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MENDING THE HOLD IN FLORIDA: GETTING A BETTER GRIP ON AN OLD INSURANCE DOCTRINE

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I. INTRODUCTION

The “Mend the Hold” doctrine, created by the United States Supreme Court in 1877,¹ is a legal device used to prevent an insurance company from raising any reason not contained in the pre-suit claim denial letter as a defense in litigation.² With rare exception, made only for the seasoned first-party insurance practitioner, the nearly universal reaction to the phrase, “mend the hold,” is confusion.³ Considering that only a handful of Florida cases⁴ have mentioned the “Mend the

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1. See *Railway Co. v. McCarthy*, 96 U.S. 258, 268 (1877) (while the United States Supreme Court cited other cases on the “Mend the Hold” doctrine, the McCarthy Court is widely cited as the opinion which “created” the “Mend the Hold” doctrine in common law).

2. *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 362 (7th Cir. 1990).

3. The “Mend the Hold” doctrine has often been confused with the legal doctrines of judicial estoppel, equitable estoppel, “fraud on the court,” and collateral estoppel, among other legal theories. See Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation With a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, “Mend the Hold,” “Fraud on the Court,” and Judicial and Evidentiary Admissions*, 4 *CONN. INS. L.J.* 589 (1997-98) (commenting that, at times, courts do not clearly identify what doctrine is being relied upon, rather it seems the courts applying the above doctrines under factual scenarios that “just [aren’t] right”); *Harbor Ins. Co.*, 922 F.2d 357 (7th Cir. 1990) (Posner, J.) (describing judicial estoppel, equitable estoppel, “fraud on the court,” collateral estoppel, and “mend the hold” as cousins).

4. See John A. DeVault, III, *“Mend the Hold” An Antiquated Doctrine of Fairness*, 70 *FLA. B.J.* 8 (1996) (noting no Florida decision citing the “mend the hold” doctrine was found after a Westlaw search; however, a recent Westlaw search reveals 5 Florida decisions which specifically mention the “Mend the Hold” doctrine).

Hold" doctrine,⁵ it is common for Florida lawyers and judges to be unfamiliar with the doctrine when it is raised in court.⁶

Part of the legal puzzlement may be explained by the fact that the phrase, "mend the hold," is not a legal term at all, but a legal adaptation of an 19th century wrestling term, meaning to get a better grip, or hold, on your opponent.⁷ Over its long, but somewhat quiet history,⁸ the "Mend the Hold" doctrine has been described as a "quirky," but "persisten[t]" doctrine, "especially applicable to insurance companies that change their reason for refusing to pay a claim"⁹ In the "quirky" words of the 1877 United States Supreme Court, the majority held as follows:

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.¹⁰

Despite the 125 year relative hibernation of the "Mend the Hold" doctrine, the doctrine has made a recent resurgence.¹¹ Along with the related doctrines of estoppel and waiver, courts and commentators have suggested that the re-birth of the "Mend the Hold" doctrine, has been a reaction to litigants' and, especially insurers',¹² increasing tendency to take inconsistent litigation positions. As one "mend the hold" commentator has aptly noted, courts have increasingly expressed intolerance for insurers who adjust legal positions like chameleons adjust their color.¹³

5. Robert H. Sitkoff, "Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases, 65 U. CHI. L. REV. 1059 (1998).

6. See, e.g., *Harbor Ins. Co.*, 922 F.2d at 362 (noting that an Illinois court called the doctrine "amend his hold"); see DeVault, III, *supra* note 4 (stating that the author believed the doctrine to be "mend the hole").

7. See *Harbor Ins. Co.*, 922 F.2d at 357.

8. See Anderson, *supra* note 3, at 692.

9. *Harbor Ins. Co.*, 922 F.2d at 357.

10. See *Railway Co.*, 96 U.S. at 258.

11. See Anderson, *supra* note 3, at 692.

12. *Id.* (One commentator has described the insurance industry as the largest, most frequent private user of the civil justice system that, conservatively, spends a billion [sic] dollars a year on coverage litigation producing tens of thousands of briefs filed against policy holders in our nations [sic] courts to deny policy benefits to insureds. The commentator references the insurance industry's briefs in these cases as examples of the flagrant inconsistent litigation positions taken by insurers against insureds.).

