1917); Ebert v. Balter, 83 N.J. Super. 545, 200 A.2d 532 (1964); Beatty v. Employer's Liability Assur. Corp., Ltd., 106 Vt. 25, 168 Atl. 919 (1933); Hickey v. Wisconsin Mut. Ins. Co., 238 Wis. 433, 300 N.W. 364 (1941).

34. Royal Indem. Co. v. Clingan, 238 F. Supp. 448 (E.D. Tenn. 1965) held that under the circumstances, the insurer's failure to affirmatively notify the director of financial responsibility of its denial of coverage to a third person estopped insurer, as against persons injured in the accident, from denying coverage. *Accord*, Simmons v. Civil Service Employees Ins. Co., 57 Cal. 2d 381, 19 Cal. Rptr. 662, 369 P.2d 262 (1962) (insurer liable for damages resulting from failure to inform D.M.V. of non-coverage); Hartford Acc. & Indem. Co. v. Come, 100 N.H. 177, 123 A.2d 267 (1956) (failure to notify D.M.V. that policy did not satisfy requirements of Financial Responsibility Act); Beatty v. Employers Liability Assur. Corp., Ltd., 106 Vt. 25, 168 Atl. 919 (1933) (silence as grounds for reasonable reliance).

35. Belt Auto. Indem. Ass'n v. Ensley Transfer & Supply Co., 211 Ala. 84, 99 So. 787 (1924); Fairbanks Canning Co. v. London Guar. & Acc. Co., 154 Mo. App. 327, 133 S.W. 664 (1911); Early v. Farm Bureau Mut. Auto. Ins. Co., 224 N.C. 172, 29 S.E.2d 558 (1944). There seems to be a split of authority as to whether the liability is based upon insurer's act of *withdrawal* or its *assumption* of the defense. As to withdrawal, see 29A AM. JUR. *Insurance* § 1469, at 582 (1960); Annot., 167 A.L.R. 246 (1929). The distinction seems to be purely academic, since either theory may be

waiver agreement can avoid these results, but it too may be waived.[36]

The use of waiver and estoppel is not limited to automobile liability cases, but applications are necessarily fewer in number in other types of insurance cases, such as life insurance. However, it seems fairly well established that if a policy is issued with knowledge of existing facts which would invalidate the contract from the moment of its inception, the insurer will not be permitted to deny coverage.[37]

An estoppel may be found in other types of indemnity insurance. Thus a carrier has been held estopped to deny liability when it failed to possess itself of knowledge held by its attorneys as to the facts of a liability suit, but nevertheless assumed to instruct the insured not to pursue an appeal, knowing that insured relied upon its instructions.[38] Also, an insurance company defending a liability suit for bodily injury to an employee of insured may be held estopped by its conduct in defending the action with full knowledge of the facts giving rise to the non-coverage.[39]

With the exception of one leading case,[40] the law in Maryland has been reasonably clear. It is well settled that an insurer who, with knowledge of facts constituting a *forfeiture*, requires the insured to do some act or change his position to his prejudice is not permitted to assert the forfeiture.[41] Also, the principle of equitable estoppel has been acknowledged,[42] and insurance companies have been held estopped to assert a forfeiture.[43] Constructive knowledge was held sufficient to support an estoppel,[44] and the knowledge or conduct of an agent may

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the proximate cause of the damage, once the insurer assumes a position upon which insured has relied and changed his position. Thus, the proximate cause may be a withdrawal (during or after trial), untimely denial of liability (before trial), control of the defense (thus denying insured a chance to settle), etc. As the court said in the *Fairbanks* case, "The loss of a right to control and manage one's own case is itself a prejudice." 133 S.W. at 667.

36. Queen Ins. Co. v. Patterson Drug Co., 73 Fla. 665, 74 So. 807 (1917); Ebert v. Balter, 83 N.J. Super. 545, 200 A.2d 532 (1964); Beatty v. Employer's Liability Assur. Corp., Ltd., 106 Vt. 25, 168 Atl. 919 (1933); Hickey v. Wisconsin Mut. Ins. Co., 238 Wis. 433, 300 N.W. 364 (1941).

