Michigan Law Review

Volume 38 | Issue 1

1939

INSURANCE - WAIVER AND ESTOPPEL AS APPLIED TO EXCEPTED RISKS

Michigan Law Review

INSURANCE — WAIVER AND ESTOPPEL AS APPLIED TO EXCEPTED RISKS — The appellee insurance company issued a policy of automobile liability insurance covering a motor truck owned by appellant, which policy stated that the occupation of assured is "handling farm machinery, crane fixtures and paints," and that the use made of the truck should be commercial ("commercial" being defined as "the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named assured's business occupation . . . including the loading and unloading thereof"). Appellant began to transport tanks of butone gas, which fact was known by appellee's agency on the date the policy was renewed. Subsequently, appellee's

employees, while unloading a tank allowed the gas to escape, thereby causing death or injury to a number of people. Claims having been made against appellant, the latter called upon appellee to make good, whereupon appellee brought suit for a declaratory judgment relative to its liability. *Held*, that, since carrying butone gas was outside the coverage of the policy and since appellee was not estopped to deny such, there was no liability. *Carnes v. Employers' Liability Assurance Corp.*, (C. C. A. 5th, 1939) 101 F. (2d) 739.

The courts will readily apply the doctrines of waiver and estoppel to prevent forfeiture whenever the insurer, after breach of a condition or term enabling the insurer to declare the policy void, continues to treat it as though in full force, or in any other way occupies inconsistent positions.[1] But the courts are practically unanimous in holding that as to conditions going to the coverage or scope, such as risks not included therein or those expressly excluded therefrom, there can be no application of the doctrine of waiver or estoppel, since such doctrine can never be used to extend the scope or coverage.[2] The reason assigned is that

[1] Queen Ins. Co. v. Young, 86 Ala. 424, 5 So. 116 (1888); Insurance Co. v. Eggleston, 96 U. S. 572 (1877); Foreman v. German Alliance Ins. Assn., 104 Va. 694, 52 S. E. 337 (1905); Viele v. Germania Ins. Co., 26 Iowa 9 (1868); Murray v. Home Ben. Life Assn., 90 Cal. 402, 27 P. 309 (1891); Carlson v. Supreme Council, American Legion of Honor, 115 Cal. 466, 47 P. 375 (1896); Brown v. State Ins. Co., 74 Iowa 428, 38 N. W. 135 (1888); Insurance Co. v. Wolff, 95 U. S. 326 (1877); Phoenix Ins. Co. v. Doster, 106 U. S. 30 (1882); Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439 (1892); Cotton States Life Ins. Co. v. Lester, 62 Ga. 247 (1879); Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276 (1871); Appleton v. Phoenix Mut. Life Ins. Co., 59 N. H. 541 (1879); Stylow v. Wisconsin Odd Fellows Mut. Life Ins. Co., 37 Minn. 306, 34 N. W. 151 (1887). See also 14 R. C. L. 1155 (1916); 113 A. L. R. 857 (1938).

[2] H. D. Foote Lumber Co. v. Svea Fire & Life Ins. Co., 179 La. 779, 155 So. 22 (1934); Kentucky Central Life & Acc. Ins. Co. v. White, (Ind. App. 1939) 19 N. E. (2d) 872; Fidelity & Guaranty Fire Corp. of Baltimore v. Bilquist, (C. C. A. 9th, 1938) 99 F. (2d) 333; Johnson v. Franklin Ins. Co., 90 Wash. 631, 156 P. 567 (1916); Carew, Shaw & Bernasconi v. General Casualty Co. of America, 189 Wash. 329, 65 P. (2d) 689 (1937); Rosenthal v. Insurance Co., 158 Wis. 550, 149 N. W. 155 (1914); Blanke-Baer Extract & Preserving Co. v. Ocean Accident & Guarantee Corp., (Mo. App. 1936) 96 S. W. (2d) 648; Henne v. Glens Falls Ins. Co., 245 Mich. 378, 222 N. W. 731 (1929); Maryland Casualty Co. v. Adams, 159 Miss. 88, 131 So. 544 (1931); Massie v. Washington Fidelity Nat. Ins. Co., 153 Miss. 433, 121 So. 125 (1929); Rosenburg v. General Accident Fire & Life Assur. Co., Ltd., (Mo. App. 1923) 246 S. W. 1009; Bankers Life Co. v. Stone, (C. C. A. 5th, 1936) 86 F. (2d) 780; Belt Automobile Indemnity Assn. v. Ensley Transfer & Supply Co., 211 Ala. 84, 99 So. 787 (1924); Protective Life Ins. Co. v. Cole, 230 Ala. 450, 161 So. 818 (1935); Miller v. Illinois Bankers' Life Assn., 138 Ark. 442, 212 S. W. 310 (1919); Conner v. Union Auto Ins. Co., 122 Cal. App. 105, 9 P. (2d) 863 (1932); Industrial Life & Health Ins. Co. v. Cofield, 110 Fla. 315, 148 So. 549 (1933); Railey v. United Life & Accident Ins. Co., 26 Ga. App. 269, 106 S. E. 203 (1920); Pierce v. Homesteaders Life Assn., 223 Iowa 211, 272 N. W. 543 (1937); McCabe v. Maryland Casualty Co., 209 N. C. 577, 183 S. E. 743 (1936); McLain v. American Glanzstoff Corp., 166 Tenn. 1, 57 S. W. (2d) 554 (1933). See also 113 A. L. R. 857 (1938) and footnote 3, below.

