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New York's Appellate Division Finds Issue of Fact Regarding Waiver and Estoppel

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Under New York law, it has been long held that as a general proposition, coverage may not be created by waiver or estoppel (*Zappone v. Home Insurance Co.*, 55 N.Y.2d 131 (1982)) and that the burden of proof is on a party claiming waiver and estoppel. *Kapplow v. Abelard Schuman Ltd.*, 193 N.Y.S.2d 931, 933 (N.Y. Sup. Ct. 1959). A recent decision by the New York Appellate Division, Second Department, has called both of these principles into question. In *County of Suffolk v. Ironshore Indemnity*, 2020 WL 6301728 (2d Dep't October 28, 2020), the court found issues of fact regarding waiver and estoppel where two errors and omissions insurers failed to issue coverage determinations for a number of months after receiving notice of the underlying claim.

In *Suffolk*, the County sought coverage for a lawsuit filed against it by EDF Renewable Development, which was the successful bidder for solar power installations on Long Island. The County, however, failed to issue the building permit for EDF to complete its installations and the project was not completed. EDF sued the County and was awarded a verdict in excess of $10 million. The County provided a copy of EDF's complaint to its errors and omissions insurers, Ironshore and Lexington, on June 19, 2013. Ironshore responded on December 10, 2013 (6 months later) and Lexington responded on November 14, 2014 (17 months later), both denying coverage based on the breach of contract exclusions in their respective policies. In the ensuing coverage litigation, the County argued that the insurers' delay in denying coverage constituted a waiver or estoppel of the exclusion.

The Second Department recognized that the breach of contract exclusion would apply to bar coverage for the underlying claim "[i]f Ironshore and Lexington issued timely disclaimers." The court then turned to the timeliness of the disclaimers. Initially, the court rejected the County's argument that statutory estoppel arose under New York Insurance Law 3420(d)(2) , which imposes strict timeliness requirements on insurers disclaiming coverage. This is because said statutory requirements apply only to claims involving bodily injury or death, which was not the nature of the underlying claim against the County. The court reasoned that the correct analysis required consideration of common-law waiver and estoppel principles, i.e., that waiver is established by proof of a voluntarily relinquishment of a known right and estoppel by proof the insured suffered prejudice as a consequence of the insurer's conduct. The court then noted that the insurers did not provide evidence that they neither waived the breach of contract exclusion nor prejudiced the County by their failure to invoke the exclusion in a timely manner. While denying summary judgment to the insurers, the court also denied summary judgment to the County on the basis that the County had not established its entitlement to judgment as a matter of law on waiver or estoppel. Indeed, it appears from the court's opinion that the County did not provide any evidence of waiver or estoppel other than the passage of time.

The case is notable for appearing to require that an insurer make an affirmative showing that it did not waive and is not estopped from denying coverage, rather than keeping that burden on the insured challenging the timeliness of the disclaimer. As such, the case can be read as upending the generally accepted tenet of New York Insurance Law that mere passage of time is insufficient to establish waiver and estoppel of coverage defenses in non-bodily injury cases.

While insurers in New York have emphasized timeliness in the bodily injury context due to Insurance Law 3420(d)(2) and its harsh penalties, the *Suffolk* decision raises a red flag for all disclaimers, including those involving professional liability and property damage. The best practice continues to be a prompt assertion of coverage defenses after tender of a lawsuit of any kind. As illustrated by this case, such timely response is the best defense to a claim of waiver or estoppel.