

# Forfeiture, Waiver, and Estoppel

## Introduction

An insurer may lose contractual rights it holds under the terms of its policy by application of three closely related legal doctrines of forfeiture, waiver, and estoppel. “[A]n insurer may lose a contractual right by: (1) estoppel, conduct by the insurer that reasonably causes an insured to rely to his detriment; or (2) waiver, an intentional relinquishment of a known right demonstrated expressly or implicitly; (3) forfeiture, the assessment of a penalty against the insurer for either misconduct or failure to perform an obligation under the contract.”<sup>1</sup>

Forfeiture may occur when an insurer fails to perform a required act. Waiver may occur when an insurer voluntarily relinquishes a known right. Estoppel may occur when an insurer misleads a policyholder to its detriment. One court has stated that estoppel is “the only theory on which to base coverage.”<sup>2</sup>

Few reported opinions have framed these issues in the context that insurance is a regulated industry. Policyholders and victims may be able to enforce the doctrines of forfeiture, waiver, and estoppel by emphasizing insurer’s violations of insurance statutes, regulations, and case law.

### ***Miller v. Elite***

“The general rule supported by the great weight of authority is that if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. In other words, the insurer’s unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds.”<sup>3</sup>

### **Forfeiture**

In a thoughtful opinion, *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 310, the California Supreme Court detailed the confusion with which many courts treat the closely related concepts of forfeiture, waiver, and estoppel in the context of losing a contractual right to arbitration. “[T]he term “waiver,” as used in the context of the failure to timely demand arbitration, refers not to a voluntary relinquishment of a known right, but to the loss of a right based on a failure to perform an obligation. ¶ Federal as well as state courts have used the term ‘waiver’ to refer to a number of different concepts. (See *United States v. Olano* (1993) 123 L. Ed. 2d 508, 519, 113 S. Ct. 1770, 1777) [distinguishing waiver as the intentional relinquishment of a known right from forfeiture as the failure to make a timely assertion of a right] (Citations). Generally, ‘waiver denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party’s failure to perform an act it is required to perform, regardless of the party’s intent to abandon or relinquish the right. ¶ We conclude that those decisions use the word “waiver” in the sense of the loss or forfeiture of a right resulting from failure to perform a required act.”<sup>4</sup>

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<sup>1</sup> *Chase v. Blue Cross of Calif.* (1996) 42 Cal.App.4th 1142, 1151 (*Chase*).

<sup>2</sup> *State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1627 (*Jioras*).

<sup>3</sup> *Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 754 (*Miller*).

<sup>4</sup> *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 310, 314-15 (*Platt Pacific*).

Some California courts of appeal have not followed the teachings of *Platt Pacific* as applied to liability insurance. “In the law, ‘forfeiture’ is defined as ‘[a] deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition.’”<sup>5</sup> “In order to find a forfeiture by the insurer of [a contractual right requires] conduct *designed* to mislead policyholders. [T]he court’s focus should be on the subjective intent of the insurer [which] distinguishes forfeiture from estoppel. Forfeiture requires an intent to mislead and is satisfied whether or not the insured is, in fact, misled. [N]o forfeiture occurs if the insurer did not engage in behavior designed to mislead the insured. [But] in the case of forfeiture, the policyholder’s actual ignorance of the provision is relevant to the extent that ignorance is known to the insurer.”<sup>6</sup> “Under [the policyholder’s] view, if the insurer did not reserve its rights the insured would automatically receive coverage without showing either reliance (for estoppel) or intentional relinquishment (for waiver). That is not the law in California.”<sup>7</sup>

However, if an insurer that wrongfully fails to defend its policyholder may forfeit the right to control the defense or settlement. “Breach of duty to defend also results in the insurer’s forfeiture of the right to control defense of the action or settlement, including the ability to take advantage of the protections and limitations set forth in section 2860.”<sup>8</sup> “[I]f the insurer wrongfully refuses to defend, leaving the insured to his own resources to provide a defense, then the insurer forfeits the right to control settlement and defense. In that event, the insured is free to settle the lawsuit on his own, and the insurer is bound by a stipulated judgment.”<sup>9</sup>

### **Waiver**

“A waiver is the relinquishment of a known right. A waiver may occur (1) by an intentional relinquishment or (2) as the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.”<sup>10</sup>

“Case law is clear that waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver. Waiver always rests upon intent. The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. California courts have applied the general rule that waiver requires

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<sup>5</sup> *Chase, supra*, 42 Cal.App.4th at 1149 quoting Black’s Law dictionary.

<sup>6</sup> *Id.* at 1157 (citations, ellipses and quotation marks omitted).

<sup>7</sup> *Jioras, supra*, 24 Cal.App.4th at 1628, fn.8.

<sup>8</sup> *Intergulf Development LLC v. Superior Court* (2010)183 Cal.App.4th 16, 20 (emphasis added); see also, *Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 984 (*Fuller-Austin*); *Atmel Corp. v. St. Paul Fire & Marine Ins. Co.* (N.D.Cal. 2005) 426 F.Supp.2d 1039, 1047.

