

## Coverage That Otherwise Does Not Exist Cannot Be Created Through Waiver or Estoppel if the Insurer Does Not Issue a Reservation of Rights to its Insured

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In *Maxwell*, the Wisconsin Supreme Court held that waiver or estoppel cannot be used to defeat a coverage clause (as opposed to a forfeiture clause) when the insurer fails to issue a reservation of rights. First, the court observed that, since 1896, Wisconsin has recognized the "general rule . . . that the doctrine of waiver or estoppel based on conduct or action of the insurer or its agent is not applicable to matters of coverage as distinguished from grounds for forfeiture." *Maxwell*, ¶ 29 (quoting *Shannon v. Shannon*, 150 Wis. 2d 434, 450-51 (1989) and citing *McCoy v. Nw. Mut. Relief Ass'n*, 92 Wis. 577, 66 N.W. 697 (1896)). The court, therefore, concluded that the distinction between a forfeiture clause and a coverage clause is crucial: While "providing and assuming full control of a defense may be grounds for establishing waiver or estoppel of a forfeiture clause when the insurer fails to issue a reservation of rights," *id.*, ¶ 41, "providing a defense does not give rise to estoppel or waiver of a coverage clause," *id.*, ¶ 40 (emphasis in original). The court reasoned that, though an insured is entitled to coverage it has paid for so long that it does not forfeit coverage by violating a provision of the policy, a court should not re-write the policy "to bind the insurer to a risk it did not contemplate and for which it has not been paid." *Id.*, ¶ 34.

Second, the court distinguished between estoppel and a court-imposed obligation to defend and/or indemnify as a result of a breach of the duty to defend or as a result of bad faith. The court acknowledged that in cases of such breach or in cases of insurer bad faith, courts sometimes characterize the resulting damages awards as the insurer being "estopped" from denying coverage; however, that characterization is a misnomer. Instead, the damage awards are "the measure of damages actually caused by the insurer's breach of the contractual duty to defend" or caused by the insurer's tortious conduct, "not an estoppel based on some otherwise inequitable conduct in the eyes of the insured." *Id.*, ¶ 55.

Despite its holding that coverage cannot be created through waiver or estoppel where an insurer fails to issue a reservation of rights (and a forfeiture clause is not at issue), the court indicated that insurers should continue to "communicate forthrightly with their insureds – especially when insurers dispute coverage." *Id.*, ¶ 61.

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