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**THE USE OF WAIVER AND ESTOPPEL AGAINST
FIDELITY BOND SURETIES**

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This paper will address the use of waiver and estoppel against fidelity bond sureties and insurers and the effect of these doctrines on sureties' ability to raise defenses under fidelity bonds and policies in coverage disputes, claims, and litigation. The focus of the paper will be action or inaction on the surety's part in the underwriting and/or claims process which have been or may be held to amount to waiver or estoppel and which therefore may prevent or hinder the surety from raising defenses to which it would otherwise be entitled.¹

I. Waiver And Estoppel Defined

Waiver is the intentional or voluntary relinquishment of a known right, claim, or privilege.² **Estoppel** or **equitable estoppel**, on the other hand is a principle that provides that a party is barred from denying or alleging a certain fact or state of facts or from taking a position because of that party's previous conduct, allegation, or denial.³ The effect of an estoppel is that a party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and acted accordingly.⁴

II. Waiver And Estoppel Applied To Sureties

No longer "favorites of the law", commercial surety companies are now treated by most courts and legislative bodies as conventional insurance companies. Thus, for example, surety companies are usually on a par with conventional insurance companies when it comes to state regulation of their claims and underwriting practices and state "vexatious refusal to pay" statutes, all of which have developed as a result of perceived and real abuses on the part of insurance companies. The net effect of these (predominantly) state⁵ statutes and administrative regulations is that sureties, which are viewed merely as specialty line insurers, are treated not as "favorites of the law", but rather as "deep pocket" predators that need to be kept in line by the full force of the law. The common law made by courts across the country has by and large mirrored this hostile view of insurance companies and sureties.⁶ This legal hostility is, at the very least, a challenge to the ability of sureties to raise and exercise their traditional rights and defenses. One example of this, and the subject of this paper, is the use

¹ In this paper, we will, for convention's sake, utilize "surety" to refer to a fidelity bond surety or fidelity insurer. We will utilize "insured" to refer to the party on whose behalf a fidelity bond or fidelity insurance policy has been issued.

² 28 Am.Jur.2d, "Estoppel and Waiver", Section 154. Black's Law Dictionary (6th Ed.) defines waiver as follows:

"The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure or forbearance to do which is inconsistent with the right, or his intention to rely upon it..."

³ Black's Law Dictionary (6th Ed.).

⁴ Equitable estoppel has also been defined as: (1) conduct amounting to a false representation of material facts with the intention or expectation that it be acted upon by the other party; (2) with the intention or expectation that such conduct be acted upon by the other party; (3) to a person with lack of knowledge or the means of knowledge of the truth; (4) who relies, in good faith thereon; and (5) takes action or fails to take action based thereon to his injury or detriment. "How To Prevent Loss of Fidelity Insurers' Rights By Waiver and Estoppel", Skillern, Frank I., 10 The Forum 301 (1974), citing 28 Am.Jur.2d 640-41, "Estoppel and Waiver", Section 35.

⁵ Regulation of the business of insurance is, because of the McCarran-Ferguson Act, 15 U.S.C. 1012 (1958), primarily a responsibility of the states.

⁶ 50 Am. Jur., Suretyship, Section 347.

of the law of waiver⁷ and estoppel to thwart the ability of fidelity bond sureties to utilize provisions in fidelity bonds and policies which exclude, limit, or condition coverage⁸ as defenses in coverage disputes and claims.⁹

A. Introduction

The burden of proof as to claims of either waiver or estoppel in a fidelity case is on the party claiming waiver or estoppel.¹⁰ Furthermore, in order for a claim of estoppel to prevail, there is the additional requirement that the party pleading it must have been misled to his injury: if there is no damage or disadvantage to the insured, a claim of estoppel will not trump an otherwise valid policy defense.¹¹

B. Actions Of Sureties In The Fidelity Claims Process Which Result In Waiver And Estoppel

The most common fidelity bond provisions deemed to be subject to waiver and estoppel are those provisions dealing with the time for which notice of a fidelity loss must be given and the time for filing a proof of loss. Although such provisions are generally held to be valid and binding,¹² courts have liberally applied the principles of waiver and estoppel to prevent sureties from raising non-compliance with such provisions to defeat the claims of their insureds.¹³ The rationale for this is that these provisions require action **subsequent** to the loss and rarely increase the surety's risk.¹⁴

Courts have also applied waiver and estoppel to prevent sureties from raising a number of other provisions in fidelity bonds and policies which exclude, limit, or condition coverage as defenses in coverage disputes and claims. The following actions on the part of surety, treated

⁷ In Baird v. Northwestern Trust Co., 217 N.W. 538 (N.D. 1928), the court held that:

"The test of a waiver is whether the words, acts and conduct of the insurer, or all of these taken together, are inconsistent with an intention to insist on a compliance with the terms of some particular provision or provisions of the insurance contract."

