

Insurance Coverage Primer:
**How to Determine if the Insurer Lost the Right to
Disclaim or Deny Coverage**

For Questions Contact Kevin Lane
Sliwa & Lane
840 Main-Seneca Building • 237 Main Street • Buffalo, New York 14203
Tel.: (716) 853-2050 • Facsimile: (716) 853-2057
E-Mail: Klane@sliwa-lane.com

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Tel.: (716) 853-2050 • Facsimile: (716) 853-2057
E-Mail: Klane@sliwa-lane.com

Introduction

In New York State, each of the three distinct doctrines of common law waiver, common law estoppel and statutory preclusion may operate to prevent an insurer from disclaiming coverage. The function and application of those doctrines, as well as the statutory authority and common law that considers the opportunity of an insurer to disclaim coverage, is set forth in greater detail below.

The Statutory Basis for an Insurer's Obligation to Disclaim

Section 3420 (d) of the New York State Insurance Law applies to coverage in a policy delivered or issued for delivery in New York State for death or bodily injury arising out of an accident occurring within New York State. That statute reads:

“If . . . an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant” (Insurance Law § 3420 [d]).

Disclaimer pursuant to Insurance Law § 3420 (d) is unnecessary when a claim falls outside the scope of coverage afforded by the policy (see *Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]; *New*

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York Mut. Underwriters v Baumgartner, 19 AD3d 1137, 1140 [4th Dept 2005]). Where the policy does not include coverage in the first instance, requiring payment of a claim upon failure to timely disclaim would have the impermissible effect of creating coverage where it never existed (see *Bettenhauser*, 95 NY2d at 188).

By contrast, “a disclaimer is necessary ‘when denial of coverage is based on a policy exclusion without which the claim would be covered’ ” (*Baumgartner*, 19 AD3d at 1140, quoting *Bettenhauser*, 95 NY2d at 188). Under those circumstances, a disclaimer is required because coverage under the policy is included absent application of the exclusion.

Therefore, courts of New York State have repeatedly held that conformity with Insurance Law § 3420 (d) is necessary only where the policy would provide coverage but for a policy defense or exclusion (see e.g. *Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648 [2001]; *Penn-America Group v Zoobar, Inc.*, 305 AD2d 1116 (4th 2005), *lv denied* 100 NY2d 511).

The Doctrine of Waiver

The first doctrine which may prevent an insurer from disclaiming coverage is that of waiver.

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The Law

Waiver is defined under the law of New York as “a voluntary and intentional relinquishment of a known right” (*Albert J. Schiff Assoc., Inc. v. Flack*, 51 NY2d 692, 698 [1980]; see *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 NY2d 966, 968 [1988]). The doctrine of waiver applies only where coverage exists and may not operate to create such protection (see e.g. *Ward v County of Allegany*, 34 AD3d 1288 (4th Dept 2006).

“[C]ourts find waiver where there is direct or circumstantial proof that the insurer intended to abandon [a] defense” (*Schiff Assoc.*, 51 NY2d at 698). Implied waiver exists where an intention to waive is unexpressed, but clearly inferable from the circumstances (see *Kiernan*, 150 NY 190, 195 [1896]; see also *Schiff Assoc.*, 51 NY2d at 698).

To prove waiver, the insured must demonstrate a “clear manifestation of intent by [the insurer]” to abandon its right to assert what it knows or should know to be a defense to coverage¹ (*Gilbert*, 70 NY2d at 968; see *Kiernan*, 150 NY at 195). Once it exists, a waiver is irrevocable.

¹ It should be noted that the doctrine of waiver vitiates only the right of an insurer to disclaim based on a coverage defense, such as the insured’s noncompliance with a condition precedent. The doctrine of estoppel, which is discussed at pages 11-18 of this Primer, defeats an insurer’s right to disclaim coverage by way of both a policy defense and a policy exclusion. (see *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 323 [1995]; *Merchants Mut. Ins. Group v. Travelers Ins. Co.*, 24 AD3d 1179, 1182 [4th Dept 2005]).

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(see *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 NY2d 175, 185 [1982]; *Kiernan*, 150 NY at 195).