As to the view that waiver may never be used to extend coverage whereas

primary liabilities and new contracts can be created only by a contractual process involving a meeting of the minds and consideration.[8] It is submitted that this distinction is sound in the legalistic sense, since the insurer does not actually intend to extend the policy's scope by a renewal after knowledge of acts by the insured lying outside the scope. Mere knowledge, by the insurer, that the insured is, at times, engaging in acts not covered by his policy, does not suggest an agreement by the insurer to cover such acts. As a practical matter, also, the result reached is sound; any other result would be unduly onerous to the insurer, and the unfair drain on the premium pool would ultimately tend to raise insurance costs to the rest of us.

estoppel may, see Draper v. Oswego County Fire Relief Assn., 190 N. Y. 12, 82 N. E. 755 (1907); Knights & Ladies of Columbia Ins. Order v. Shoaf, 166 Ind. 367, 77 N. E. 738 (1906); Gerka v. Fidelity & Casualty Co., 251 N. Y. 51, 167 N. E. 169 (1929).

Yet the general rule and weight of authority is to the effect that if a liability insurer assumes the defense of an action brought against the insured with full knowledge of facts taking the injuries outside the coverage of the policy and the insurer gives no notice of disclaimer of liability or reservation of its rights, it is then estopped from setting up the defense of non-coverage. See in this connection, 16 BOST. L. REV. 236 (1936); Fidelity & Casualty Co. v. Blausey, 49 Ohio App. 556, 197 N. E. 385 (1934); Daly v. Employers' Liability Assur. Corp., 269 Mass. 1, 168 N. E. 111 (1929); Oehme v. Johnson, 181 Minn. 138, 231 N. W. 817 (1930); Tozer v. Ocean Accident & Guarantee Corp., 94 Minn. 478, 103 N. W. 509 (1905); Patterson v. Adan, 119 Minn. 308, 138 N. W. 281 (1912). See contra, Belt Automobile Indemnity Assn. v. Ensley Transfer & Supply Co., 211 Ala. 84, 99 So. 787 (1924); Goodman v. Georgia Life Ins. Co., 189 Ala. 130, 66 So. 649 (1914); Hollings v. Brown, 202 Ala. 504, 80 So. 792 (1919). See also 18 CORN. L. Q. 605 (1933); Barker v. Travelers Ins. Co., (Tex. Civ. App. 1932) 52 S. W. (2d) 285; Minsker v. John Hancock Mut. Life Ins. Co., 254 N. Y. 333, 173 N. E. 4 (1930).

[8] Palumbo v. Metropolitan Life Ins. Co., (Mass. 1935) 199 N. E. 335; Equitable Life Assur. Society v. Langford, 234 Ala. 681, 176 So. 609 (1937); Home Ins. Co. of N. Y. v. Campbell Motor Co., 227 Ala. 499, 150 So. 486 (1933); McCoy v. Northwestern Mutual Relief Assn., 92 Wis. 577, 66 N. W. 697 (1896); Washington Nat. Ins. Co. v. Craddock, (Tex. Comm. App. 1937) 109 S. W. (2d) 165; Ruddock v. Detroit Life Ins. Co., 209 Mich. 638, 177 N. W. 242 (1920). See 5 COOLEY, BRIEFS ON INSURANCE, 2d ed., 3953 (1927); Prudential Ins. Co. v. Brookman, 167 Md. 616, 175 A. 838 (1934).