⁸ Couch On Insurance 2d, Section 49B:1, provides:

"Provisions in contracts of insurance requiring notice and proofs of loss, injury, death, claim against the insured, etc., may, like all other provisions or conditions which are inserted by insurers for their benefit or protection, be waived by them, or by their authorized agents, and since waiver of notice and proofs matures the insured's rights of action on the policy, it thereby effects the same result as though the condition requiring notice and proofs were struck out of the policy, even though it is a prescribed standard policy or a statute expressly provides for written notice and proofs."

⁹ Even before considering any waiver or estoppel, the ability of sureties to utilize these "policy defenses" is hampered by the construction of any ambiguities in such policy provisions against the surety. M.S. Walker, Inc. v. Travelers Indemnity Company, 470 F.2d 951 (1973); Western National Bank of Kasper v. Hawkeye-Security Insurance Co., 380 F. Supp 508 (1974); Feutz v. Massachusetts Bonding & Ins. Co., 85 F.Supp 418 (1949); Massachusetts Bonding & Insurance Co. v. Feutz, 182 F. 2d 752 (1950); First National Bank of Fort Walton Beach v. United States Fidelity and Guaranty Company, 416 F.2d 52 (1969); Century Bank v. St. Paul Fire & Marine Ins. Co., 482 P.2d 193 (Cal. 1971); Cary v. National Surety Co., 252 N.W. 123 (Minn. 1933). Also, see "The Doctrine of Contra Proferentem in Fidelity Coverage Cases", 10 The Forum 75 (1974).

¹⁰ Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993); Reynolds v. Detroit Fidelity & Surety Co., supra.

¹¹ Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993); Bankers' Trust Co. v. American Surety Co., 191 P. 845 (Wash. 1920).

¹² 29 Am.Jur., Insurance, Section 1100.

¹³ See, Annot: "Effect of failure to give notice, or delay in giving notice or filing of proofs of loss, upon fidelity bond or insurance", 23 ALR2d 1065; Imperial Insurance, Inc. v. Employers' Liability Assurance Corp., 442 F.2d 1197 (D.C. Cir. 1970).

¹⁴ Standard Accident Insurance Co. v. Ponsell's Drug Stores, Inc., 202 A.2d 271 (Del. 1964).

in separately numbered sections of this paper follow, have been held to constitute a waiver and/or estoppel of a policy defense:

- Acceptance of late notice or proof of loss;
- Continuing investigation of a claim notwithstanding late notice or late proof of claim;
- Other actions or representations by the surety or its agents which lead the insured to believe that the claim will be paid or that a defense is waived;
- Making a settlement offer;
- Denial of coverage on another basis without asserting such defense as an additional basis for denial
- Failure to timely raise such affirmative defenses in litigation
- Representations or actions of the surety or its agents as to the existence or extent of coverage which are contrary to the terms of coverage itself.

Except for the last category, all of these actions involve actions of the surety or its agents in the *claims* process, including litigation of such claims, which result in waiver and estoppel. The last category involves representations or actions of the surety or its agents in the *underwriting* process which result in waiver and estoppel.

1. Waiver Or Estoppel By Acceptance Of Late Notice Or Late Proof Of Loss

One of the most common ways that a fidelity bond surety has been held to waive, or to be estopped to assert, a bond defense is by accepting a claim or proof of loss notwithstanding the fact that notice of the claim or filing of the proof of loss is not timely, i.e. is made later than is provided for in the bond. In such cases, acceptance of the late notice or proof of loss is generally held to be a waiver of (or to act as an estoppel against the surety from raising) the bond requirements regarding the time for giving notice under the bond and for filing a proof of loss.¹⁵

2. Waiver Or Estoppel By Continuing Investigation Of A Claim Notwithstanding A Late Notice Or Proof Of Loss

¹⁵ Royal Loan Corp. v. American Surety Co. of New York, 173 N.E.2d 17 (Ill.App. 1961) (**waiver of notice and proof of loss requirements** by accepting proof of loss and agreeing to pay after expiration of time limit); New Amsterdam Cas. Co. v. W.D. Felder & Co., Inc., 214 F.2d 825 (5th Cir. 1954) (**waiver of insufficiency of proof of loss** by accepting proof of loss without objection, fully investigating insured's claim, and denying liability on merits thereof, not on grounds of insufficiency of proofs of loss); National Surety Co. v. Fletcher Sav. & Trust Co., 169 N.E. 524 (Ind. 1930) (**waiver of late proof of loss** by inviting insured to file proof of loss out of time); People's Loan & Savings Co. v. Fidelity & Casualty Co., 147 S.E. 171 (Ga. App. 1929); Docking v. National Surety Co., 252 P. 201 (Ks. 1927) (**waiver of late proof of loss** by accepting late proof of loss without objection and by failing to raise in answer when issue was raised for first time at trial); Goldman v. Fidelity & Deposit Co. of Maryland, 104 N.W. 80 (Wis. 1905) (**waiver of late notice** where surety failed to object and where surety called on insured to make an effort to effect settlement with employee and then required him to submit itemized proof of loss and subsequently called on employer to take steps for criminal prosecution of employee); Crystal Ice Co. v. United Surety Co., 123 N.W. 619 (Mich. 1909) (**waiver of various breaches of bond** by surety's action in furnishing blanks for proof of loss and accepting such proofs without objection). However, see Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993) (no waiver despite failure to send to insured a reservation of rights or to comment upon insured's failure to file proof of loss where no reason existed for insurer to reiterate its allegiance to bond's prescriptive period, since it had done nothing to indicate willingness to deviate from it); Redington v. Hartford Accident and Indemnity Co., 463 F.Supp. 83 (S.D.N.Y. 1978) (no waiver of 2 year contractual limitations period by not promptly asserting it upon notification of claim more than 2 years after receipt of notice of loss where there was no evidence that surety intended to waive limitations period but gave numerous reminders when put on notice of claim that neither acceptance of notice of claim, proof of loss nor investigation of claim undertaken by it was to be construed as admission of liability or waiver of any rights or defenses).