13. *Id.*

While there can be little question that in recent years there has been increased “judicial perturbation”¹⁴ to an insurer’s “weather vane”¹⁵ arguments that “shift with the wind,”¹⁶ there is equally little question that most state courts have failed to provide a cogent, consistent theory to preclude the shifting positions in the first-party insurance context.¹⁷ To complicate matters, well-entrenched rules of “notice”¹⁸ pleadings and other procedures favoring the liberal amendment of those pleadings,¹⁹ clash, almost irreconcilably, with equitable doctrines such as “Mend the Hold” that require every proverbial duck to be in the proverbial row at the outset of the litigation. Historically, Florida Courts have been no different.²⁰

In the first-party insurance context, Florida courts have traditionally, relied on loose, general notions of waiver and estoppel to prohibit insurers from raising certain matters in defensive pleadings that were not initially raised in the claim denial letter even in the face of procedural rules favoring liberality of pleading amendments.²¹ Indeed, rather than creating tension with the rationale of the “Mend the Hold” doctrine, several of Florida’s procedural rules of pleading, as well as portions of the state insurance code, act as a quasi-“Mend the Hold” doctrine and complement the judicial treatment by procedurally effecting a waiver for matters not raised,²² not raised timely,²³ or improperly raised.²⁴ Those rules, however, do not go as far as the “Mend the Hold” doctrine, for if the matter is timely and properly raised, the matter will be procedurally allowed even if it was not initially raised in the claim denial letter.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 591 (stating many times courts do not clearly identify why an inconsistent position should be precluded; it seems to be a matter of “it just isn’t right”).

18. Fed. R. Civ. P. 8 (requiring “notice” pleadings only state ultimate facts alleging a recognized cause of action).

19. Fed. R. Civ. P. 15(d) (governing amendments of pleadings). It is universally recognized that the Federal Rules of Civil Procedure allow for liberality of amendment of pleadings.

20. Fla. R. Civ. P. 1.190(a), (d), (e), 1.140, 1.110 (pleading and amendment rules for Florida are similar to the Federal rules).

21. See *Southchase Parcel 45 Cmty. Ass’n, Inc. v. Garcia*, 844 So. 2d 650, 651 (Fla. 5th Dist. Ct. App. 2003); See also *MLB v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001).

22. See, e.g., Fla. R. Civ. P. 1.140(h) (stating any affirmative defenses not timely raised are waived).

23. *Id.*

24. See, e.g., Fla. R. Civ. P. 1.120(b) (requiring claims and defenses based on fraud be pleaded specifically); See also Fla. R. Civ. P. 1.120(c) (requiring defenses based on failure of conditions precedent be pleaded with specificity).

What is lacking, from Florida's "mend the hold" insurance jurisprudence is a clear, uniform judicial theory to remedy insurers engaging in a "gotcha"²⁵ or "sporting"²⁶ theory of justice against insureds in coverage litigation. Historically, Florida Courts have applied the "Mend the Hold" principles, masquerading behind theories of estoppel and waiver.²⁷

This article addresses the "Mend the Hold" doctrine in Florida. Part I of the article generally discusses the judicial development of the "Mend the Hold" doctrine. Part II of the article traces the "Mend the Hold" doctrine in Florida as applied by the Florida Courts in insurance matters, loosely disguised under traditional waiver and estoppel principles. Part III of the article discusses the interplay between Florida procedural and statutory provisions, common insurance policy provisions, and the "Mend the Hold" doctrine. Finally, the article posits that Florida Courts should formally adopt, through its common law or by statutory codification, the "Mend the Hold" doctrine to promote judicial economy and fundamental fairness in first-party insurance matters.

II. MEND THE HOLD HISTORICALLY: WHAT IS IT?

A. *Distinguished from Waiver and Estoppel*

The "Mend the Hold" doctrine has common historical roots with the doctrines of both equitable and judicial estoppel.²⁸ Inasmuch, all three doctrines aim to prevent a party from shifting litigation positions, they are properly said to be "cousins."²⁹

While it is accurate to relate the "Mend the Hold" doctrine with the other equitable doctrines, to equate the "Mend the Hold" doctrine with those equitable doctrines would be inaccurate. Equitable estoppel requires a detrimental reliance on an inconsistent prior position.³⁰ The more stringent theory of judicial estoppel is understood to prevent a party from using conflicting theories to prevail in both a prior and

25. *Salcedo v. Asociacion Cubana, Inc.*, 368 So. 2d 1337, 1339 (Fla. 3d Dist. Ct. App. 1979).

26. *See Anderson, supra* note 3 at 692.

27. *See Southchase Parcel 45 Cmty. Ass'n, Inc. v. Garcia*, 844 So. 2d 650, 651 (Fla. 5th Dist. Ct. App. 2003); *see also MLB v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001).

28. *See Sitkoff, supra* note 5.

29. *Harbor Ins. Co.*, 922 F.2d at 357.

30. *See Sitkoff, supra* note 5 (explaining the requirement of reliance in equitable estoppel is reflective of equitable estoppel's purpose).

subsequent litigation.³¹ The “Mend the Hold” doctrine requires neither detrimental reliance, nor conflicting theories in subsequent litigation.

