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Waiver and Estoppel in Louisiana Insurance Law

The doctrines of waiver and estoppel have been extensively applied in the field of insurance law. These principles have been used to circumvent the harsh effects of a strict enforcement of conditions in insurance policies, particularly the doctrine of warranty.¹ Another use of waiver and estoppel has been to soften the impact upon insurance contracts of rules applicable to contracts in general.² One writer has observed that the great increase in the use of waiver and estoppel in the field of insurance cases during the present century may be due to the fact that insurance has changed from a custom-made service bought only by sophisticated businessmen to a brand name commodity demanded by untrained consumers.³ This Comment is limited to an examination of the principles of waiver and estoppel and application of these doctrines in insurance law, particularly in Louisiana.

Waiver

Waiver may generally be defined as the intentional relinquishment of a known power or privilege.⁴ The doctrine of waiver is conventional in nature and arises by agreement. Therefore, some type of intention to waive, either express or implied, is necessary.⁵ In the law of insurance, waiver most frequently involves the relinquishment by an insurer of a power of avoiding liability under an insurance policy. Only powers or privileges

of requiring that all incorrect statements be material in order to avoid the contract, whether warranties or representations, and regardless of the absence or presence of an intent to deceive. Such legislation would do away entirely with the concept of warranty in insurance contracts, which might be objectionable as a restriction of the parties' freedom to contract. However, in view of the fact that all but fraudulent warranties have been effectively abrogated by the present statute, perhaps the slight additional infringement on the freedom to contract would be justified in order to attain a simpler and more manageable rule.

1. VANCE, *INSURANCE* 470-71, § 81 (3d ed. 1951). For a discussion of the doctrine of warranty with emphasis upon its status in Louisiana, see Comment, 22 *LOUISIANA LAW REVIEW* 190 (1961).

2. VANCE, *INSURANCE* 470-71, § 81 (3d ed. 1951).

3. Morris, *Waiver and Estoppel in Insurance Policy Litigation*, 105 U. P. A. L. REV. 925 (1957). Professor Morris also contends that waiver and estoppel have been used by the courts as a guise to accomplish this change in insurance clientele.

4. *Ratcliffe v. Acacia Mut. Life Ins. Co.*, 187 So. 329, 331 (La. App. Orl. Cir. 1939). See 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* 594, § 9081 (1944); VANCE, *INSURANCE* § 81 (3d ed. 1951); Comment, 6 *BAYLOR L. REV.* 337 (1954); 29A AM. JUR. *Insurance* § 1009 (1960).

5. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9081 (1944); VANCE, *INSURANCE* §§ 81, 88 (3d ed. 1951); 29A AM. JUR. *Insurance* § 1010 (1960).

relating to conditions of a contract can be waived;⁶ thus waiver cannot be used to extend insurance coverage to a risk not properly within the limits of a policy as written.⁷

Generally, neither consideration nor promissory estoppel is necessary to support a waiver,⁸ although many times either or both are present in waiver situations in the form of additional premiums, or substantial change of position, or forbearance by the insured in reliance upon the insurer's conduct.⁹ No Louisiana insurance case has been found dealing with this problem; therefore, Louisiana is presumably in accord with the general rule that consideration is not a necessary element of an effective waiver.¹⁰

6. The terms "power of avoidance" and "privilege of forfeiture" are used synonymously throughout this discussion.

7. *C. E. Carnes & Co. v. Employers' Liab. Assur. Corp.*, 101 F.2d 739 (5th Cir. 1939) (The court held that knowledge of a local agent that the insured was using his vehicle in a manner not covered by the policy did not extend coverage to what was not originally covered. The court stated: "It is well settled that conditions going to the coverage or scope of a policy of insurance, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action. The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel. . . . This is a case where the coverage is sought to be extended. The doctrine of waiver cannot be invoked to create a primary liability, and bring within the coverage of the policy risks not included or contemplated by its terms." *Id.* at 742. From the language of the court it cannot be determined whether it was dealing with a question of waiver or a question of estoppel, or whether the terms were considered to be interchangeable. Apparently the court considered the rule to be the same for waiver as well as estoppel.); *H. D. Foote Lumber Co. v. Svea Fire & Ins. Co.*, 179 La. 779, 155 So. 22 (1934) (In this case the fire insurance policy specifically excluded from coverage lumber stored within 100 feet of a building. The court held that knowledge of a local agent after inception of the policy that lumber was being stored within 100 feet of a building did not preclude the insurer from urging lack of coverage as a defense.); *Jacobs v. Metropolitan Life Ins. Co.*, 39 So.2d 346 (La. App. Orl. Cir. 1949). *Accord*, *Fireman's Fund Ins. Co. v. Compania de Navegacion, Interior*, 19 F.2d 493 (5th Cir. 1927); *New Orleans, T. & M. Ry. v. Union Marine Ins. Co.*, 286 Fed. 32 (5th Cir. 1923); *Steers v. Home Ins. Co.*, 38 La. Ann. 952 (1886); 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9090 (1944). *See* VANCE, *INSURANCE* 498-500, § 84 (3rd ed. 1951).

8. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* 621-22, § 9087 (1944) ("The majority of jurisdictions support the doctrine that no consideration is essential to support a waiver by an insurer; in fact, it has been a common holding that neither consideration nor any element of estoppel need be present in order for a waiver to exist."); VANCE, *INSURANCE* § 84 (3d ed. 1951).