A surety's continuing investigation of claim notwithstanding late notice of the claim or the late filing of a proof of loss has also been held to be grounds for holding such bond provisions to be waived or for estopping a surety from raising such provisions as a defense to coverage.¹⁶ In determining whether or not a surety's investigation of claims gives rise to a waiver or estoppel, courts typically examine the length and nature of the surety's investigation. The more in depth the investigation conducted by the surety, the more likely it will be deemed to have waived a late notice or proof of loss. This is particularly true if the investigation prejudices the insured, either by (1) causing it to incur time, trouble and expense in assisting the surety in its investigation¹⁷; or (2) misleading or lulling the insured into a false sense of security by intimating that the claim will or may be paid or by taking actions which led the insured to reasonably believe that the claim would be paid.¹⁸

Nevertheless, there are a number of cases which have denied an insured's claim of waiver or estoppel, when all the surety did was to conduct a preliminary or cursory investigation of the claim by discussing the claim with the insured or by requesting more information about a claim.¹⁹ Moreover, unless the insured has suffered some prejudice as a result of the surety's investigation, courts will generally not hold there to be a waiver or estoppel merely because the surety conducted an investigation of the claim.

3. Waiver And Estoppel By Making A Settlement Offer

¹⁶ William H. Sill Mortgages, Inc. v. Ohio Casualty Ins. Co., 412 F.2d 341 (6th Cir. 1969) (**waiver of requirement that action be instituted within 12 months of discovery of loss** where insurer continued investigation for more than one year after insured informed it of suspected defalcation and did not advise insured of conclusion that loss was not covered); New Amsterdam Cas. Co. v. W.D. Felder & Co., Inc., 214 F.2d 825 (5th Cir. 1954) (**waiver of defense of insufficiency of proof of loss** by accepting proof of loss without objection, fully investigating insured's claim, and denying liability on merits thereof, not on grounds of insufficiency of proofs of loss); People's Bank of Queen City v. Aetna Casualty & Surety Co., 40 S.W.2d 535 (Mo. App. 1931) (**waiver of late notice provision** when, after notice was given, surety made full investigation and was given access to all records of insured without objecting to sufficiency of notice until after investigation and denial of claim); Fitchburg Sav. Bank v. Massachusetts Bonding & Ins. Co., 174 N.E. 325 (Mass. 1931) (underwriter's asking for further information and not complaining regarding defect estopped insurer from claiming defective notice of loss) Exchange Bank of Novinger v. Turner, 14 S.W.2d 425 (Mo. 1929) (**waiver/estoppel of late notice/proof of loss provision** due to invitation of discussion and disclosure of substantive merits of claim and acknowledgment of some liability without intimating that it was standing on time limit fixed in bond for making of proof of loss; these action held to imply that surety was extending the time period for providing notice); Roark v. City Trust, Safe Deposit & Surety Co., 110 S.W.1 (Mo. App. 1908) (**waiver** of sufficiency of notice provision when surety requested additional information from claimant over the course of several months after loss occurred but had not made any complaints regarding notice).

¹⁷ American Surety Co. of New York v. Blount County Bank, 30 F.2d 882 (5th Cir. 1929) (**waiver of late notice** by requiring or inducing insured to incur trouble or expense of proving employee embezzlement).

¹⁸ Reynolds v. Detroit Fidelity & Surety Co., 19 F.2d 110 (6th Cir. 1927) (**waiver of limitations period** if the surety's conduct has been such as to mislead the insured, or to throw him off his guard and lull him into a false security, or if it has held out to the insured reasonable hopes of adjustment, or leaves the question of adjustment an open one, or induces delay in bringing suit to enable it to investigate the claim, provided that such action is the cause of delay in commencing suit); American Surety Co. of New York v. People's Bank, 189 S.E. 414 (Ga. App. 1936) (surety which had notice of claim and which led insured to believe that claim would be paid without suit not entitled to raise limitations period in bond).