The Application of the Waiver Doctrine

The practical effect of the doctrine of waiver is easily discerned: if an insurer has knowledge that its insured failed to comply with a policy condition precedent to coverage, that insurer must disclaim coverage in a timely fashion.

By way of example, an insurer may waive its right to disclaim based on a coverage defense if that insurer fails to disclaim on the ground that its insured did not comply with policy conditions requiring

- timely notice of loss (see *General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]);
- the prompt disclosure of suit papers (see *Matter of Allstate Ins. Co. [Zenaty]*, 174 AD2d 832, 834 [3d Dept 1991]);
- the consent of the carrier prior to the settlement of the claim (see *Firemen's Fund Ins. Co. v Freda*, 156 AD2d 364, 365-366 [2d Dept 1989]); or
- timely filing of proof of loss (see *Schunk v New York Cent. Mut. Fire Ins. Co.*, 237 AD2d 913, 914 [4th Dept 1997]).

An insurer may also waive its right to disclaim when it, among other things,

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- participates in an arbitration proceeding despite knowledge of a ground upon which to void the policy (see *Commerce & Indus. Ins. Co. v Nester*, 230 AD2d 795 [2d Dept 1996]), *affd* 90 NY2d 255; *Government Empls. Ins. Co. v Cusi*, 163 AD2d 918 [4th Dept 1990]);
- fails to comply with its duty to act expeditiously in processing a no-fault claim (see *Presbyterian Hosp. in City of New York v Aetna Cas. & Sur. Co.*, 233 AD2d 431, 432 ([2d Dept 1996]); or
- otherwise manifests an intent to relinquish the protection of a policy defense (*compare Compis Servs. v Hartford Steam Boiler Inspection & Ins. Co.*, 272 AD2d 886, 888 [4th Dept 2000]).

In short, an insurer aware that its insured failed to comply with a condition precedent to coverage should provide a timely disclaimer of coverage on that ground to avoid waiving that defense.

The Doctrine of Preclusion

The second doctrine which may prevent an insurer from disclaiming coverage is that of preclusion.

The Law

The doctrine of preclusion arises from the terms of Insurance Law § 3420 (d). “[T]o effectively disclaim liability or deny coverage . . . under a policy of liability insurance, an insurer must ‘give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage’ ”

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(*Hartford Ins. Co. v Nassau County*, 46 NY2d 1028, 1029 [1979] [quoting what is now section 3420 (d)]). The failure of an insurer to give notice “as soon as is reasonably possible” after it first learns of the grounds for disclaimer precludes effective disclaimer or denial of coverage (*New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006]; *First Fin. Ins. Co. v Jetco Contracting Corp.*, 1 NY3d 64, 68-69 [2003]).

“The timeliness of an insurer’s disclaimer is measured from the point [at which] the insurer first learns of the grounds for disclaimer of liability or denial of coverage” (*Aguirre*, 7 NY3d at 772 [internal quotations omitted]). “When the basis for denying coverage was or should have been readily apparent before the onset of the delay of disclaimer, the insurer’s explanation is insufficient as a matter of law” (*Aguirre*, 7 NY3d at 772 [internal quotations and punctuation omitted]).

Because Insurance Law § 3420 (d) sets forth an unconditional rule that an insurer must provide a prompt written disclaimer, the question whether prejudice inured to the insured is of no import (see *Allstate Ins. Co. v. Gross*, 27 NY2d 263, 269-270 [1970]). The only relevant issue is whether the insurer may demonstrate that it acted within a reasonable time (see *Jetco*, 1 NY3d at 69).

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The Application of the Preclusion Doctrine

Insurance Law § 3420 (d) provides a simple, cogent message to claims professionals and attorneys alike: hesitate in disclaiming coverage at your own risk. What is neither simple nor cogent is the relevant time in which an insurer may effectively disclaim coverage.