9. VANCE, *INSURANCE* § 84 (3d ed. 1951).

10. Presumably the doctrine of consideration is recognized in Louisiana insurance cases, because it has been held that the Civil Code does not regulate insurance contracts in absence of specific legislation. *Barry v. Louisiana Ins. Co.*, 12 Mart.(O.S.) 493 (La. 1822). *See* Nabors, *Civil Law Influences Upon the Law of Insurance in Louisiana*, 6 TUL. L. REV. 515 (1932); SAUNDERS, *REVISED CIVIL CODE OF LOUISIANA* xviii (1909); Comment, 4 TUL. L. REV. 267 (1930). *But see* *Brown v. Duplantier*, 1 Mart.(N.S.) 312 (La. 1823). It should be noted that under a strict civilian theory as set forth by the Louisiana Civil Code, consideration is not required to create a binding obligation. *See*

Waiver may be express.¹¹ For example, suppose that an insured breaches or fails to comply with a policy condition which creates in the insurer a power of avoidance or privilege of forfeiture. After learning of this power or privilege, the insurer, through an agent with proper authority, manifests to the insured, in a manner provided by the policy, that it waives the power or privilege. The insurer cannot thereafter assert that power or privilege because it is considered as having been waived.

Most waivers considered in the course of insurance litigation, however, are not express and must be implied from the insurer's conduct or inaction. Circumstances from which a waiver may be inferred must be such as to indicate that a relinquishment was intended by the insurer.¹² Also the inference of waiver from certain conduct or inaction must be reasonable.¹³

It is well established in Louisiana and elsewhere that acceptance of premium payments by an insurer after receiving knowledge of facts creating a power of avoidance or privilege of forfeiture constitutes a waiver of such powers or privileges.¹⁴ Acceptance of premiums manifests an intention to keep a policy of insurance in force for the additional period covered by the premium payments.

Habitual acceptance of premium payments in arrears establishes a custom between the parties from which the insured may reasonably infer a relinquishment by the insurer of the power to avoid the policy for failure to pay premiums punctually or for failure to insist upon formal reinstatement procedures established by the policy.¹⁵ Waiver may also occur where nonpayment

LA. CIVIL CODE arts. 1779, 1893-1900 (1870). See, generally, Smith, *A Refresher Course in Cause*, 12 LOUISIANA LAW REVIEW 2 (1951).

11. VANCE, INSURANCE 480-83, § 82 (3d ed. 1951); 29A AM. JUR. *Insurance* § 1015 (1960).

12. 16 APPLEMAN, INSURANCE LAW AND PRACTICE 594, § 9081 (1944); VANCE, INSURANCE § 83 (3d ed. 1951); 29A AM. JUR. *Insurance* § 1009 (1960).

13. *Ashley v. Southern Life & Health Ins. Co.*, 6 So.2d 781 (La. App. 2d Cir. 1942); *Goodwin v. Federal Mut. Life Ins. Co.*, 180 So. 662 (La. App. 2d Cir. 1938).

14. *McConnell v. Southern States Life Ins. Co.*, 31 F.2d 715 (5th Cir. 1929); *Dutton v. Harmonia Ins. Co.*, 191 La. 72, 184 So. 546 (1938); *Story v. The Hope Ins. Co.*, 37 La. Ann. 254 (1885); *Wills v. Liberty Indus. Life Ins. Co.*, 159 So. 141 (La. App. 2d Cir. 1935); *Cobbs v. Unity Indus. Life Ins. Co.*, 158 So. 263 (La. App. Orl. Cir. 1935); *Clay v. Liberty Indus. Life Ins. Co.*, 157 So. 838 (La. App. 1934). See, generally, 16 APPLEMAN, INSURANCE LAW AND PRACTICE § 9271 (1944); VANCE, INSURANCE 487, 489-91, § 83 (3d ed. 1951); 29A AM. JUR. *Insurance* § 1083 (1960).

15. *Morris v. Sovereign Camp, W.O.W.*, 203 La. 507, 14 So.2d 428 (1943); *Muse v. Strudwick Fair Service Ins. Co.*, 42 So.2d 925 (La. App. Orl. Cir.

is due to failure of the insurer to adhere to its established custom of sending collectors to receive premium payments, even though the policy states that such a practice is merely a courtesy, and that the insured is primarily responsible for transmitting payments to the insurer.¹⁶ Similarly waiver of the power to cancel a policy for failure to pay premiums in a timely manner can be found where an insurer accepts past due premiums and fails to notify the insured of its intention to cancel within a reasonable time.¹⁷

Louisiana and other jurisdictions hold that an insurer must exercise a power of avoidance within a reasonable time or be considered as having waived the power.¹⁸ Since the period of silence or inaction must be unreasonable, there is no waiver by inaction where the insurance agent begins procedures for a formal written waiver as required by the policy soon after being notified of facts creating a power of avoidance in the insurer.¹⁹

1949); *Soleyman v. Woodmen of the World*, 3 So.2d 466 (La. App. 2d Cir. 1941); *Mobley v. Universal Life Ins. Co.*, 167 So. 217 (La. App. Orl. Cir. 1936), *aff'd on rehearing*, 172 So. 55 (La. App. Orl. Cir. 1937); *Riley v. Life & Cas. Ins. Co.*, 145 So. 33 (La. App. Orl. Cir. 1932); *Bush v. Liberty Indus. Life Ins. Co.*, 130 So. 839 (La. App. Orl. Cir. 1930); *Graff v. Sovereign Camp, Security Degree, W.O.W.*, 1 La. App. 119 (Orl. Cir. 1925); 29A AM. JUR. *Insurance* § 1081 (1960); 45 C.J.S. *Insurance* § 717(a) (1946).