<sup>9</sup> *Fuller-Austin, supra*, 135 Cal.App.4th at 984 (emphasis added); see also, *Safeco Ins. Co. v. Superior Court*,(1999) 71 Cal.App.4th 782, 787; *United Services Automobile Assn. v. Alaska Ins. Co.* (2001) 94 Cal.App.4th 638, 644.

<sup>10</sup> *Gaunt v. Prudential Ins. Co.* (1967) 255 Cal.App.2d 18, 23 (*Gaunt*); see also, *Insurance Co. of the West v. Haralambos Beverage Co.* (1987) 195 Cal.App.3d 1308, 1321.

the insurer to intentionally relinquish its right to deny coverage and that a denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial. Waiver depends solely on the intent of the waiving party, and is not established merely by evidence the insurer failed to specify the exclusion in a letter reserving rights. An intention to waive a limitations provision is not evinced by the failure to raise that point in a letter denying a claim. Of the 33 sister states to consider the issue, 32 agree with the California rule.”<sup>11</sup>

A waiver may be either express, based on words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right.<sup>12</sup> An insurer may be found to have waived a policy condition without any showing of detrimental reliance by the insured.<sup>13</sup>

Waiver is generally a question of fact.<sup>14</sup> As a practical matter, the proof necessary to establish a waiver is extremely difficult to elicit. Reported cases enforcing a waiver are very rare. But a useful technique to determine whether an insurer does waive any basis to deny coverage is simply to ask it - in writing. Under some circumstances, the insurer will withdraw or narrow the assertion of a reservation of rights, particularly if doing so will eliminate a disqualifying conflict of interest for dependent counsel. Some insurers find it to be a fair trade to limit a reservation in return for controlling the defense through dependent counsel and avoiding the expense of pay for independent counsel.

Waiver may be imposed on an insurer that fails to conduct an adequate investigation. “If a ground for asserting lack of coverage under an insurance policy could have been discovered by the insurer through reasonable investigation, that ground is waived if the insurer fails to state it at the time a request for coverage is tendered by the insured; consequently, the insurer may not belatedly raise that ground if the reason upon which the insurer initially denied coverage is found to have no merit or if the insurer did not deny coverage at the outset. Application of the waiver rule to disputes over whether coverage exists is designed as an incentive to compel an insurance company to fulfill its duty to thoroughly investigate a claim before denying coverage.”<sup>15</sup> “[A]t the time it denies coverage an insurer must state all grounds for noncoverage which are reasonably discoverable”<sup>16</sup>

Waiver rarely creates a viable basis to defeat a reservation of rights. “In virtually every case discussing the waiver issue, the courts have found that there was no waiver if the insurer made a reservation of rights at any time, even if years after the defense was undertaken.”<sup>17</sup> “As a general

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<sup>11</sup> *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 34 (*Waller*) (citations, ellipses and quotation marks omitted.)

<sup>12</sup> *Id.* at 32.

<sup>13</sup> *Chase, supra*, 42 Cal.App.4th at 1151.

<sup>14</sup> *Aetna Cas. & Sur. Co. v. Richmond* (1977) 76 Cal.App.3d 645, 653.

<sup>15</sup> *Alta Cal. Regional Center v. Fremont Indemnity Co.* (1994) 25 Cal.App.4th 455, 459.

<sup>16</sup> *Id.* at 467.

<sup>17</sup> *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal App 4th 861, 889 (emphasis added and ellipses omitted.)

rule, doubtful cases will be decided against the existence of a waiver.”<sup>18</sup>

### **Estoppel**

Under the doctrine of promissory estoppel, the promise by one party and the resulting detrimental reliance on that promise by another party operate as a substitute for consideration that may make the modification enforceable to the extent necessary to prevent injustice. Thus, a modification of the contract may be enforced when a party has made a promise that it should reasonably expect to induce action or forbearance on the part of the other party, and that does induce such action or forbearance.”<sup>19</sup>

“Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.”<sup>20</sup>

“An insurer is estopped from asserting a right, even though it did not intend to mislead, as long as the insured reasonably relied to its detriment upon the insurer’s action.”<sup>21</sup> “Refraining from hiring separate counsel does not manifest reliance in the same way as withdrawing already-hired counsel.”<sup>22</sup>

“An insurer can be estopped from raising coverage defenses if, knowing of the grounds of noncoverage, it provides a defense under the policy without a reservation of rights, and the insured reasonably relies on this apparently unconditional defense to his detriment.”<sup>23</sup> Detrimental reliance may be shown if the insurer’s delay in asserting a reservation of rights prevented the policyholder from taking steps to protect his interests against the insurer. Such reliance may be supported by establishing that the insurer was under a duty to promptly communicate its coverage challenge. Such a duty is recognized in statute, regulations, and case law.<sup>24</sup>

As applied to the duty to defend, “failure to retain separate counsel does not by itself show any detriment.”<sup>25</sup> Nor is delay in asserting a reservation of rights usually sufficient to prove

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<sup>18</sup> *Ringler Assocs. Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1188.