Generally, the question whether an insurer provided a timely disclaimer is one of fact (see e.g. *Jetco*, 1 NY3d at 70). However, depending on the extent of unexplained delay and the portion of New York State in which a particular case is venued, the court may find a disclaimer untimely as a matter of law and preclude an insurer from disclaiming coverage.² The period of unexcused delay after which each of the four intermediate appellate courts of this state will find a disclaimer untimely is as follows:

² By way of background, the Unified Court System of the State of New York contains a single trial court of statewide jurisdiction with a branch in each county (referred to as “Supreme Court”), four intermediate appellate courts (referred to as the “Appellate Division”) and a high court (referred to as the “Court of Appeals”). Because the Court of Appeals has not, to date, established a bright line rule as to the moment at which a disclaimer is untimely as a matter of law, the question of timeliness is generally determined by the body of law established by the intermediate appellate court with jurisdiction in the county in which a particular case is venued. The Appellate Divisions of the Third and Fourth Judicial Departments hear cases venued in “upstate” New York, while the Appellate Divisions of the First and Second Judicial Departments consider matters venued in New York City and its immediate vicinity.

For those not familiar with the geography of New York State, an easy way to determine in which Judicial Department a case might be venued is to reference a *Seinfeld* rerun. Any area of this state considered by a *Seinfeld* episode generally comes within the jurisdiction of the Appellate Divisions of the First or Second Judicial Departments. Any area outside the ambit of a typical *Seinfeld* episode likely falls within the Appellate Divisions of the Third or Fourth Judicial Departments.

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- **Appellate Division, First Department:** unexcused 30-day delay in disclaiming unreasonable as a matter of law (see *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [1st Dept 2002], *lv denied* 98 NY2d 605);
- **Appellate Division, Second Department:** unexcused 41-day delay in disclaiming unreasonable as a matter of law (see *Nationwide Mut. Ins. Co. v Steiner*, 199 AD2d 507, 508 [2d Dept 1993]);
- **Appellate Division, Third Department:** unexcused 42-day delay in disclaiming unreasonable as a matter of law (see *Squires v Robert Marini Bldrs.*, 293 AD2d 808, 810 [3d Dept 2002], *lv denied* 99 NY2d 502); and
- **Appellate Division, Fourth Department:** unexcused delay of more than two months is unreasonable as a matter of law (see *Nuzzo v Griffin Tech.*, 222 AD2d 184, 188 [4th Dept 1996], *lv denied* 91 NY2d 802).

The highest appellate court of New York has, in opinions limited to the facts of those matters, found unexcused delays of 48 days (see *Jetco*, 1 NY3d at 68-70) and 62 days (see *Hartford Ins. Co.*, 46 NY2d at 1030) unreasonable as a matter of law.

Therefore, careful practice requires that an insurer disclaim coverage no later than 30 days after learning of the grounds for disclaimer of liability or denial of coverage. Any hesitation, though, in disclaiming once a ground upon which to deny protection is known is perilous, as there is no bright line rule that an unexplained delay of less than 30 days is

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reasonable (see *Hess v Nationwide Mut. Ins. Co.*, 273 AD2d 689, 690 [3d Dept 2000]).

The Doctrine of Estoppel

The third doctrine which may prevent an insurer from disclaiming coverage is that of estoppel.

The Law

The doctrine of estoppel arises where an insurer acts in a manner inconsistent with a lack of coverage, and the insured relies upon those representations to its detriment. Estoppel rests upon the misleading conduct of the insurer and may occur innocently, without intent, from any conduct on the part of the insurer that would, were the insurer not held estopped, operate as a fraud on the insured who has taken or neglected to take some action to his or her prejudice in reliance upon the insurer's conduct (see e.g. *Schiff Assoc.*, 51 NY2d at 699; *Merchants Mut. Ins. Group*, 24 AD3d at 1182; *American Transit Ins. Co. v Wilfred*, 296 AD2d 360 [1st Dept 2002]).

Therefore, "when an insurer defends an action on behalf of an insured, in his stead, with knowledge of facts constituting a defense to the coverage of the policy, it is thereafter estopped from asserting that the

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policy does not cover the claim” (*O’Dowd v American Sur. Co. of New York*, 3 NY2d 347, 355 [1957]; see *Schiff Assoc.*, 51 NY2d at 699; *Wise v McCalla*, 24 AD3d 435, 437 [2005]). The burden of proving estoppel rests with the person urging application of that doctrine (see e.g. *Merchants Mut. Ins. Group*, 24 AD3d at 1182).