An insurer's insistence upon compliance with formal reinstatement procedures after delinquent payments may negate any intention to waive punctual payment requirements. *Holloman v. Jefferson Standard Life Ins. Co.*, 188 So. 500 (La. App. 2d Cir. 1939); *Ratlcliffe v. Acacia Mut. Life Ins. Co.*, 187 So. 329 (La. App. Orl. Cir. 1939); *Crease v. Liberty Indus. Life Ins. Co.*, 151 So. 89 (La. App. 2d Cir. 1933). There is no basis for waiver where conduct of the insurer is not inconsistent with policy provisions. Therefore, punctual payment requirements were not considered waived by a custom of accepting tardy payments under a policy which provided that acceptance of late payments constituted automatic reinstatement. *Richardson v. American Nat'l Ins. Co.*, 137 So. 370 (La. App. Orl. Cir. 1931).

16. *Hebert v. Woodruff's Ins. Co.*, 19 So.2d 290 (La. App. 1st Cir. 1944); *Lewis v. Louisiana Indus. Life Ins. Co.*, 4 So.2d 755 (La. App. 2d Cir. 1941).

17. *Trager v. Louisiana Equitable Life Ins. Co.*, 31 La. Ann. 235 (1879); *Ellzey v. Hardware Mut. Ins. Co.*, 40 So.2d 24 (La. App. 1st Cir. 1949); *Smith v. Washington Nat'l Ins. Co.*, 178 So. 691 (La. App. 2d Cir. 1937); *Anderson v. Life & Cas. Co.*, 158 So. 270 (La. App. Orl. Cir. 1935); *Jones v. First Nat'l Life, Health & Acc. Ins. Co.*, 8 La. App. 691 (1st Cir. 1928).

But acceptance of premiums not known at the time to be overdue does not constitute a waiver. *Ratlcliffe v. Acacia Mut. Life Ins. Co.*, 187 So. 329 (La. App. Orl. Cir. 1939).

18. *Trager v. Louisiana Equitable Life Ins. Co.*, 31 La. Ann. 235 (1879); *Boyd v. American Fire & Cas. Co.*, 50 So.2d 688 (La. App. 2d Cir. 1951); *Ellzey v. Hardware Mut. Ins. Co.*, 40 So.2d 24 (La. App. 1st Cir. 1949); *Monroe Air Park No. 1, Inc. v. American Aviation & Gen. Ins. Co.*, 41 So.2d 795 (La. App. 2d Cir. 1949); *Smith v. Washington Nat'l Ins. Co.*, 178 So. 691 (La. App. 2d Cir. 1937); *Anderson v. Life & Cas. Co.*, 158 So. 270 (La. App. Orl. Cir. 1935); *Jones v. First Nat'l Life, Health & Acc. Ins. Co.*, 8 La. App. 691 (1st Cir. 1928). See VANCE, *INSURANCE* § 83 (3d ed. 1951); 29A AM. JUR. *Insurance* § 1076 (1960).

19. *People's Bank of Donaldsonville v. National Fire Ins. Co.*, 130 La. 951, 58 So. 826 (1912) (Upon being notified that ownership of building insured

A power or privilege must be known in order to be waived. Therefore, an insurer unaware of facts creating a power of avoidance or privilege of forfeiture, or without reasonable basis to know of such facts, cannot be said to waive such a power by continuing the policy in force.²⁰ Moreover, knowledge acquired by the insurer must be sufficient to indicate that it has a power of avoidance.²¹ Notice of facts which would cause a reasonable man to inquire further imposes a duty of investigation upon the insurer, and failure to investigate has been held to constitute a waiver of all powers or privileges which a reasonable search would have uncovered.²²

Conduct after loss inconsistent with an intention to exercise a power of avoidance constitutes a waiver of the insurer's defense under the policy.²³ Thus an offer to pay has been considered a waiver of powers and privileges known to exist at the time;²⁴ special circumstances in negotiating an adjustment of a loss may be grounds for waiver;²⁵ raising and repairing a vessel with knowledge of a power to avoid has been held a waiver;²⁶

against fire had been changed in violation of the policy, the agent stated that he would execute the required endorsement the next morning. Ironically the building was damaged by fire during the night. The court properly held that no valid waiver had been completed at the time of the loss.); *Community Stores of Louisiana, Inc. v. Associated Indem. Corp.*, 144 So. 909 (La. App. 1st Cir. 1932) (The agent of a theft insurer commenced procedure for formal waiver consistent with the terms of the policy provision soon after being notified of a relocation of one of the insured's stores. Before the steps had been completed, a burglary loss occurred. The court held that the insurer had not waived the power to avoid liability based upon relocation because both parties knew that waiver would not be effective until the formal endorsement steps had been completed.).

20. *Whiteman v. Rhode Island Ins. Co.*, 78 F. Supp. 624 (E.D. La. 1948); *Camors v. Union Marine Ins. Co.*, 104 La. 349, 28 So. 926 (1900); *Allison v. Aetna Life Ins. Co.*, 158 So. 389 (La. App. 2d Cir. 1935). See 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9086 (1944); 29A AM. JUR. *Insurance* § 1017 (1960).

21. *Moore v. Louisiana Fire Ins. Co.*, 177 La. 645, 148 So. 904 (1933). See 29A AM. JUR. *Insurance* § 1017 (1960).

22. *Franz v. United Casualty Co.*, 49 F. Supp. 267 (E.D. La. 1943); *Peterson v. Pacific Fire Ins. Co.*, 148 So. 283 (La. App. Orl. Cir. 1933) (dictum). See 29A AM. JUR. *Insurance* §§ 1025-1027 (1960).