The “Mend the Hold” doctrine is succinctly summed up as limiting a party’s defenses to those based on the pre-litigation explanation for the non-performance given to the other party.³² Simply put, the “Mend the Hold” doctrine limits the available defenses to the exact defense asserted at the time of breach.³³ Historically, “Mend the Hold” is a contract doctrine, applicable only to contract cases.³⁴ As the doctrine has jurisprudentially matured, “Mend the Hold” has proved particularly applicable to insurance matters.³⁵

B. *McCarthy and Harbor Insurance: Inception to Modernity*

A historical examination of the “Mend the Hold” doctrine is incomplete without first discussing *Railway Co.*³⁶ and *Harbor Ins. Co.*³⁷ The 1877 *Railway Co.* case involved a relatively insignificant transportation and contract dispute over sixteen carloads of cattle.³⁸ This is the case where the Supreme Court created the “Mend the Hold” doctrine.³⁹ More than a century later, the “Mend the Hold” doctrine was once again addressed by the Honorable Judge Richard Posner in the *Harbor Ins. Co.* case that involved over a billion dollars in bank loans, the collapse of an enormous international financial conglomerate, securities fraud convictions, and an estimated \$25 million dollars in insurance coverage, divided between two insurers, one primary and one excess.⁴⁰

i. *Railway Co. v. McCarthy*

The *Railway Co.* decision is significant, primarily for its use of the phrase, “mend the hold.” After McCarthy’s cattle arrived five hours late in Baltimore, the railroad company refused to ship the cattle that day as agreed.⁴¹ Initially, the railroad told McCarthy there were

31. *Id.* (explaining the purpose of judicial estoppel is to preserve the integrity of the judicial system by disallowing inconsistent results).

32. *Id.* (explaining the traditional purpose of of the “mend the hold” doctrine is to allow a contracting party to rely on the given explanation for the breach as the exclusive reason).

33. *Id.*

34. *Id.*

35. *Harbor Ins. Co.*, 922 F.2d at 357.

36. *Railway Co.*, 96 U.S. at 258.

37. *Harbor Ins. Co.*, 922 F.2d at 357.

38. *Railway Co.*, 96 U.S. at 258.

39. *Id.*

40. *Harbor Ins. Co.*, 922 F.2d at 359-60.

41. *Railway Co.*, 96 U.S. at 258.

insufficient cars to accommodate the cattle.⁴² McCarthy sued on the “contract of affreightment”⁴³ and the railroad defended.⁴⁴ The railroad sought to avail itself not of the pre-suit “want of cars”⁴⁵ defense initially raised, but shifted to a litigation defense that prohibited the shipment of goods on the Sabbath.⁴⁶ The gist of the railroad’s litigation defense hinged on the undisputed fact that a Sunday shipment of McCarthy’s cows would be illegal.⁴⁷ For reasons unimportant here, the “Sunday law of West Virginia” was applicable to the cattle shipment.⁴⁸

In rejecting the railroad’s shift in positions, the Court found it fair to presume that the reason given at the time of the breach, i.e., the insufficiency of the cars, was the real defense.⁴⁹ The Court bluntly noted the Sunday Law defense of illegality was an after-thought, suggested by the pressure and exigencies of the case.⁵⁰ As a result, the Court enunciated a settled principle of 1877 law creating a name for the situation where a party is not permitted to give one reason pre-suit and change his ground after litigation has begun.⁵¹ The settled principle of 1877 law name now had a name: the “Mend the Hold” doctrine.

ii. Harbor Insurance Company v. Continental Bank

For over a century, the “Mend the Hold” doctrine received relatively miniscule implementation in case law, until 1990 when one of America’s most respected jurists, Judge Richard Posner, touched on the doctrine in one of the largest insurance disputes of the era. In *Harbor Ins. Co.*, Judge Posner, in what proved to be a very colorful opinion,⁵² chastised an insurer for “hoking up” a phony defense and for trying inconsistent defenses on “for size.”⁵³

42. *Id.* at 265.

43. BLACK’S LAW DICTIONARY (8th ed. 2004) (defining contract of affreightment as an agreement for carriage of goods by water).

44. *Railway Co.*, 96 U.S. at 258.

45. *Id.* at 265 (According to the defendant, there were not enough cars necessary to transport the plaintiff’s cattle.).

46. *Id.* at 265.

47. *Id.*

48. *Id.* at 267.

49. *Id.*

50. *Railway Co.*, 96 U.S. at 267.

51. *Id.*

52. Jeffrey W. Stempel, *An Inconsistently Sensitive Mind: Richard Posner’s Cerebration of Insurance Law and Continuing Blind Spots of Economicalism*, 7 CONN. INS. L.J. 7, 15 (2001).

53. *Harbor Ins. Co.*, 922 F.2d at 363.