The Application of the Estoppel Doctrine

Similar to the doctrine of waiver, the practical effect of the doctrine of estoppel is easily apprehended. If an insurer has knowledge that a claim comes within the ambit of a policy exclusion and is therefore removed from coverage, or that coverage in a particular matter is defeated by application of a policy defense, that insurer must either disclaim coverage on that ground or reserve its right to do so to avoid invoking a common law bar to the denial of coverage. An insurer that defends an action without reserving its right to disclaim coverage on a particular ground may be estopped from asserting that defense to coverage at a later time, even if mistaken on the requirement of coverage.

Circumstances in which an insurer may be estopped from disclaiming or withdrawing coverage on the basis of an applicable policy exclusion include matters in which that insurer

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- represented the insured for two years before disclaiming coverage on the ground that coverage did not begin until after the subject accident (see *Wilfred*, 296 AD2d at 361);
- represented the insured for 11 years before disclaiming coverage on grounds that were known to the insurer throughout the course of the litigation (see *Brooklyn Hosp. Ctr. v Centennial Ins. Co.*, 258 AD2d 491, 492 [2d Dept 1999]);
- defended and settled a claim on behalf of its insured before attempting to escape its coverage obligations by way of an exclusion (see *National Cas. Co. v State Ins. Fund*, 227 AD2d 115, 118 [1st Dept 1996]); and
- controlled the early stages of the defense of its insured for seven months before attempting to disclaim coverage on the basis of an exclusion (see *Dryden Mut. Ins. Co. v Michaud*, 115 AD2d 150, 152 [3d Dept 1985]).

It bears noting that estoppel will not, however, lie where an insured is not prejudiced by its insurer's delay in denying or disclaiming coverage. (see e.g. *Merchants Mut. Ins. Group*, 24 AD3d at 1182).

Therefore, if an insurer has knowledge that a claim is not within the scope of coverage afforded by a policy, that insurer must either deny or disclaim coverage on that ground, or reserve its right to do so, before defending the subject action to avoid being estopped from denying coverage on that ground at a later time.

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The Doctrine of Estoppel and the Creation of Coverage

A related, and ill-resolved, question pertaining to the doctrine of estoppel is whether that concept may create coverage where none previously existed.

In *Albert J. Schiff Associates, Inc. v Flack* (51 NY2d 692, 698 [1980]), which is largely considered to be the seminal case germane to the doctrine of estoppel in New York State, the Court of Appeals intimated that the application of that concept could create coverage where none previously existed:

“[E]quitable estoppel . . . [arises] where . . . an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense. In such circumstances, though coverage as such does not exist, the insurer will not be heard to say so (see *O’Dowd v American Sur. Co. of N. Y.*, 3 NY2d 347; *Gerka v Fidelity & Cas. Co.*, 251 N.Y. 51, 57 . . .)” (*Schiff Assoc.*, 51 NY2d at 698).

The authority upon which the *Schiff* Court based that opinion suggests a slightly less encompassing rule. While coverage may be created by estoppel, that protection must have existed in the first instance, and have been subject to defeat by application of a policy exclusion or defense. (see *O’Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347, 355

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[1957] [(W)hen an insurer defends on behalf of an insured, in his stead, with knowledge of facts constituting a defense to coverage of the policy, it is thereafter estopped from asserting that the policy does not cover the claim”]; *Gerka v The Fidelity & Cas. Co. of New York*, 251 NY 51 [1929] [estopping the insurer from denying coverage where the insurer knew of limiting language excepting from coverage the loss at issue, but proceeded with the defense of its insured]; *compare William H. Moore Constr. Co., Inc. v. United States Fid. & Guar. Co.*, 293 NY 119 [1944] [estopping an insurer from denying coverage where the insurer knew an exclusion removed a particular loss from coverage but defended the action to verdict]).

Therefore, the doctrine of estoppel typically applies only where a relevant policy of insurance exists and where an insurance company seeks to deny or disclaim coverage after defending the action for an extended period of time (*see e.g. Nassau Ins. Co. v Manzione*, 112 AD2d 408, 409 [2d Dept 1985] [(W)here there is no coverage under an insurance policy because the policy was not in existence at the time of the accident, estoppel cannot be used to create coverage”], *appeal denied* 66 NY2d 605; *see generally Zappone v Home Ins. Co.*, 55 NY2d 131, 137 [1982];

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Charlestowne Floors, Inc. v Fidelity & Guar. Ins. Underwriters, Inc., 16 AD3d 1026, 1027 [4th Dept 2005]; *Wausau Ins. Cos. v Feldman*, 213 AD2d 179, 180 [1st Dept 1995]). Distilled to its essence, the operative rule is that “estoppel cannot create coverage where none existed under the policy’s terms” (*Jefferson Ins. Co. of New York v Travelers Indem. Co.*, 92 NY2d 363, 370 [1998]; see *Charlestowne Floors*, 16 AD3d at 1027).