23. *Kahmann & McMurry v. Aetna Ins. Co.*, 242 Fed. 20 (5th Cir. 1917); *Kettingham v. New England Fire Ins. Co.*, 76 F. Supp. 996 (W.D. La. 1948); *Dutton v. Harmonia Ins. Co.*, 191 La. 72, 184 So. 546 (1938); *Roach v. Harmonia Fire Ins. Co.*, 176 La. 356, 145 So. 769 (1933); *Vitrano v. Western Ins. Co.*, 10 Orl. App. 126 (La. App. 1913); *Finkelstein Bros. v. Virginia State Ins. Co.*, 4 Orl. App. 154 (La. App. 1907). Cf. *Fontenot v. State Farm Mut. Ins. Co.*, 119 So.2d 588 (La. App. 1st Cir. 1960). See 29A AM. JUR. *Insurance* §§ 1099-1106 (1960).

24. *Vitrano v. Western Ins. Co.*, 10 Orl. App. 126 (La. App. 1913) (the insurer made an offer after loss with knowledge of a power of avoidance and was precluded from asserting the power of avoidance).

25. *Dutton v. Harmonia Ins. Co.*, 191 La. 72, 184 So. 546 (1938); *Finkelstein v. Virginia State Ins. Co.*, 4 Orl. App. 154 (La. App. 1907).

26. *Kahmann & McMurry v. Aetna Ins. Co.*, 242 Fed. 20 (5th Cir. 1917).

and retention of a chattel for an unreasonable time for repair has been held to constitute a waiver of a known power of avoidance.²⁷ Insurers may preserve their rights to urge defenses pending investigation of losses by securing non-waiver agreements provided an unreasonable period of inaction does not occur after making such an agreement.²⁸ Section 651 of the Louisiana Insurance Code²⁹ protects insurers and facilitates the gathering of facts concerning claims by specifying that certain actions after loss such as acknowledging notice of claim, furnishing forms for reporting losses, and investigating and negotiating possibilities of settlement shall not be construed as waiver of defenses by an insurer.

Since waivers are conventional in nature, they bind the insurer only if made by an agent with actual or apparent authority.³⁰ Therefore, as a general rule valid waivers must conform to policy provisions regulating the authority of agents to waive conditions.³¹ However, acts done by agents without authority may be ratified and limitations upon the authority of agents may be waived or effectively enlarged by subsequent conduct or inaction of the insurer which would estop the insurer from denying that the agent lacked authority.³² Also it seems that actual or apparent authority of an agent would not be an issue where inaction or conduct of the insurer, and not merely action or inaction of the agent, constituted the waiver, such as

27. *Roach v. Harmonia Fire Ins. Co.*, 176 La. 356, 145 So. 769 (1933). *Accord*, *Kettingham v. New England Fire Ins. Co.*, 76 F. Supp. 996 (W.D. La. 1948) (insurer held to have waived a policy requirement that suit be filed within twelve months after loss where the adjustor lulled the insured into inaction).

28. *Sheeren v. Gulf Ins. Co.*, 174 So. 380 (La. App. Orl. Cir. 1937).

29. LA. R.S. 22:651 (1950), as amended and re-enacted, La. Acts 1958, No. 125.

30. *Mongeau v. Liverpool & London & Globe Ins. Co.*, 128 La. 654, 55 So. 6 (1911); *Richard v. Springfield Fire and Marine Ins. Co.*, 114 La. 794, 38 So. 563 (1905) (an agent with authority to write and issue policies was held to have at least apparent authority to waive policy provisions); *Murphy v. Royal Ins. Co.*, 52 La. Ann. 775, 27 So. 143 (1899) (dictum); *Gipson v. First Nat. Life Ins. Co.*, 25 So.2d 844 (La. App. 2d Cir. 1946) (dictum); *Diboll v. Aetna Life Ins. Co.*, 32 La. Ann. 179 (1880). See 16 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 9121, 9122 (1944); VANCE, INSURANCE § 90 (3d ed. 1951).

31. *Ponder v. Jefferson Standard Life Ins. Co.*, 6 F.2d 300 (W.D. La. 1925); *Antoine v. Eagle & British Dominions Ins. Co.*, 147 La. 554, 85 So. 238 (1920) (dictum); *Dominick v. Detroit Fire & Marine Ins. Co.*, 147 La. 549, 85 So. 236 (1920) (dictum). Cf. *St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co.*, 114 La. 146, 38 So. 87 (1905).

32. 16 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 9121-9122 (1944). But an insured must be reasonable in interpreting an agent's authority. *Diboll v. Aetna Life Ins. Co.*, 32 La. Ann. 179 (1880). (an agent was held without apparent authority to issue an antedated receipt in order to avoid lapse of a policy for failure to pay premiums timely).

inaction for an unreasonable period of time after knowledge of a power of avoidance or retention of premiums with knowledge of a power of avoidance. An agent's knowledge obtained within the scope of his employment is imputed to the insurer even though the agent may not have authority to waive policy conditions.³³

The parol evidence rule excludes proof of waivers executed prior to or contemporaneously with a written contract which would contradict or vary the terms of the written contract of insurance.³⁴ But waivers subsequent to the issuance of an insurance policy may be proved by parol evidence because parties may alter or even abandon an existing, written contract by parol agreement.³⁵ Also it should be noted that the parol evidence rule applies only to *terms* of a contract as distinguished from provisions which regulate the inception of a policy as a binding contract.³⁶ Thus, waivers of provisions regulating the inception of a policy are provable by parol evidence.

Estoppel

The type of estoppel discussed in this Comment, as distinguished from promissory estoppel, was conceived as an equitable device to prevent one from asserting rights, privileges, or powers under conditions which would make it inequitable for him to do so.³⁷ More specifically, equitable estoppel in insurance law may be urged by a party to an insurance contract when he has reasonably relied to his detriment upon an inaccurate or misleading representation of fact made by the other party.³⁸ The

33. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9101 (1944); VANCE, *INSURANCE* 541, 546, § 90 (3d ed. 1951).