The Seventh Circuit Court of Appeals addressed an insured bank, Continental, that bought a billion dollars in loans from a collapsed bank, Penn Square Bank.⁵⁴ Continental Bank was charged with securities fraud and settled the charges by agreeing to pay \$17.5 million.⁵⁵ It had a valid insurance policy that delineated that Harbor Insurance Company would reimburse the first \$15 million and Allstate Insurance Company would be reimbursing the next \$10 million.⁵⁶ Before the bank settled its securities fraud case, the insurers argued that the behavior of the directors was so egregious that federal and state law would forbid indemnity on the policies.⁵⁷

However, when the bank sued on the policies, the insurers “changed course, and stated that the bank settled . . . the fraud case prematurely and improvidently because the directors had not been guilty of any misconduct at all.”⁵⁸ Despite the inconsistent positions of the insurers, a jury agreed and found no liability on the policies.⁵⁹ In rejecting the insurers “chang[e] of tune,”⁶⁰ Judge Posner noted that the “Mend the Hold” doctrine embodies the notion that a party is expected to have “all his pins in perfect order when he files his first pleading.”⁶¹ However, the court remained concerned that the “reach of the [mend the hold] doctrine” was jurisprudentially uncertain, and that there may be some circumstances where an insurer should be allowed to amend its initial claim denial decision; the rules of procedure do countenance just such an amendment.⁶² After discussing the interplay between procedural rules allowing amendment of pleadings, the court stated that the doctrine is “very damaging to insurance companies;” nevertheless, it was required as a necessary “corollary” of the duty of “good faith” imposed on parties to a contract.⁶³

The court struck the balance between modern rules of pleading and contractual notions of good faith by adding a caveat to the “Mend the Hold” doctrine. In the retrial, the jury was to be instructed that the insurance companies were not allowed to change their initial de-

54. *Id.* at 359.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 360.

59. *Harbor Ins. Co.*, 922 F.2d at 360.

60. *Id.*

61. *Id.* at 364.

62. *Id.* at 363.

63. *Id.*

fense to liability unless the change was based on new information that could not have been obtained at the time of the initial pleading.⁶⁴

After *Harbor Ins. Co.*, the "Mend the Hold" doctrine was, in a sense, modernized to conform to modern rules of pleading. Under *Harbor Ins. Co.*'s conceptualization of the "Mend the Hold" doctrine, an insurer has a "safe-harbor," of sorts, for newly discovered defenses which could not have been discovered earlier. In the face of the *Harbor Ins. Co.* holding, an insurer attempting to raise a defense not raised initially in the claim denial letter has a two-pronged burden of proof: first, that the information is "new"; second, that the "new" information could not have been obtained earlier.⁶⁵

III. MEND THE HOLD IN FLORIDA: DOES IT EXIST?

Much attention to this point has been spent on one 1877 United States Supreme Court opinion and one opinion over 100 years later out of the Seventh Federal Circuit. Florida, like other states,⁶⁶ has many cases that recognize the "essentials" of the "Mend the Hold" doctrine in insurance matters without specifically identifying the application as the "Mend the Hold" doctrine.

In Florida, it can be properly said that the doctrine is incognito, operating under multiple aliases. Florida's "Mend the Hold" doctrine is disguised under doctrines of waiver and estoppel. Despite the jurisprudential confusion between doctrines of waiver, estoppel, and mend the hold, the answer to the question of whether the "Mend the Hold" doctrine exists in Florida is, "Yes." As it has historically been the case, the doctrine is especially applicable in Florida in first-party insurance scenarios.

A. Florida Cases: Mend the Hold Essentials

For example, in the 1979 case of *Salcedo*, the Florida Third District Court of Appeals mentioned the "Mend the Hold" doctrine, but it applied an estoppel theory to preclude a party from arguing inconsistent positions regarding mediation provisions and the statute of limitations in both a prior and subsequent action.⁶⁷ This case is a good

64. *Id.* at 369.

65. *Harbor Ins. Co.*, 922 F.2d at 363.

66. See Sitkoff, *supra* note 5 (citing cases from several jurisdictions); see also *Harbor Ins. Co.*, 922 F.2d at 363 (citing cases from other jurisdictions).

67. *Salcedo*, 368 So. 2d at 1337.

illustration of a Florida court's application of a doctrine akin to judicial estoppel, under a "mend the hold" sobriquet.⁶⁸

Again, in *Heimer v. Travelers Ins. Co.*,⁶⁹ Florida's Third District Court of Appeals mentioned the "Mend the Hold" doctrine to correct what it considered "Catch-22"⁷⁰ litigation tactics but invoked nothing resembling any traditional "mend the hold" jurisprudence. The *Heimer* decision is a good example of the Florida court's application of the "Mend the Hold" doctrine to correct a litigation strategy that the court felt just wasn't right. The analysis applied in *Heimer*, masquerading under the "mend the hold" misnomer, was essentially one of equitable estoppel, where a party misleads another, to the other's detriment, in an attempt to "have his cake and eat it too."⁷¹

In yet other situations, Florida courts, especially in insurance cases, have expressly applied the doctrines of waiver and estoppel to a factual situation where "mend the hold" was more of a proposition. A line of Florida cases that I have labeled the "Proof of Loss" cases are illustrative.

For example, in *Balough v. Jewelers' Mutual Ins. Co.*,⁷² an insurer made a general denial of liability prior to litigation. The insured was required under the policy to file proof of loss within a certain time frame and failed to do so.⁷³ It was undisputed that the insured failed to file a timely proof of loss, but the court nevertheless upheld the insured's claim for benefits.⁷⁴ The court noted that the insurer's "unconditional denial of liability" made filing of the proof of loss a "futile act" since coverage had already been denied.⁷⁵ Rather than relying on the "Mend the Hold" doctrine, which would have clearly precluded the insurer from raising the proof of loss defense, the court stated that the requirement for filing a proof of loss was waived⁷⁶ under Florida law.

68. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1118 (1989) (meaning a descriptive name or epithet; nickname).

69. 400 So. 2d 771, 772-73 (Fla. 3d Dist. Ct. App. 1981).

70. *Heimer*, 400 So. 2d at 773 citing *Salcedo*, 368 So. 2d at 1339 ("In earlier times, the rule we apply in this case was said to reflect the feeling that a party may not 'mend his hold,' . . . or 'blow hot and cold at the same time' or 'have his cake and eat it too!' . . . Today, we might say that the courts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed.")

71. *Id.* at 773.

72. 167 F. Supp. 763, 768 (S.D. Fla. 1958).

73. *Id.*

74. *Id.* at 774.

75. *Id.* at 773.

76. *Id.*

*Am. Ins. Co. of Newark v. Burson*⁷⁷ epitomizes the Florida court's application of the modern "Mend the Hold" doctrine in an insurance case, under the guise of waiver. In that case, the Fifth Circuit, applying Florida law, held that an insurer's general denial of liability pre-suit, constituted a "waiver" of any failure by the plaintiff to promptly notify the insurer of the loss.⁷⁸

However, in its rationale, the court identified the essential elements⁷⁹ of *Harbor Ins. Co.'s* "Mend the Hold" doctrine:

[T]he testimony convinces us that [the insurer] had actual knowledge of the loss within a reasonable time frame[.]. [N]evertheless, in view of further testimony that the appellant denied liability for the loss on the ground that it was 'an embezzlement instead of a theft[sic], we think the record fairly supports the trial court's conclusion that the general denial of liability by the [insurer] constituted a waiver of any failure to promptly notify the [insurer] of the loss.⁸⁰

Thus, the *Burson* decision provides a good paradigm of a Florida court applying waiver principles through a "mend the hold" analysis. The *Burson* court relied on all the "mend the hold" essentials: the pre-suit reason for claim denial, the change in litigation position, and the availability of the information to the insurer, measured by the court's determination that the insurer had "actual knowledge." Similar, yet not identical, "waiver/mend the hold" holdings were reached in a line of Florida "proof of loss" cases.⁸¹

77. 213 F.2d 487, 490 (5th Cir. 1954).

78. *Id.* at 490.

79. *Harbor Ins. Co.*, 922 F.2d at 362.

80. *Burson*, 213 F.2d at 490.

81. See *Wegener v. Int'l Bankers Ins. Co.*, 494 So. 2d 259 (Fla. 3d Dist. Ct. App. 1986) (holding that the insurer "waives" any right to argue compliance with conditions precedent of recovery, such as proof of loss, when insurer argued that policy was cancelled); See also *Guarantee Mut. Fire Ins. Co. v. Jacobs*, 57 So. 2d 845, 848 (Fla. 1952) (holding that insurer's agent had authority to "waive" proof of loss when insured were informed that losses would not be covered); See *Keel v. Indep. Life and Accidental Ins. Co.*, 99 So.2d 225, 227 (Fla. 1957) (holding that insurer's agent who informed insured that insurer would deny liability constituted a "waiver of proof of loss," because the proof of loss was "useless and unnecessary"); See *Bituminous Cas. Corp. v. Oceano Towing Co.*, 197 F.2d 210, 211 (Fla. 5th Cir. 1952) (holding that when defendant, insurer, by its letter of May 14, 1948, *originally denied liability under the policy*, it based such denial, not on lack of notice, but upon lack of coverage, thereby waiving policy notice requirements); See *Hartford Accident and Indem. Co. v. Phelps*, 294 So.2d 362, 365 (Fla. 1st Dist. Ct. App. 1974) (disallowing certain proof of loss defenses because court could "not conceive" that insurer denied claim on unrelated grounds and failed to avail itself of rights under the policy to inspect and supervise repair pre-suit); See *Quesada v. F.E.M.A.*, 577 F. Supp. 695, 698 (S.D. Fla. 1983) (holding that letter denying liability waived proof of loss requirements).

Perhaps the purest Florida “mend the hold” case is found in the Southern District of Florida’s opinion in *Yorkshire Ins. Co.*⁸² Again, rather than applying the “Mend the Hold” doctrine, the court applies the doctrines of waiver and estoppel. There, certain insured shipping containers were lost and suit was brought by the owner of the containers against the container insurer.⁸³ Prior to litigation, the insurer set forth four specific grounds for the initial denial of coverage.⁸⁴ Once in litigation, the insurer asserted some other defenses not raised in the claim denial letter based on technical policy exclusions.⁸⁵

Neither citing the *Harbor Ins. Co.* decision, nor mentioning the words “mend the hold,” the court applied the *Harbor Ins. Co.* “Mend the Hold” doctrine and rejected the new defenses as having been “waived:”