¹⁹ Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993) (no waiver of time limitation period through acknowledgments of receipt of information and investigative inquiries); Baird v. Northwestern Trust Co., supra. (surety did not waive provision of bond restricting liability to losses discovered within six months following expiration of the bond by sending an accountant to review the insured's books nor by the accountant's statements while checking the books as to whether the bank did or did not have a meritorious claim); Sheet Metal & Roofing Contractors' Ass'n v. Liskany, 369 F.Supp. 662 (W.D. Ohio 1974) (acts or conduct of insurer giving rise to waiver or estoppel must have occurred within time limitation for notice of loss, proof of loss, and filing of suits rather than after such limitations have run, and such a waiver or estoppel situation will not be related back where time limitation has lapsed); and Standard Accident Insurance Co. v. Ponsell's Drug Stores, Inc., 202 A.2d 271 (Del. 1964) (surety's request for more information regarding claim was not waiver of proof of loss requirement); Ace Van & Storage Co. v. Liberty Mutual Insurance Co., 336 F.2d 925 (D.C. Cir. 1964) (no waiver of proof of loss where insurer accepted untimely presented proof of loss, continued discussion of matter, and gave memorandum saying it "will continue investigation to as prompt a disposition of this matter as is reasonably possible"); U.S. Shipping Board Merchant Fleet Corp. v. Aetna Casualty & Surety Co., 98 F.2d 238 (D.C. Cir. 1938) (no waiver and estoppel where surety accepted late notice and made its own independent investigation); National City Bank v. National Security Co., 58 F.2d 7 (6th Cir. 1932) (no waiver or estoppel by surety's acknowledgment of receipt of delayed notice of loss and asking to be kept advised of progress of case).

A surety's actions in attempting to negotiate the settlement of a fidelity claim may result in waiver and estoppel of policy defenses, particularly if such negotiations mislead or prejudice an insured.²⁰

4. Waiver And Estoppel By Denial Of Coverage On Other Ground

A surety's denial of a claim on one basis will frequently lead to waiver of and/or estoppel to assert another defense as an additional basis for denial.²¹ As the cases cited herein indicate, a denial of a fidelity claim on substantive grounds or for the reason that a claim is otherwise not covered under the bond frequently results in a waiver of procedural provisions of the bond, such as the provisions requiring timely notice, timely proof of loss, or timely bringing of suit. Such waiver and estoppel will likely result unless such provisions and defenses are specifically set out in a reservation of rights letter or agreement at the earliest opportunity following receipt of notice of the claim and/or proof of loss and again, most certainly, in the denial of the claim.²²

²⁰ Forrester v. Aetna Casualty and Surety Co., 478 F.Supp. 42 (N.D. Ga. 1979) (if negotiations for settlement of claim have led insured to believe that claim would be paid by insurer without suit, such conduct will constitute **waiver of time requirement of policy**); Royal Loan Corp. v. American Surety Co. of New York, 173 N.E.2d 17 (Ill.App. 1961) (**waiver of notice and proof of loss requirements** by accepting proof of loss and agreeing to pay after expiration of time limit); Home Indemnity Co. v. Midwest Auto Auction, Inc., 285 F.2d 708 (10th Cir. 1960) (**estoppel to raise contractual limitation period** as a result of surety's making several settlement offers, one or more of which occurred after expiration of contractual limitation period for bringing suit); Fidelity and Deposit Co. of Maryland v. Bates, 76 F.2d 10 (8th Cir. Iowa 1935) (**waiver of proof of timeliness of proof of loss** when adjuster continued his investigation without objection to the sufficiency or timeliness of notice or proof of loss and stated that any loss shown to be result of dishonest act of cashier would be paid without suit); Knights Of The Ku Klux Klan, Inc. v. Fidelity & Deposit Co. of Md., 169 S.E. 514 (Ga. App. 1933) (**estoppel to raise contractual limitations period** as a result of acts in negotiating for settlement of loss, leading obligee to believe claim would be paid without suit).