34. *Bell v. The Western Marine and Fire Ins. Co.*, 5 Rob. 423 (La. 1843); *Bell v. Firemen's Ins. Co.*, 5 Rob. 446 (La. 1843). *Accord*, *New York Life Ins. Co. v. Stewart*, 69 F.2d 957 (5th Cir. 1934). *See* VANCE, *INSURANCE* § 90 (3d ed. 1951). *See, generally*, McCORMICK, *EVIDENCE* §§ 210-222 (1954). Language of the Louisiana parol evidence statutes indicates that they do not apply to insurance contracts. LA. CIVIL CODE arts. 2275-2283 (1870); LA. R.S. 15:437 (1950). Therefore, presumably the common law parol evidence rule applies in light of the rule that insurance cases are governed by the general commercial law in absence of specific Louisiana legislation. *Barry v. Louisiana Ins. Co.*, 12 Mart. (O.S.) 493 (La. 1822). *See* Nabors, *Civil Law Influences Upon the Law of Insurance in Louisiana*, 6 TUL. L. REV. 515 (1932); SAUNDERS, *REVISED CIVIL CODE OF LOUISIANA* xviii (1909); Comment, 4 TUL. L. REV. 267 (1930).

35. VANCE, *INSURANCE* § 90 (3d ed. 1951); 29A AM. JUR. *Insurance* § 1918 (1960).

36. VANCE, *INSURANCE* § 90 (3d ed. 1951).

37. *Id.* § 86.

38. *Goodwin v. Federal Mut. Ins. Co.*, 180 So. 662, 666 (La. App. 2d Cir. 1938). *Accord*, *McDaniel v. Equitable Life Assur. Soc'y*, 166 So. 889 (La. App. 2d Cir. 1936). *See* 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* §§ 9031, 9088

representation may be express or implied by conduct or inaction.³⁹ No consent by either party is necessary,⁴⁰ and generally the authority of an agent whose conduct gives rise to estoppel is immaterial as long as he is acting within the course or scope of his employment.⁴¹ Detrimental reliance can be based upon the assumption that the insured would have procured other coverage had he known that the insurer could avoid liability.⁴²

In Louisiana as in other jurisdictions, an insurer who issues a policy with actual or imputed knowledge of a power of avoidance, or under such circumstances that it should have known or discovered the power, will be held estopped to assert the power of avoidance where the insured reasonably relies upon such conduct to his detriment.⁴³ Issuing a policy with knowledge

(1944); VANCE, *INSURANCE* §§ 81, 88 (3d ed. 1951); Morris, *Waiver and Estoppel in Insurance Policy Litigation*, 105 U. PA. L. REV. 925 (1957); Comment, 6 BAYLOR L. REV. 337 (1954).

39. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9088 (1944); VANCE, *INSURANCE* § 89 (3d ed. 1951).

40. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9081 (1944); VANCE, *INSURANCE* § 88 (3d ed. 1951).

41. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* §§ 9101, 9121 (1944); VANCE, *INSURANCE* § 90 (3d ed. 1951). *Contra* dictum in *Dominick v. Detroit Fire & Marine Ins. Co.*, 147 La. 549, 85 So. 236, 238 (1920): "Our brethren of the Court of Appeal drew a distinction between an express waiver and such conduct on the part of the local agent as would lull the insured into a false confidence, and thus furnish ground for estoppel. Our brethren overlooked the fact that what the agent could not do by an express consent he could not do by any conduct such as would furnish ground for an estoppel, and thereby accomplish the same result."

42. VANCE, *INSURANCE* § 88 (3d ed. 1951).

43. *Stovall v. Empire State Ins. Co.*, 215 La. 100, 39 So.2d 837 (1949); *Quinones v. Life & Cas. Ins. Co.*, 209 La. 76, 24 So.2d 270 (1945); *Hardy v. Commercial Standard Ins. Co.*, 172 La. 500, 134 So. 407 (1931); *Gitz Sash Factory, Inc. v. Union Ins. Soc'y*, 160 La. 381, 107 So. 232 (1926); *Corporation of Roman Catholic Church v. Royal Ins. Co.*, 158 La. 601, 104 So. 383 (1925); *Mongeau v. Liverpool & London & Globe Ins. Co.*, 128 La. 654, 55 So. 6 (1911); *Union Nat'l Bank v. Manhattan Life Ins. Co.*, 52 La. Ann. 36, 26 So. 800 (1898); *Michael v. Mut. Ins. Co.*, 10 La. Ann. 737 (1855); *Maggio v. State Farm Mut. Auto. Ins. Co.*, 102 So.2d 505 (La. App. 1st Cir. 1958); *appeal after trial on merits*, 123 So.2d 901 (La. App. 1st Cir. 1960); *Pacific Fin. Co. v. Granite State Fire Ins. Co.*, 45 So.2d 378 (La. App. 2d Cir. 1950); *Gipson v. First Nat'l Life Ins. Co.*, 25 So.2d 844 (La. App. 2d Cir. 1946); *Jacobs v. Southern Nat'l Life Ins. Co.*, 21 So.2d 173 (La. App. Or. Cir. 1945); *Lapeyrouse v. Orleans Indus. Life, Health, Acc. & Burial Benefit Ins. Co.*, 4 So.2d 569 (La. App. Or. Cir. 1941); *Bordelon v. National Life & Acc. Ins. Co.*, 187 So. 112 (La. App. Or. Cir. 1939); *Demary v. Royal Indem. Co.*, 182 So. 389 (La. App. 1st Cir. 1938); *Succession of Dekan v. Life Ins. Co.*, 172 So. 37 (La. App. Or. Cir. 1937); *Winders v. Co-op. Burial Ass'n*, 157 So. 320 (La. App. 2d Cir. 1934); *Breland v. Great States Ins. Co.*, 150 So. 313 (La. App. 1st Cir. 1933); *Pizillio v. City of New York Ins. Co.*, 150 So. 106 (La. App. 1st Cir. 1933); *James v. Community Burial Service Corp.*, 5 La. App. 633 (Or. Cir. 1927); *Tarver v. People's Fire Ins. Co.*, 6 Or. App. 59 (La. App. 1908). *Dicta contra*, *Martin v. First Nat'l Fire Ins. Co.*, 143 La. 631, 79 So. 171 (1918). See 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* §§ 9088, 9251 (1944); VANCE, *INSURANCE* §§ 88-89 (3d ed. 1951).