37. Woodmen of the World Life Ins. Soc. v. Counts, 221 Ark. 143, 252 S.W.2d 390 (1952) (life ins.; carrier estopped to deny double indemnity); Cason v. Aetna Life Ins. Co., 91 Ga. App. 323, 85 S.E.2d 568 (1954) (group life ins.; carrier's knowledge of ineligibility, plus acceptance of premium, held estoppel); Dees v. National Cas. Co., 17 Tenn. App. 186, 66 S.W.2d 603 (1933) (group health and accident ins.; carrier's knowledge of insured's tuberculosis waived non-coverage provision).

38. Globe Navigation Co. v. Maryland Cas. Co., 39 Wash. 299, 81 Pac. 826 (1906) (admiralty indem. bond; carrier estopped to set up ignorance of facts showing non-coverage).

39. Royle Mining Co. v. Fidelity & Cas. Co. of N.Y., 126 Mo. App. 104, 103 S.W. 1098 (1907) (indem. for employee bodily injury; excluded injuries as result of violating safety precautions).

40. Prudential Ins. Co. v. Brookman, 167 Md. 616, 175 Atl. 838 (1934).

41. Royal Ins. Co. v. Drury, 150 Md. 211, 132 Atl. 635 (1926). *Accord,* Baltimore Life Ins. Co. v. Howard, 95 Md. 244, 52 Atl. 397 (1902).

42. Turnbull v. Home Fire Ins. Co., 83 Md. 312, 34 Atl. 875 (1896), defines the elements required.

43. Maryland Life Ins. Co. v. Gusdorf, 43 Md. 506 (1876), where an insurance policy provided that the insured goods could not be moved unless the insurer was notified and the new location endorsed upon the policy. Plaintiff personally informed the president of the company, who promised he would see to the endorsement. The insurance company was held estopped to invoke the forfeiture. *Accord,* Monahan v. Mutual Life Ins. Co., 103 Md. 145, 63 Atl. 211 (1906).

44. Monahan v. Mutual Life Ins. Co., 103 Md. 145, 63 Atl. 211 (1906).

be imputed to the company.[45] Both beneficiary and insured are charged with notice of the provisions of insurance policies,[46] and the effect of a non-waiver agreement is recognized.[47]

Unfortunately, the spectre of the "general rule" has found its way into the Maryland decisions. In *Bower & Kaufman v. Bothwell*,[48] the court seemed to be following the better rule. The case involved a strike insurance policy which covered "cessation of work by a part, or all of the employees"; a claim was made for loss resulting from refusal of employees to return to work at reduced wages after the factory had first been closed by the employers themselves. The employers contended that the insurer had waived the limitation of the policy by accepting proof of loss and making payments up until the time insurer decided that the policy did not cover such a "cessation of work." The court stated, "[I]t is not a forfeiture that is to be found waived, nor a violation of a condition or any irregularity; it is an inapplicability of the policy, so that the waiver argued for would be, in effect, an extension of the contract. Such an extension would, at least, we think, require an estoppel, if not a new consideration to support it."[49] The court went on to find that it was questionable whether the insurer had in any way been put on notice that the cessation of work was of a type not covered by the policy. The court also found that the other elements of an estoppel were not present, since the insured took no action in reliance upon the conduct of the insurer and was not prejudiced by the insurer's subsequent conduct.[50]

However, *Prudential Insurance Co. v. Brookman*,[51] exhibits a stronger influence of the "general rule". In *Brookman*, a disability insurance policy excluded coverage after age sixty. Plaintiff was injured while cranking his automobile and claimed disability. Both the original application for insurance and the proof of loss showed his age to be less than sixty. Subsequently, a conflicting date of birth was found in plaintiff's naturalization papers, and the company denied liability. Prior to this denial of liability, an assistant manager had been corresponding with the plaintiff as to whether or not he was actually disabled (the manager thought not) and had requested a resumption of premium payments to continue the insurance in effect. The court quoted extensively from *Bothwell*, but added that it was doubtful "whether an estoppel, strictly speaking, could suffice to create

45. Baltimore Life Ins. Co. v. Howard, 95 Md. 244, 52 Atl. 397 (1902) (life ins.; where agent personally collected premiums and submitted his books weekly). *But see* Burns v. Prudential Ins. Co., 162 Md. 228, 159 Atl. 606 (1932) and Crook v. New York Life Ins. Co., 112 Md. 268, 75 Atl. 388 (1910).