²¹ H.S. Equities, Inc. v. Hartford Accident and Indemnity Co., 661 F.2d 264 (2nd Cir. 1981) (denial of claim on ground that loss is not covered operates as **waiver of notice requirements of policy**); Delmar Bank of University City v. Fidelity & Deposit Co. of Md., 428 F.2d 32 (8th Cir. 1970) (**waiver of defense that loss was not result of forgeries** by surety when it denied liability on ground that checks giving rise to loss did not bear forged endorsements within meaning of bond, but failed to assert defense that loss was not result of forgeries); Standard Accident Insurance Co. v. Ponsell's Drug Stores, Inc., 202 A.2d 271 (Del. 1964) (conduct of insurer in informing insured that it was not going to do anything about claim could be construed as denial of liability and accordingly a waiver of requirement of proof of loss); Standard Brass & Manufacturing Co. v. Maryland Casualty Co., 153 So.2d 475 (4th Cir. 1963) (**waiver of untimely proof of loss** where surety declined claim on basis of insufficient proof of dishonesty but agreed to consider further evidence of same since this lulled insured into a false sense of security); Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Md., 202 F.2d 794 (7th Cir. 1953) (**waiver of defense of insufficiency of proof of loss** by denial of liability on grounds that acts of principal's employee were not covered by bond); New Amsterdam Cas. Co. v. W.D. Felder & Co., Inc., 214 F.2d 825 (5th Cir. 1954) (**waiver of defense of insufficiency of proof of loss** by accepting proof of loss without objection, fully investigating insured's claim, and denying liability on merits thereof, not on grounds of insufficiency of proofs of loss); Star Fastener v. American Employers' Ins. Co., 96 N.E.2d 713 (Mass. 1951) (denial of all liability would estop surety from requiring insured to file sworn claim within 90 days after notice of loss if denial is made within such 90 day period; however, if denial occurs after time within which insured could file sworn claim, insurer would not be estopped from raising requirement that insured file sworn claim within 90 days after notice of loss); Fuller v. Home Indemnity Co., 60 N.E.2d 1 (Mass. 1945) (denial of liability or refusal to pay not predicated on failure to furnish proof of loss is a waiver of any objection on that ground); Docking v. National Surety Co., 252 P. 201 (Ks. 1927) (**waiver of notice provision** when surety denies claim on other grounds); Cary v. National Surety Co., 251 N.W. 123 (Minn. 1933) (**waiver of defense of notice provision** by surety when it disclaimed all liability; surety could not later raise defense of noncompliance with the bond's provisions—which noncompliance had never been previously raised by the surety, particularly where the insured acted in good faith and in a reasonable manner and where surety was not prejudiced by the acts or omissions of the insured); Masters v. Massachusetts Bonding and Insurance Co., 84 N.W.2d 462 (Mich. 1957) (**waiver of notice requirements** by denial of claim for reasons of lack of proof of the principal's wrongdoing without asserting lack of proper notice as a grounds for denial); Farmer's Produce Co. v. Aetna Casualty & Surety Co., 213 N.W. 685 (Mich. 1927) (**waiver of notice requirements** by denial of claim for reasons of lack of proof of the principal's wrongdoing without asserting lack of proper notice as a grounds for denial); Piedmont Grocery Co. v. Hawkins, 104 S.E. 736 (W.Va. 1920) (**waiver of insufficient notice** by denial of liability solely on other grounds); Deleware State Bank v. Colton, 170 P. 992 (Ks. 1918) (**waiver of timely notice of loss** by conduct of surety in placing its denial of liability upon other distinct grounds); Equitable Surety Co. v. Bank of Hazen, 181 S.W.279 (Ark. 1915) (**waiver of notice provision** through unconditional denial of all liability); T.M. Sinclair & Co. v. National Surety Co., 107 N.W. 184 (Iowa 1906); T.M. Sinclair & Co. v. National Surety Co., 107 N.W. 184 (Iowa 1906) (**waiver of proof of loss requirement** where surety denies all liability).

²² Nevertheless, there is authority that a denial of a claim will not result in waiver or estoppel of other defenses unless the denial prejudiced the insured or otherwise induced the insured to take action. See People's Bank & Trust Co. of Madison County v. Aetna Casualty & Surety Co., 113 F.3d 629 (6th Cir. 1997) (no waiver or estoppel of defense of absence of manifest intent although insurers denied coverage for loss

5. Miscellaneous Actions And Representations Giving Rise To Waiver And Estoppel

There are various other actions or representations by the surety which may result in a defense being waived or the surety being estopped from raising such defense to a fidelity claim. What these actions or representations have in common is that in each, the surety or its agents takes actions or makes representations which lead the insured into believing that the claim will be paid or that a defense is waived.²³

6. Waiver Of Defenses By Failure To Timely Raise In Litigation

In most jurisdictions, policy defenses are in the nature of “affirmative defenses” to be raised by the surety in a suit on a fidelity bond or policy. The failure to raise such affirmative defenses in a timely and proper way may very well result in it being deemed waived.²⁴

in question on single specific ground in years 1985 and 1986 respectively, and did not raise any other defenses until suit was filed in 1994); New York University v. Continental Insurance Co., 662 N.E.2d 763 (N.Y. 1995) (no waiver of defense based on inventory shortage exclusion despite fact that insurer failed to include this defense in either of the disclaimer letters sent to insured: failure to disclaim based on an exclusion will not give rise to coverage that does not exist; although an insurer may waive right to disclaim based on insured's noncompliance with condition precedent, its right to disclaim coverage based on policy exclusion can be defeated only by estoppel); State Bank of Viroqua v. Capitol Indemnity Corp., 214 N.W.2d 42 Wis. 1974) (where insurer did not deny coverage within time notice of loss was required to be given and did not induce bank to postpone giving notice by promises or action upon which bank relied, but denied liability only after expiration of time within which notice should have been given, insurer was not estopped to raise defense of failure to give timely notice and did not waive such defense because it denied liability); Oakley Grain & Supply Co. v. Indemnity Insurance Co., 173 F.Supp. 419 (S.D. Ill. 1959) (insurer's inaction and general denial of any liability on ground that evidence failed to point to loss resulting from acts enumerated in bond did not give rise to waiver of notice and proof of loss defense where denial of liability occurred after time for furnishing proof of loss had expired); Murray v. American Surety Co. of N.Y., 69 F.2d 147 (5th Cir. 1934) (no waiver or estoppel as to provision requiring notice within ten days of after discovery of loss by surety denying liability for loss on ground that one year time limit for discovery of loss had expired where notice defense was not disclosed until time of suit on bond at which time surety promptly took advantage of it).