[I]t is again the Court’s conclusion that it was Underwriters’ intent to waive certain defenses that had not been asserted in the denial of coverage. However, the Court recognizes that without sufficient information, a defendant cannot be held knowingly to have waived a particular defense in an initial denial of coverage. In other words, if an insurer recognizes the applicability of a particular defense based upon evidence uncovered subsequent to an initial denial of coverage, that insurer should not be precluded from using such a defense on the theory that the defense was waived in the initial denial of coverage, particularly where there is no evidence to indicate that an insured relied upon a waiver to its detriment Based upon the evidence represented to the Court, it is clear that Underwriters had knowledge [of the new defenses].⁸⁶

Here the essentials of the “mend the hold” are present but are merged with the “voluntary relinquishment of a known right” element, commonly associated with the waiver doctrine, and the “detrimental reliance” element, commonly associated with estoppel principles. While lacking all of the elements of either waiver or estoppel, all the elements of “mend the hold” are present.

B. “Mend the Hold” In Florida Procedure and Statutes

No rule of Florida procedure or provision of the Florida Statutes specifically mentions the “Mend the Hold” doctrine, just as specific application of the doctrine cannot be found in Florida case law. With

82. *Yorkshire Ins. Co.*, 81 F. Supp. 2d at 1340.

83. *Id.* at 1347.

84. *Id.* at 1346-47.

85. *Id.* at 1342-43.

86. *Id.* at 1347.

liberal procedural rules allowing amendment of pleadings, there appears to be significant tension between the "Mend the Hold" doctrine and those rules. Upon closer scrutiny, however, both Florida rules of pleading procedure and the insurance code appear to be entirely compatible with the application of "Mend the Hold" doctrine in first-party insurance cases.

Florida Rule of Civil Procedure 1.140⁸⁷ is one such example. The rule clearly provides that any defenses not initially raised are "waived."⁸⁸ "The operation of the waiver provision of Rule 1.140(h) is not limited to defenses and objections specified in the rule. . . ."⁸⁹ "All defenses and objections, whether provided for by that rule or by any of the other rules or by statute, are waived unless initially presented. . . ."⁹⁰ It is certainly arguable that this rule, read in *pari materia* with the rules of procedure, provides for the liberal amendment of pleadings and allows pleadings to be amended to add new defenses. After reviewing the judicial gloss interpreting the procedural amendment rule, however, an equally compelling argument can be made against amendment of the rule, in that the rule, and its judicial interpretation, appears to codify a quasi-"Mend the Hold" doctrine by providing for the waiver of defenses not initially raised.

Under the applicable case law, the amendment, while liberal, is not automatic. If the amendment will be futile, the amendment process has been abused, or if the amendment is prejudicial to a party, it will be disallowed.⁹¹ Judge Posner stated that both abuse of the amendment process and prejudicial conduct are demonstrated where "a party . . . hokes up a phony defense to the performance of these duties and then when that defense fails (at some expense to the other party) tries on another defense for size."⁹²

Under such circumstances, Judge Posner would say that an insurer attempting to amend its pleadings is acting in bad faith.⁹³

87. Fla. R. Civ. P. 1.140(h). Waiver of Defenses. (1) A party waives all defenses and objections that the party does not present either by motion . . . , or, in a responsive pleading. (2) The defenses of failure to state a cause of action or a legal defense or to join an indispensable party may be raised . . . at the trial on the merits in addition to being raised either . . . in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised at any time.

88. *Id.*

89. *See* Fla. R. Civ. P. 1.140(h) Committee Comments, Waiver of defenses.

90. *Id.*

91. *See Carr ex. rel Estate of Grushka v. PersonaCare of Pompano E., Inc.*, 890 So. 2d 288, 289 (Fla. 4th Dist. Ct. App. 2004) *See also* *Butler Univ. v. Bahssin*, 892 So. 2d 1087, 1089 (Fla. 2d Dist. Ct. App. 2004).

92. *Harbor Ins. Co.*, 922 F.2d at 363.

93. *Id.*

Indeed, Florida Insurance Statutes reveal that public policy in Florida favors a prompt determination by insurers of whether reasonable grounds exist to deny a claim for coverage. These statutes underscore Judge Posner's concerns regarding the inequity and bad faith which often result from an insurer's shifting of defenses. If the claim denial is delayed, based on insufficient information or an insufficient investigation, or denied without a factual explanation of the reasons for denial, those circumstances give rise to statutory bad faith under Florida law.⁹⁴ In the no-fault automobile insurance arena, an insurer is required to deny a claim within 30 days.⁹⁵ Thus, both Florida procedure and Florida's Insurance Code contain provisions similar to those promoted by the "Mend the Hold" doctrine of defense waiver and the prompt determination of defenses.