46. Burns v. Prudential Ins. Co., 162 Md. at 234, 159 Atl. at 608, also holding that the burden is on the beneficiary to show belief in the statement of an agent, reasonableness of the resulting reliance, and prejudice as the result of such reliance.

47. Non-waiver agreements are recognized and used extensively in Maryland. American Auto. Ins. Co. v. Master Building & Supply Co., 179 F. Supp. 699, 705 (D. Md. 1959); Hardware Mut. Cas. v. Mitnick, 180 Md. 604, 26 A.2d 393 (1942).

48. 152 Md. 392, 136 Atl. 892, 52 A.L.R. 158 (1927).

49. *Id.* at 396, 136 Atl. at 894, citing Draper v. Oswego County Fire Relief Ass'n, 190 N.Y. 12, 82 N.E. 755 (1907), which criticized *McCoy* as going too far, and Wheeler v. United States Casualty Co., 71 N.J. Law 396, 59 Atl. 347 (1904).

50. 152 Md. at 397, 136 Atl. at 894.

51. 167 Md. 616, 175 Atl. 838 (1934).

a new contract."[52] The court cited the "general rule" from *McCoy* and others, and proceeded to hold for the insurer because there was no contractual "undertaking to insure against disability occurring after the age of sixty as well as before it, if the insured should prove to be so old."[53] However, rather than applying the "general rule," the court could easily have reached the same decision on the ground that the essential elements of an estoppel were not present. The record contained (a) no evidence of receipt at the home office of notice of the statement in the naturalization papers, or of the attitude of the officers with regard to it, and (b) the premium resumption letters were written by an agent not authorized to extend the policy since a clause in the policy expressly excluded modification except by the insurer's president and certain other officers.[54]

Although the Maryland Court in *Brookman* applied the "general rule," it did so without expressly overruling its previous statement in *Bothwell* that an estoppel might be sufficient to extend the coverage of an insurance policy. It thus remains unclear whether Maryland has fully adopted the "general rule." This uncertainty is demonstrated by *American Auto. Ins. Co. v. Master Bldg. Supply & Lbr. Co.*,[55] where Judge Thomsen quoted extensively from both cases and then said, "In the instant case there was no new contract, no change of position by [the insured] and no other facts amounting to an estoppel."[56]

The holding of the *Brookman* case should be considered as a step backward by the Maryland court. Surely *Bothwell* is a more accurate statement of the law: that in a proper case, an estoppel may suffice to extend the coverage of an insurance contract. If a case such as the instant *Ebert* case were to arise in Maryland at the present time, it is entirely conceivable that the court, adhering strictly to the "general rule," might hold that an insurer who defended an insured for 31 months is not estopped to deny non-coverage. The Maryland court would best serve the interests of justice by retreating to its pre-*Brookman* stand and contributing to the demise of the "general rule."[57]

52. *Id.* at 620, 175 Atl. at 840.

53. *Id.* at 621, 175 Atl. at 840.

54. *Id.* at 622, 175 Atl. at 840.

55. 179 F. Supp. 699 (D. Md. 1959).

56. *Id.* at 705.

57. For an example of how far some courts will go to avoid the "general rule," see Travelers Ins. Co. v. Eviston, 110 Ind. App. 143, 37 N.E.2d 310 (1941), where the court held that a waiver of a policy provision excluding disability coverage for persons over seventy years of age was not an extension of the coverage under the "general rule." In order to extend the coverage, according to the court, the waiver would have to extend the policy to cover automobile accident indemnity, life, fire, etc. Here, the court held, disability from accident was still the coverage of the policy, but the agent had waived the non-coverage as to age.