of certain facts giving rise to a power of avoidance is considered an implied representation that the policy is not void or voidable because of those facts.⁴⁴ Generally, an insurer must investigate for possible powers of avoidance where it has actual or imputed notice of circumstances which would lead one reasonably to investigate further.⁴⁵

In other jurisdictions it has been held that equitable estoppel can arise during the existence of an insurance contract, although no Louisiana cases have been found considering this question. Generally, this occurs where an agent represents a fact, expressly or impliedly, such as an interpretation of a policy condition, or that certain action has been taken in accordance with terms of the policy.⁴⁶

Errors made by agents in filling out applications for insurance will preclude the insurer from urging any defense based upon the inaccurate information in the application.⁴⁷ It would be inequitable to hold the insured responsible for the conduct of an agent of the insurer in such cases. It has been stated that these situations constitute an exception to the rule that a party is presumed to have read what he is signing.⁴⁸

Estoppel is an equitable remedy and is not available to one who does not have clean hands.⁴⁹ Therefore, if collusion exists between an agent and an insured in attempting to defraud an insurer,⁵⁰ or in absence of collusion if the insured is in bad faith, the insured cannot urge estoppel.⁵¹

A special provision of the Louisiana Insurance Code⁵² pro-

44. 16 APPLEMAN, INSURANCE LAW AND PRACTICE § 9088 (1944); VANCE, INSURANCE § 88 (3d ed. 1951).

45. 16 APPLEMAN, INSURANCE LAW AND PRACTICE 626, § 9088 (1944); 29A AM. JUR. *Insurance* § 1026 (1960).

46. 16 APPLEMAN, INSURANCE LAW AND PRACTICE § 9168 (1944); VANCE, INSURANCE § 88 (3d ed. 1951).

47. Telford v. New York Life Ins. Co., 227 La. 855, 80 So.2d 711 (1955); Miller v. Preferred Life Ins. Co., 107 So.2d 323 (La. App. 2d Cir. 1958). See VANCE, INSURANCE § 89 (3d ed. 1951); 29A AM. JUR. *Insurance* §§ 1057-1071 (1960).

48. National Life & Acc. Ins. Co. v. Vaughn, 32 So.2d 490 (La. App. 1st Cir. 1947) (dictum); Note, 27 COLUM. L. REV. 330 (1927).

49. VANCE, INSURANCE § 89 (3d ed. 1951); 29A AM. JUR. *Insurance* §§ 1068-1071 (1960).

50. Shuff v. Life & Cas. Ins. Co., 164 La. 741, 114 So. 637 (1927); Strudwick Funeral Home v. National Life & Acc. Ins. Co., 176 So. 891 (La. App. Or. Cir. 1937) (dictum); Pons v. Tharp-Sontheimer Indus. Life & Burial Ins. Co., 173 So. 205 (La. App. Or. Cir. 1937); Lucas v. American Bankers' Ins. Co., 141 So. 394 (La. App. 2d Cir. 1932).

51. Harris v. Guaranty Income Life Ins. Co., 226 La. 152, 75 So.2d 227 (1954).

52. LA. R.S. 22:692 (1950): "No policy of *fire insurance* issued by any in-

vides that a *fire insurer* cannot urge violation of any representation, warranty, or condition to avoid liability under the policy if any officer or agent of the insurer had knowledge of pertinent facts constituting a violation, unless the officers or agents acted fraudulently. The operation of this statutory provision is similar to equitable estoppel. It should be noted here, however, that reliance by the insured to his detriment is not required in order for this statutory provision to be available.

Reasons for the Confusion of Waiver and Estoppel

Much confusion surrounds the principles of waiver and estoppel in insurance law.⁵³ Many courts have used the two terms interchangeably,⁵⁴ while others have considered waiver and estoppel as being complementary, that is, that waiver must be supported by estoppel, or estoppel is the result of waiver.⁵⁵ However, many decisions and several writers in the field have recognized that waiver and estoppel are distinct and independent concepts.⁵⁶ There are several possible sources of this confusion.

suror on property in this state shall hereafter be declared void by the insurer for the breach of any *representation, warranty or condition* contained in the said policy or in the application therefor. Such breach shall not avail the insurer to avoid liability unless such breach (1) shall exist at the time of the loss, and be either such a breach as would increase either the moral or physical hazard under the policy, or (2) shall be such a breach as would be a violation of a warranty or condition requiring the insurer to take and keep inventories and books showing a record of his business. *Notwithstanding the above provisions of this Section, such a breach shall not afford a defense to a suit on the policy if the fact or facts constituting such a breach existing [existed] at the time of the issuance of the policy and were, at such time, known to the insurer or to any of his or its officers or agents, or if the fact or facts constituting such a breach existed at the time of the loss and were, at such time, known to the insurer or to any of his or its officers or agents, except in case of fraud on the part of such officer or agent or the insured, or collusion between such officer or agent and the insured.* Amended and re-enacted Acts 1958, No. 125." (Emphasis added.)