Using standard cooperation clauses⁹⁶ in policies, insurance companies require insureds, prior to filing lawsuits, to produce documents, attend examinations under oath,⁹⁷ and provide all details surrounding the loss. The insurer's pre-suit right of investigation, under the threat of claim denial, is broad and aimed at making sure that only rightful claims are paid. Full compliance with these policy provisions is a condition precedent to an action on an insurance claim.⁹⁸ Hence, an insurer has the opportunity to fully investigate and test even the most routine claim prior to issuing its claim denial. Standard policy cooperation and investigation provisions along with statutory bad faith provisions, which require that an insurer conduct a

94. See FLA. STAT. § 627.426(2)(a), (b) (1982) (known as the claims' administration statute which requires a liability insurer to raise coverage defenses within 30 days or waive those defenses to coverage); see also FLA. STAT. § 624.155 (2005) (incorporating FLA. STAT. § 626.9541(i) (2008), requiring insurers to properly investigate and evaluate claims and creating a cause of action for bad faith if the insurer violates the statute in the claims process); see also FLA. STAT. § 626.9541(i)(3)(a)-(i) (2008) (requiring an insurer to promptly and reasonably communicate and investigate claims or be held liable for bad faith).

95. FLA. STAT. § 627.737(3) (2008) (requiring an insurer to investigate and deny a claim within 30 days or pay the claim).

96. 34 AM. JUR. PROOF OF FACTS 2D 155 § 1, R. 15.8 (2008) (A cooperation clause generally requires the insured's cooperation with the investigation of the insurer.).

97. See *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 303 (Fla. 4th Dist. Ct. App. 1995) (holding that an insured who refused to attend examination under oath forfeited entire policy); see also *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944, 945 (11th Cir. 1990) (holding that giving of recorded statements and other written statements with a claims adjuster not the equivalent of an examination under oath); see also *Fassi v. Am. Fire & Cas. Co.*, 700 So. 2d 51, 52 (Fla. 5th Dist. Ct. App. 1997) (holding that a delayed willingness to comply with examination under oath provision does not cure initial refusal).

98. *Am. Fire & Cas. Co. v. Collura*, 163 So. 2d 784, 788 (Fla. 2d Dist. Ct. App. 1964). Because cooperation clauses are material policy conditions, material breaches of such clauses preclude recovery, unless waiver or estoppel can be shown. See generally 34 AM JUR POF 2D 155 (2008).

reasonable investigation, counterbalance any argument that an insurer should be allowed to amend to state a defense not initially presented in the claims denial letter.

There are two questions that should be addressed for purposes of determining the proper balance between liberal amendment and strict application of the "Mend the Hold" doctrine in first-party insurance matters. The first question involves an insurer who has not availed itself of the full pre-suit cooperation of its insured, its contractual right to investigate, or its statutory obligation to provide an insured with a factual basis for its claim denial after a reasonable investigation. Under those circumstances, is the insurer abusing the amendment process, to the prejudice of the insured, by denying the claim on one ground and then switching grounds after the insured files a lawsuit on the claim? Second, can the insured reasonably assert it is bad faith for the insurer to change its position on the basis of information that could not be acquired earlier?⁹⁹ A simple, appropriate response is found in Judge Posner's *Harbor Ins. Co.* opinion: "[Procedural considerations aside], one might suppose that an insurer owes their [sic] insured a duty of fuller inquiry prior to denying a claim on a ground that later proved to be untenable."¹⁰⁰

Florida's Rules of Procedure when read in conjunction with provisions of Florida's Insurance Code would appear to prohibit amendment to "add" defenses not raised in the claim denial letter on par with the "Mend the Hold" doctrine. Given that an insurer has substantial pre-suit investigation rights and that the insured is required to cooperate in that investigation, requiring the insurer to explore all possible defenses, or risk waiving any defenses not raised prior to a claim being denied, does not appear incompatible with existing rules of procedure in Florida.

Other Florida rules of procedure recognize the unfairness to one party when another party actually raises a defense but fails to fully flesh out a position. These rules are clearly consistent with the conceptual underpinnings of the "Mend the Hold" doctrine. For example, Florida Rule of Civil Procedure 1.120(b) requires matters of fraud to be plead with specificity.

The rationale underlying the heightened pleading requirements for fraud is meant to enable the party charged to respond specifically to spurious charges of fraudulent behavior by alerting them to the precise

99. *Harbor Ins. Co.*, 922 F.2d at 363.

100. *Id.*

conduct with which it is charged.¹⁰¹ In a life insurance context, Florida courts have held that a fraud claim not specifically pleaded is properly dismissed.¹⁰²

Florida Rule of Civil Procedure 1.120(c) requires that a denial of performance or occurrence of a conditions precedent be pled specifically. If the denial of performance of a condition precedent is not made with the requisite specificity, then the issue is waived.¹⁰³ Condition precedents not preserved by an insurer in a pleading with the required particularity are considered waived and are insufficient to create an issue for trial.¹⁰⁴ Improper pleadings are appropriately disregarded and a judgment on the pleadings is appropriate in favor of the affirmative pleader.¹⁰⁵ An amendment is not a result contemplated by this language. For that reason, it can be surmised that Florida's various rules of procedure follow the "Mend the Hold" doctrine because a pleading must be absolute to proceed in litigation.