²³ Forrester v. Aetna Casualty and Surety Co., 478 F.Supp. 42 (N.D. Ga. 1979) (provision limiting time to sue to 12 months after inception of loss may be **waived** by insurer by conduct which would reasonably lead insured to believe that strict compliance with limitation provision would not be insisted upon); New Amsterdam Casualty Co. v. Basic Building & Loan Ass'n of City of Newark, 60 F.2d 950 (3rd Cir. 1932) (**waiver of proof of loss requirement** where surety knew of loss and cooperated to protect itself against loss); Ceylon Farmers' Elevator Co. v. Fidelity & Deposit Co. of Maryland, 203 N.W. 985 (Minn. 1925) (**waiver of proof of loss requirement** where surety's agent assisted insured in preparation of claim forms and where surety failed to object to presentation of claim during the investigation); Hartford Accident & Indemnity Co. v. Luper, 421 P.2d 811 (Okla. 1966) (**waiver of limitations period for filing proof of loss** by surety whose agent wrote several letters stating that claim would not be paid as long as employee maintained he was innocent of charge of dishonesty); Maryland Casualty Co. v. Tucker, 96 P.2d 80 (Okla. 1939) (**waiver of proof of loss requirement** by surety where extent of loss from embezzlement could not be immediately determined and agent of surety suggested that matter be allowed to lie dormant until loss could be determined, but mailed forms for proof of loss to insured); American Surety Co. of New York v. Peoples Bank, 189 So. 414 (Ga. App. 1936) (surety which led insured to believe that claim would be paid without suit if insured would force estate, from deposit of which cashier as administrator transferred funds to his personal account, to exhaust bond of cashier as administrator before calling on bond of cashier as such, held not entitled to take advantage of provision requiring that action on bond be brought within stated time); Thomas v. Standard Accident Ins. Co. of Detroit, Mich., 7 F.Supp. 205 (D. Mich. 1934) (agreement that suit should be brought immediately to determine liability under bond waived formal proof of loss); Borough of Nanty-Glo v. American Surety Co. of New York, 175 A. 536 (Penn. 1934) (surety **estopped from raising conditions regarding notice of loss, filing of claim, and timely suit** where it was held to have misled insured as to the necessity of performing the condition in the policy where the surety undertook an independent investigation for more than a year, twice requested indulgence from the insured and never requested further notice of loss or any proof of claim); Inter-City Express Lines, Inc. v. Hartford Accident & Indemnity Co., 178 So. 280 (La. App. 1938) (surety **waived provision requiring notice be sent to home office** when insured was led to believe that notice to surety's agent was all that was required, settlement was discussed, and defense of improper notice was not raised until just before trial). However, see Sheet Metal & Roofing Contractors' Ass'n v. Liskany, 369 F.Supp. 662 (W.D. Ohio 1974) (for doctrines of waiver and estoppel to be applied against an insurer, with regard to delay in giving notice of loss and filing suit, insurer must have performed some act which in and of itself prevents insured from seeking a remedy in court; mere conversation, negotiation or discussion is not sufficient unless it deterred insured from his chosen course of action and misled insured to extent that it delayed filing of suit until limitation period had terminated); Public Warehouses of Matanzas v. Fidelity & Deposit Co. of Md., 77 F.2d 831 (2nd Cir. 1935) (that insured asked person without authority to grant extension of time to make proof of loss and were informed of reference of request to home office and of necessity of certain additional proof before claim could be passed on held insufficient to show waiver of provision requiring proof of loss within 30 days of discovery of loss).

²⁴ Masters v. Massachusetts Bonding and Insurance Co., 84 N.W.2d 462 (Mich. 1957); Hanover Insurance Co. v. Cameron Country Mutual Insurance Co., 730 F.Supp. 998 (E.D. Mo. 1990); Galotrade Shipping and Chartering, Inc. v. Travelers Indemnity Co., 706 F.Supp. 214 (S.D.N.Y. 1989); F.D.I.C. v. Central Air Control, Inc., 785 F.Supp. 898 (D. Kan. 1992); Stokors, S.A. v. Roth, 887 F.Supp. 265 (D. Kan. 1995);

C. Actions Of Sureties In The Fidelity Bond Underwriting Process Which Result In Waiver And Estoppel

The above-cited cases generally involve actions by the surety in the *claims* process. In addition, there are a number of cases involving representations or actions of the surety or its agents in the *underwriting* process which may give rise to waiver or estoppel of provisions of the bond. Such representations or actions usually pertain to the existence or extent of coverage of the bond which are contrary to the terms of coverage itself. These actions or representations can be broken down into several categories:

- The surety's knowledge of facts, including the insured's expectations regarding the nature and extent of coverage, at the time of underwriting which are deemed to estop it from raising a particular defense to coverage or are deemed a waiver of such defense²⁵;
- The surety's representations to the insured at the time of underwriting regarding the nature and extent of coverage which are deemed to estop it from raising a particular defense to coverage or are deemed a waiver of such defense²⁶;
- Other actions by the surety at the time of underwriting which are otherwise inconsistent with its raising a particular defense to coverage and are deemed to estop it from raising a particular defense to coverage or are deemed a waiver of such defense²⁷.