<sup>19</sup> *Platt Pacific, supra*, 6 Cal.4th at 320-21 (citation omitted).

<sup>20</sup> *Gaunt, supra*, 255 Cal.App.2d 18, 23

<sup>21</sup> *Chase, supra*, 42 Cal.App.4th at 1157; *Waller, supra*, 11 Cal.4th at 34.

<sup>22</sup> *Hartford Fire Ins. Co. v. Spartan Realty Int’l, Inc.* (1987) 196 Cal.App.3d 1320, 1327 (*Spartan*); but c.f. *Miller, supra*, 100 Cal.App.3d at 755 (“[The policyholder] relied to his detriment on [the insurer’s] defense under the policy as evidenced by his failure to retain an attorney”.)

<sup>23</sup> *Jioras, supra*, 24 Cal.App.4th at 1626.

<sup>24</sup> See, *Is There a Deadline to Deny Coverage?*

<sup>25</sup> *Jioras, supra*, 24 Cal.App.4th at 1629; *Spartan, supra*, 196 Cal.App.3d at 1327.

detrimental reliance.<sup>26</sup> However, by negative implication detrimental reliance may be supported by evidence that independent counsel would have structured the defense differently or could have negotiated a more advantageous settlement.<sup>27</sup>

The key to enforcing an estoppel is to have admissible evidence of detrimental reliance.

### **Policyholder's Burden of Proof**

“[W]e hold that, as with waiver, the burden of proof is on the party asserting forfeiture and must be demonstrated by clear and convincing evidence.”<sup>28</sup> “The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver.”<sup>29</sup>

### **Question of Fact**

“Whether there has been a waiver is usually regarded as a question of fact to be determined by the jury, or by the trial court if there is no jury. By contrast, [t]he estoppel issue is a nonjury fact question to be determined by the trial court in accordance with applicable law. However, the trial court may properly resolve an issue of waiver as a question of law when the underlying facts are undisputed.”<sup>30</sup>

### **Create Coverage?**

Although the doctrines of estoppel, waiver, and forfeiture have been applied by the courts to render insurance policy contract provisions unenforceable, a line of recent cases challenges the applicability of estoppel or implied waiver to create coverage. “The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrines in this respect is therefore to be distinguished from the waiver of, or estoppel to assert, grounds of forfeiture. It is the general and quite well settled rule of law that the principles of estoppel and implied waiver do not operate to extend the coverage of an insurance policy after the liability has been incurred or the loss sustained. There is a definite distinction between the waiver of a right to declare a forfeiture,

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<sup>26</sup> “An insurer’s delay in reserving its right to contest coverage is not ordinarily sufficient to establish prejudice to the insured.” (*National Union v. Siliconix, Inc.* (N.D.Cal.1989) 726 F.Supp. 264, 270 (*Siliconix*).

<sup>27</sup> One court found no detrimental reliance because “[t]here is no showing separate counsel might have obtained a more advantageous settlement. No claim has been asserted that if separate counsel might have structured the defense differently.” (*Jioras, supra*, 24 Cal.App.4th at 1629 (ellipses omitted).) Another court found no detrimental reliance because “(1) [the insurer] has allowed [the policyholder] complete independence in selecting counsel to represent it in the patent suit; (2) [the insurer] has allowed [the policyholder]’s hand-picked counsel complete independence in conducting [the policyholder]’s defense; and (3) [the insurer]’s involvement in the patent suit was limited to paying [the policyholder]’s legal fees and other litigation expenses.” (*Siliconix, supra*, 726 F.Supp. at 271.)

<sup>28</sup> *Chase, supra*, 42 Cal.App.4th at 1151, 1157.

<sup>29</sup> *Waller, supra*, 11 Cal.4th at 31.

<sup>30</sup> *Old Republic Ins. Co. v. FSR Brokerage* (2000) 80 Cal. App. 4th 666, 679 (citations and quotation marks omitted).

to cancel or to rescind based upon some breach of a condition of the policy on the one hand and the extension of the coverage provided by the policy on the other.”<sup>31</sup>

**Practice Pointer**

The law of forfeiture as applied to compelling arbitration requires merely the failure to perform a required act. Liability insurer is a regulated industry. Regulations require insurers to deny coverage not later than 40 days after notice, subject to the right to extend for additional periods of 30 days if the insurer writes to the policyholder to explain why. Good arguments may be made that liability insurers that fail to reserve their rights within 40 days have failed to perform an act required by law, thus resulting in a forfeiture.

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<sup>31</sup> *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal. App. 4th 1054, 1066 (citations, ellipses and quotation marks omitted.)