The rules of pleading procedure for both fraud and condition precedents are yet two additional examples of legal recognition of the fact that, under certain circumstances, allowing a party to amend its pleadings is inconsistent with basic notions of fairness. In that regard, the procedural rule's compatibility with the rationale behind the "Mend the Hold" doctrine is quite apparent.

III. CONCLUSION

Whether the practice is labeled waiver, estoppel, or "mend the hold," Florida courts recognize that there are situations where permitting an insurer to change its position after an insured files a lawsuit would lead to injustice. The Courts of Florida have addressed this perceived unfairness by loosely applying equitable doctrines to prohibit an insurer from raising matters not raised in the initial claim denial letter. These equitable applications would be more clearly defined as the "Mend the Hold" doctrine, which would serve to avoid judicial confu-

101. *Brooks v. Blue Cross & Blue Shield of Fla.*, 116 F.3d 1364, 1370 (11th Cir. 1997).

102. *Robertson v. PHF Life Ins. Co.*, 702 So.2d 555, 556 (Fla. 1st Dist. Ct. App. 1997).

103. *Hodusa Corp. v. Abra Constr. Corp.*, 546 So. 2d 1099, 1101 (Fla. 2d Dist. Ct. App. 1989); *W.J. Kiely & Co. v. Bituminous Cas. Corp.*, 145 So. 2d 762 (Fla. 3d Dist. Ct. App. 1962); *Davie Westview Developers, Inc. v. Boblin*, 533 So. 2d 879, 880 (Fla. 4th Dist. Ct. App. 1988); *San Marco Contracting Co. v. Dep't of Transp.*, 386 So. 2d 615, 617 (Fla. 1st Dist. Ct. App. 1980); *Scarborough Assoc. v. Fin. Fed. Sav. & Loan*, 647 So. 2d 1001, 1004 (Fla. 3d Dist. Ct. App. 1994); *Paulk v. Peyton*, 648 So. 2d 772, 773 (Fla. 1st Dist. Ct. App. 1994).

104. *Cooke v. Ins. Co. of N. Am.*, 652 So. 2d 1154, 1156 (Fla. 2d Dist. Ct. App. 1995).

105. *Paulk*, 648 So. 2d 772.

sion between the distinct doctrines of waiver, estoppel, and "mend the hold."

Part of the judicial reluctance to label the doctrine as "Mend the Hold" may stem from a perceived conflict between the doctrine and procedural rules allowing for liberal amendment of pleadings. Upon closer scrutiny, Florida procedure, Florida's Insurance Code, accepted insurance policy provisions, and the "Mend the Hold" doctrine all seemingly come together to promote the same ends. A reasonable investigation aided by the insured's full cooperation, followed by a prompt claims decision, is a result clearly contemplated by Florida's Insurance Code and accepted policy provisions. Florida Procedure and the "Mend the Hold" doctrine both limit the right to amend pleadings in many respects and provides for a waiver of matters not timely or properly raised.

In the final analysis, a cogent, consistent judicial theory precluding insurers from raising known or discoverable defenses not initially raised in the letter of claim denial properly strikes the fairness balance between all parties in coverage litigation. Formal adoption of the "Mend the Hold" doctrine would promote fairness and judicial economy and is more desirable than the present *ad hoc* approach applied by Florida courts.

Fairness would dictate that insurers must be advised to fully avail themselves of their pre-suit rights and their corresponding statutory duty to investigate the basis for claim denial. Further, fairness would dictate that the insured contemplating litigation against its insurer should be able to determine whether the basis for claim denial is legitimate or not before incurring the substantial emotional and monetary costs associated with prolonged coverage dispute. In the event of coverage litigation, judicial economy is enhanced by narrowing the litigation issues and by transferring much of the discovery process to the pre-suit claims process, where the insured is required to cooperate and the insurer is required to reasonably investigate.

By whatever name and in whatever form, whether substantive estoppel, procedural specificity, bad faith or automobile no-fault law, Florida jurisprudence has got a good grip on the idea that an insurer owes its insured a full inquiry prior to denying a claim. Now, all that needs to be done is to stop wrestling with the doctrine's designation. Following Vermont's lead and renaming the doctrine the "insurance defense waiver rule"¹⁰⁶ would help clarify some of the mystification

106. See Sitkoff, *supra* note 5 (noting that Vermont, which has advanced the "Mend the Hold" doctrine, has renamed the doctrine as the "Insurance Defense Waiver Rule").

surrounding the “Mend the Hold” doctrine. As legally curious¹⁰⁷ or as “quirky”¹⁰⁸ as the phrase, “mend the hold,” may sound, the doctrine is a reality for insureds and insurers, alike. Florida courts would be well served to properly recognize and apply the doctrine with judicial authority.¹⁰⁹

107. *Harbor Ins. Co.*, 922 F.2d at 363.

108. *Id.*

109. *Id.*