Davis v. Bryan, 810 F.2d 42 (2d Cir. 1987) (failure to raise statute of limitations at earliest possible moment results in its waiver).

²⁵ Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., 318 F.Supp. 1301 (D. Fla. 1970), rev'd on other grounds, 463 F.2d 4 (5th Cir. 1972), 523 F.2d 744 (5th Cir. 1975), 465 F.Supp. 478 (D. Fla. 1979) (**waiver of defense based on knowledge and discovery provision of bond** when surety knew at the time of underwriting that only one individual, who was the sole stockholder and alter ego of corporations, could steal anything of consequence and further knew that the only thing he could steal was the very substantial amount of premium deposits entrusted to care of his corporations and belonging to others); Frederick Inv. Co. v. American Surety Co. of New York, 169 A. 155 (Pa. 1933) (**waiver of definition of "employee" provision**—surety's knowledge of the risks which its insured wanted to cover and fact that otherwise independent contractor was listed as a "covered employee" demonstrated that individual was intended to be a covered employee, notwithstanding the fact that individual was not, properly speaking, an "employee" within the definition of the bond); Pennsylvania Car Co. v. Hartford Accident & Indemnity Co., 151 A. 664 (Del. Super. Ct. 1930) (surety **estopped** to deny liability on basis that dishonest individual was not an "employee actually in the service of the employer" where the individual covered by bond was engaging in the fraud of a subsidiary company that was under the supervision and direction of the holding company for whom the individual was employed, particularly when the individual's position was listed in the schedule of positions attached to the bond). However, see Employer's Administrative Services, Inc. v. Hartford Accident & Indemnity Co., 709 P.2d 559 (Ariz. App. 1985) (no estoppel to deny that two sole officers, directors and shareholders of a corporation were covered employees under the bond where (1) a member of an independent insurance agency who procured the bond for the corporation was acting as an insurance broker on behalf of the corporation so that his knowledge could not be imputed to the surety; and (2) the independent agent did not intend that the individuals at issue be automatically covered; and (3) the surety was not aware that the individuals were the sole officers, directors and shareholders of the corporation).

²⁶ United States Fidelity & Guaranty Company v. Craig County Bank of Vinita, Oklahoma, 227 F.2d 799 (10th Cir. 1955) (**waiver and estoppel of termination provision of bond** where surety which had been promptly informed of previous banking irregularities advised insured that bond was in force and in effect and took actions, including extending the bond, which led insured to rely upon such actions and to take no action to obtain another bond); Davis Co. v. Hartford Accident & Indemnity Co., 425 S.W.2d 776 (Tenn. App. 1967) (**waiver of termination provision and estoppel to deny liability on bond** when surety was given notice by notice to surety's agent and neither surety nor agent thereafter notified insured that bond was forfeited or cancelled as to dishonest employee);

²⁷ T.M. Sinclair & Co. v. National Surety Co., 107 N.W. 184 (Iowa 1906) (where surety described individuals in the bond as brokers when securing their fidelity, surety was **estopped** from alleging that they were commissioned merchants: Surety chose its own language in describing them and knew of their actions; it cannot thereafter claim that it did not insure the individuals.); Research Equity Fund, Inc. v. Ins. Co. of North America, 602 F.2d 200 (9th Cir. 1979) (employee of investment adviser which was listed as named insured on declarations page of bond and which employee was listed as an employee of such investment adviser on application for bonds was covered by bond, notwithstanding the fact that he was not technically an "employee" within definition of bond);

The bottom line in regard to the above cases is that a defense to a fidelity claim raised by a surety which is inconsistent with an earlier action on the part of the surety or its agent at the time of underwriting is susceptible to being defeated by waiver or estoppel arguments.

III. Avoiding Waiver And Estoppel

The above cases make clear that the surety needs to act perspicaciously if it wants to preserve those defenses provided to it under its fidelity bond. Care is required in both the underwriting and claims processes lest the surety be deemed to have waived various policy defenses or to be estopped from raising those defenses. Since the results in waiver and estoppel cases are very factually dependent, it is difficult to discern more than a very few universally applicable principles or prescriptions from these cases. Nevertheless, it is clear, based on these cases, that sureties can take some measures to minimize the possibility that the principles of waiver and estoppel will be used against it.