53. See 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* 597, § 9081 (1944); VANCE, *INSURANCE* 471, § 81 (3d ed. 1951) ("There can be no doubt that sad confusion has resulted from the use of these adapted tools."); 29A AM. JUR. *Insurance* § 1010 (1960).

54. *E.g.*, Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U.S. 308 (1902); Globe Mut. Life Ins. Co. v. Wolff, 95 U.S. 326 (1877); Commercial Standard Ins. Co. v. Robertson, 159 F.2d 405 (6th Cir. 1947); C. E. Carnes & Co. v. Employers' Liab. Assur. Corp., 101 F.2d 739 (5th Cir. 1939); Morris v. Sovereign Camp, 203 La. 507, 14 So.2d 428 (1943); Gitz Sash Factory, Inc. v. Union Ins. Soc'y, 160 La. 381, 107 So. 232 (1926); Martin v. First Nat'l Fire Ins. Co., 143 La. 631, 79 So. 171 (1918); Gipson v. First Nat'l Life Ins. Co., 25 So.2d 844 (La. App. 2d Cir. 1946); Hebert v. Woodruff's Ins. Co., 19 So.2d 290 (La. App. 1st Cir. 1944); Phenix Ins. Co. v. Grove, 215 Ill. 299, 74 N.E. 141 (1905); Wisdom v. Farm Prop. Mut. Ins. Ass'n, 199 Iowa 408, 202 N.W. 5 (1925); McCracken v. Car & Gen. Ins. Corp., 94 N.H. 474, 55 A.2d 894 (1947).

55. *E.g.*, Coursey v. International Harvester Co., 109 F.2d 774 (10th Cir. 1940); Corporation of Roman Catholic Church v. Royal Ins. Co., 158 La. 801, 104 So. 383 (1925); Muse v. Strudwick Fair Service Ins. Co., 42 So.2d 925 (La. App. OrL. Cir. 1949).

56. *E.g.*, Union Mut. Life Ins. Co. v. Wilkinson, 80 U.S. (13 Wall.) 222

Both waiver and estoppel operate to allow recovery on insurance policies;⁵⁷ thus the need for differentiation in a given case is diminished. Another factor lending to the confusion is that waiver is generally accompanied by promissory estoppel which is easily confused with equitable estoppel, although the two are separate and distinct doctrines and serve different purposes.⁵⁸

Also tending to cause confusion is the difficulty of making the distinction in many cases where implied waiver or estoppel is involved.⁵⁹ For example, when an insurer has knowledge of a power of avoidance and subsequently issues a policy,⁶⁰ or accepts premium payments, or fails to exercise the power of avoidance within a reasonable time, an intention to waive policy conditions or an estoppel by a representation that the policy is effective in spite of the facts creating the power of avoidance may be inferred. Whether such conduct is properly a waiver or an estoppel must be determined by considering other circumstances indicating the intentions manifested by the parties. An intention to waive must be manifest in order for waiver to be properly inferred, whereas no such intention is necessary for estoppel.

Although either waiver or estoppel has the same effect, that is, allowing recovery on a policy of insurance, the distinction

(1871); *Williams v. Unity Indus. Life Ins. Co.*, 181 So. 210 (La. App. Or. Cir. 1938); *Seavey v. Erickson*, 244 Minn. 232, 69 N.W.2d 889, 52 A.L.R.2d 1144 (1955); *A. Perley Fitch Co. v. Continental Ins. Co.*, 99 N.H. 1, 104 A.2d 511, 49 A.L.R.2d 156 (1954); *Baird v. Fidelity-Phenix Ins. Co.*, 178 Tenn. 653, 162 S.W.2d 384 (1942); *Mears v. Farmers Co-op. Fire Ins. Co.*, 112 Vt. 519, 23 A.2d 699 (1942). See 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9081 (1944); VANCE, *INSURANCE* § 81 (3d ed. 1951); Comment, 6 BAYLOR L. REV. 337 (1954); 29A AM. JUR. *Insurance* §§ 1008-1010 (1960).

57. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9081 (1944); VANCE, *INSURANCE* § 81 (3d ed. 1951).

58. VANCE, *INSURANCE* 472, § 81 (3d ed. 1951). Promissory estoppel is used to make promises enforceable in absence of consideration in the form of a bargained-for equivalent where one has relied to his detriment upon a promise by another. It differs from equitable estoppel in that the latter involves detrimental reliance upon a misleading representation of fact by another. See 1 CORBIN, *CONTRACTS* §§ 114, 194-195 (1950).

59. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9081 (1944).

60. Note that waiver in such a situation could not be proved by parol evidence because that rule excludes proof of parol agreements prior to or contemporaneously with the inception of a written contract which attempts to vary or modify provisions of the written agreement. See discussion page 208 *supra*. The general parol evidence rule is apparently applicable to Louisiana insurance cases in view of the rule that the general commercial law, not the Civil Code, governs Louisiana insurance cases in absence of specific legislation on the subject. *Barry v. Louisiana Ins. Co.*, 12 Mart. (O.S.) 493 (La. 1882). See Nabors, *Civil Law Influences Upon the Law of Insurance in Louisiana*, 6 TUL. L. REV. 515 (1932); SAUNDERS, *REVISED CIVIL CODE OF LOUISIANA* xviii (1909); Comment, 4 TUL. L. REV. 267 (1930). *But see* *Brown v. Duplantier*, 1 Mart. (N.S.) 312 (1823).