A discussion of the doctrine of estoppel would, however, remain incomplete without reference to one important caveat to the rule that this concept may not operate to create coverage where none existed.

As intimated above, the doctrine of estoppel is pertinent only where a source of indemnification has been contracted for and a policy premium paid. Although the subject loss may fall outside the risks insured, estoppel may arise if a policy of insurance protecting the party seeking the benefit of that doctrine exists.

So too, though, is it clear that a party not insured under the policy of insurance relative to which an estoppel is sought to apply may, in certain circumstances, seek otherwise nonexistent coverage through application of that doctrine.

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In *Bucon, Inc. v Pennsylvania Manufacturing Association Insurance Co.* (151 AD2d 207 [3d Dept 1989]), the Appellate Division, Third Department recognized that an estoppel may arise out of the issuance of a certificate of insurance purporting to provide coverage for a party not otherwise insured under the relevant policy of insurance.

In *Bucon*, the insured-subcontractor requested coverage for the plaintiff-contractor pursuant to a policy of liability insurance issued by the defendant-insurer to the insured-subcontractor. The subject policy did not protect against loss arising out of liability running to the plaintiff-contractor (see *Bucon, Inc.*, 151 AD2d at 210).

However, upon the request of the insured-subcontractor, the defendant-insurer issued a certificate of insurance representing that the plaintiff-contractor was an additional insured under the subject policy of insurance. That representation caused the plaintiff-contractor to permit the insured-subcontractor to proceed with the work of the project in which both were involved (see *Bucon, Inc.*, 151 AD2d at 209).

Thereafter, an employee of the insured-subcontractor suffered injury at the project and commenced legal action against, among others, the plaintiff-contractor. In resolving the declaratory judgment action that

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considered the request of the plaintiff-contractor for insurance coverage from the defendant-insurer, the *Bucon* Court found that, although the subject policy of insurance did not contain coverage for the plaintiff-contractor, the defendant-insured was estopped from denying protection for the plaintiff-contractor because that entity reasonably relied upon the representation that coverage had been procured and elected not to procure its own protection (see *Bucon, Inc.*, 151 AD2d at 210-211).

Therefore, because an insurance certificate, although not conclusive as to the existence or terms of an insurance contract, “is evidence of an insurer’s agreement to extend coverage” (*Armstrong v Ogden Allied Facilities Mgt. Corp.*, 234 AD2d 235, 236 [1st Dept 1996]), an insurer issuing a certificate of insurance suggesting that coverage exists for a party that is not, at first glance, otherwise entitled to protection under the relevant policy of insurance may be estopped from denying coverage promised in the certificate of insurance after the issuance of that instrument (see *Bucon, Inc.*, 151 AD2d 210-211; *Stevens v Nationwide Mut. Ins. Co.*, 79 AD2d 888 [4th Dept 1980]). The corollary to the rule that “estoppel cannot create coverage where none existed under the policy’s terms” (see *Jefferson Ins. Co.*, 92 NY2d at 370) thus appears to be that

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estoppel may create coverage “where the party for whose benefit the insurance was procured reasonably relied upon the provisions of an insurance certificate to that party’s detriment” (*Lenox Realty, Inc. v. Excelsior Ins. Co.*, 255 AD2d 644, 646 [3d Dept 1998], *lv denied* 93 NY2d 807; *see Bucon, Inc.*, 151 AD2d at 210-211; *compare Linarello v City Univ. of New York*, 6 AD3d 192, 195 [1st Dept 2004]).

Conclusion

In sum, reference to each of the three aforementioned doctrines is required in evaluating a question of coverage. Though each of those doctrines bears a different name, their application results in the same outcome: one who fails to heed the relevant statutory and common law of New York State will be prevented from disclaiming or denying coverage.

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