- Sureties should have clear guidelines for their agents regarding the authority of such agents to make representations regarding the extent or nature of fidelity bond coverage.
- Bonds should contain specific provisions specifying and limiting the means by which coverage can be amended or extended. Such provisions should require a written endorsement from the home office and should provide that coverage may not be amended or extended, notwithstanding any representations of the agent to the contrary.
- Communication and coordination between the surety's underwriting department and its agents is important so that bond coverage provisions are not inconsistent with actions of the surety's agent in calculating or accepting premiums, in listing of covered individuals and entities on the bond application and/or declarations page. This is particularly important insofar as the bond limits coverage to certain entities and individuals: Special care should be devoted to ensure that individuals listed for purpose of coverage are not inconsistent with the bond's provisions regarding covered individuals, particularly the definition of "employee" under the bond.
- When first receiving notice of a claim, the surety's representative should acknowledge notice of the claim via a short letter containing a reservation of rights.
- Extensions of time for the investigation and presentation of claims may be appropriate under the circumstances. However, these should be in writing and carefully drafted so as to prevent a waiver of defenses. These also should include a reservation of rights.
- The surety's representatives and agent should make no promises or assurances until the claim has been fully investigated.
- The surety should avoid multiple lines of communication so as to avoid conflicting information being given to the insured.
- Every communication with the insured should be in writing. Oral communications with the insured (i.e. through telephone calls or face-to-face meetings) should be confirmed and memorialized by contemporaneous correspondence.
- The surety should investigate a claim thoroughly before denying it so as to be apprised of all available defenses. Any denial should be in writing and should

include all grounds for denial of the claim. It should also reserve any and all rights and defenses available to the surety under the bond or otherwise.

- The surety should point out to the insured any problem with notice and/or proof of loss promptly following receipt thereof.
- If the fidelity claim is clearly not timely, the surety should attempt to get a non-waiver agreement before making any further investigation of the claim. If this is impracticable, a full reservation of rights should be made.

Obviously, the above actions are only a general set of guidelines for sureties. Some of these guidelines may not be desirable in every case and in every jurisdiction. Indeed, there are many occasions when a surety will want to voluntarily waive certain technical defenses that it may have under its bond. On the other hand, these guidelines are necessarily generic, and may therefore be inadequate for a particular situation or jurisdiction. Accordingly, it is important to be familiar with the law regarding waiver and estoppel in the particular jurisdiction in question.

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Bernard A. Reinert is a principal shareholder, the Chairman and the President of the St. Louis law firm, Reinert & Duree, P.C. The firm is engaged in the general practice of law. Its practice includes insurance coverage litigation, civil litigation arising out of property and casualty claims, subrogation claims litigation, medical malpractice litigation, products and general liability litigation and commercial litigation including particularly but not limited to franchise litigation. The firm specializes in fidelity bond, surety bond and construction contract matters.

Mr. Reinert was admitted to the Bar in Missouri in 1962 and in Illinois in 1963. He went to undergraduate school at St. Mary's Mission Seminary College at Techny, Illinois and at St. Louis University in St. Louis, Missouri and graduated with a Bachelor of Arts degree in 1958. He graduated from St. Louis University School of Law in 1962 with a Bachelor of Laws degree. He was a law clerk to United States District Judge Omer Poos in Springfield, IL in 1962-1963.

Mr. Reinert is a member of the American Bar Association, the Missouri Bar, the Illinois State Bar Association, and the Bar Association of Metropolitan St. Louis. He has been a member of the Torts and Insurance Practice Section and of the Fidelity and Surety Law Committee for approximately thirty years. He has served several terms as and is presently a Committee Vice-Chairman. He has participated in many of the Committee's programs, chaired a program in San Francisco, and presented papers at more than a dozen industry programs. A notable paper which Mr. Reinert has authored is entitled "Duty of the Performing Surety to Bond Principal and Indemnitors: Good Faith". Another paper which he presented to the Committee dealt with the surety's rights in subrogation to bonded contract funds before and after the Federal Tax Lien Act of 1966. Mr. Reinert has participated in other activities of the Committee including the Commercial Blanket Bond National Institute, and the Financial Institution Bond National Institute (London, 1992) and the Commercial Blanket Bond Annotation Project. He has participated in updating the Banker's Blanket Bond Annotation. He has participated in the publication of the Fidelity And Surety News (FSN) under the editorial sponsorship of St. Louis University School of Law. He serves as the FSN Subcommittee's liaison to the FSN Editor, Professor Donald King. Mr. Reinert participated in the "Subrogation Project" culminating in the August, 1990 ABA Annual Meeting Program the Fidelity and Surety Law Committee entitled "The Subrogation Rights of the Contract Bond Surety" presenting a paper entitled "Elements of Proof in the Contract Bond Surety's Subrogation Action to Recover the Bonded Contract Funds". Mr. Reinert and his firm have participated in the Northeast Surety and Fidelity Claim Seminar for the past five years, contributing two papers annually including this year, 1996.

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