between the two should be maintained and preserved.⁶¹ Where parol evidence or authority of an agent is involved, correct disposition of a case may very well depend upon properly distinguishing between waiver and estoppel.⁶² Parol evidence is irrelevant for estoppel, and an agent need only be acting within the scope of his employment, whereas waiver requires a consideration of both elements in most cases.⁶³

Conclusion

Waiver is conventional in nature, whereas estoppel is merely an equitable device. Waiver generally requires an intention and consent. Proof of a waiver is subject to the parol evidence rule, and as a general rule it must be shown that the agent had actual or apparent authority to waive policy conditions. Estoppel does not require consent or intention since it is based on detrimental reliance. It is generally held that the parol evidence rule is not properly applicable to exclude proof of estoppel,⁶⁴ although no Louisiana appellate court decision has been found involving this question. An agent need not have actual or apparent authority to waive policy provisions, but need only be acting within the scope of his employment in order to give rise to estoppel. Consideration is not required either for waiver or estoppel. An insured who is in bad faith, who is unreasonable in interpreting an insurer's conduct or inaction as a waiver, or who is unreasonable in relying upon an insurer's conduct or inaction can assert

61. 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9081 (1944); VANCE, *INSURANCE* § 81 (3d ed. 1951).

62. *E.g.*, *New York Life Ins. Co. v. Stewart*, 69 F.2d 957 (5th Cir. 1934) seems clearly in error on this point where it was held that parol evidence was inadmissible to show that an agent of the insurer filled out the application for life insurance. To the same effect see *Lumber Underwriters v. Rife*, 237 U.S. 605 (1915); *Batchelder v. Queen Ins. Co.*, 135 Mass. 449 (1883). It is submitted that such decisions resulted from failure to properly distinguish between waiver and estoppel.

63. It should be pointed out that no Louisiana insurance case decided by an appellate court has been found discussing consideration in relation to waiver and estoppel.

64. *E.g.*, *Union Mut. Life Ins. Co. v. Wilkinson*, 80 U.S. (13 Wall.) 222 (1871); *Iverson v. Metropolitan Life Ins. Co.*, 151 Cal. 746, 91 Pac. 609 (1907); *New York Life Ins. Co. v. Patten*, 151 Ga. 185, 106 S.E. 183 (1921); *Forwood v. Prudential Ins. Co.*, 117 Md. 254, 83 Atl. 169 (1912); *Tuttle v. Pacific Mut. Life Ins. Co.*, 58 Mont. 121, 190 Pac. 993, 16 A.L.R. 601 (1920); *Wolf v. Prudential Ins. Co.*, 62 R.I. 270, 4 A.2d 897 (1939); *Salvate v. Firemen's Ins. Co.*, 42 R.I. 433, 108 Atl. 579 (1920). See VANCE, *INSURANCE* § 87 (3d ed. 1951). *Contra*, *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U.S. 308 (1902); *New York Life Ins. Co. v. Fletcher*, 117 U.S. 519 (1886); *Harris v. North Am. Ins. Co.*, 190 Mass. 361, 77 N.E. 493 (1906); *Thomas v. Commercial Union Assur. Co.*, 162 Mass. 29, 37 N.E. 672 (1894); *Gillan v. Equitable Life Assur. Soc'y*, 143 Neb. 647, 10 N.W.2d 693 (1943), *vacating a former opinion*, 142 Neb. 497, 6 N.W.2d 782 (1942).

neither waiver nor estoppel. Likewise, neither waiver nor estoppel is available to an insured in bad faith.

Robert A. Hawthorne, Jr.

Distribution of a Limited Insurance Fund to Multiple Claimants

The problem of how to distribute a fund, insufficient to satisfy all claims, is encountered in various areas of the law, such as in bankruptcy and in the administration of insolvent successions. In these instances, the courts with the aid of legislation have developed rather well-settled methods of distribution. However, procedures for distributing limited insurance funds among multiple claimants are not so clearcut, and except in rare instances where there is legislation on the matter¹ the insurer distributes the fund subject to certain obligations to the insured. The purpose of this Comment is to examine the problems involved where there are multiple claims to limited insurance funds, to review current methods of distribution, and to discuss suggested alternative procedures. This discussion contemplates an insurance fund to be distributed according to the terms of the Standard Automobile Liability Policy,² although much of the discussion is pertinent to other types of casualty insurance policies.

The Settlement Process

Single claims to the insurance fund. Most of the leading cases which consider the legal relations between insurer, insured,

1. A New York statute makes provision for allocating proceeds of insurance policies held by certain carriers of passengers for hire. N.Y. VEHICLE AND TRAFFIC LAW § 17(1). This provision states that the policy must require payment of specified limits "to be apportioned ratably among the judgment creditors according to the amount of their respective judgments." It has been held that the proper form of remedy under this statute, when several persons have been killed or injured as the result of a single accident and the wrongdoer is insolvent, is an inequitable proceeding by a judgment creditor suing in his own behalf and in behalf of others similarly situated to administer the proceeds of the policy as a fund created by statute for ratable protection. *Bleimeyer v. Public Serv. Mut. Cas. Ins. Corp.*, 250 N.Y. 264, 165 N.E. 286 (1929).

2. STANDARD AUTOMOBILE LIABILITY POLICY, NATIONAL BUREAU OF CASUALTY UNDERWRITERS AND MUTUAL INSURANCE RATING BUREAU, BASIC AUTOMOBILE AND PHYSICAL DAMAGE FORM (1955). See Faude, *The 1955 Revisions of the Standard Automobile Policy: Coverage: Insuring Agreements and Exclusions*, in *Section of Insurance Law, 1955 AMERICAN BAR ASSOCIATION PROCEEDINGS* 48 (1956).