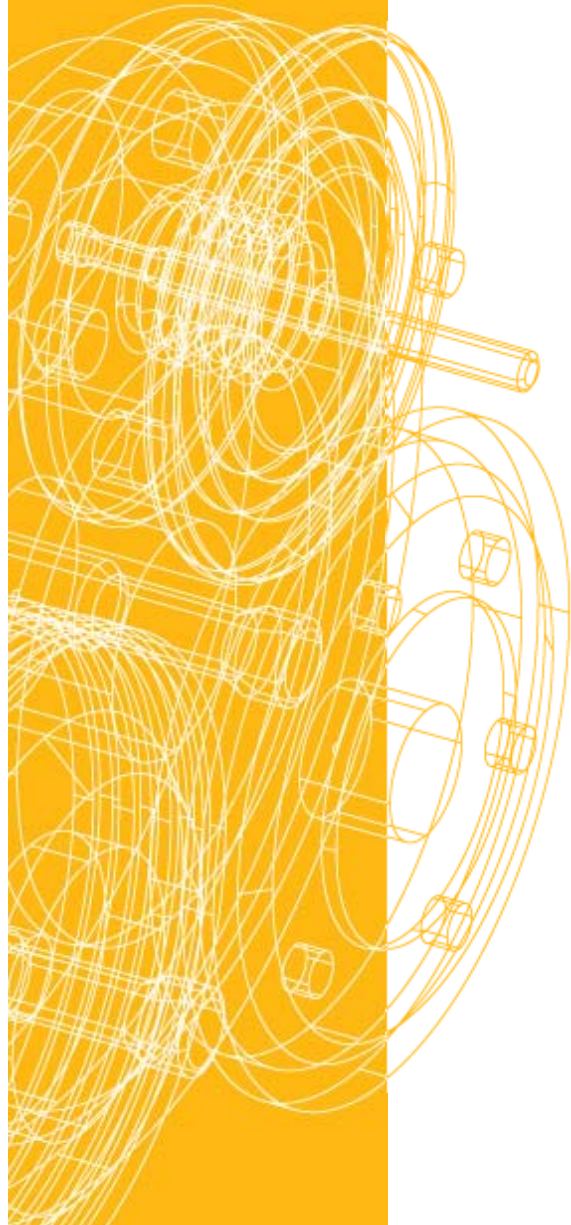


THOMPSON
COE



DOING IT RIGHT THE FIRST TIME: Reserving Rights And Denying Coverage

Brian S. Martin

Why Should You Reserve Your Rights?

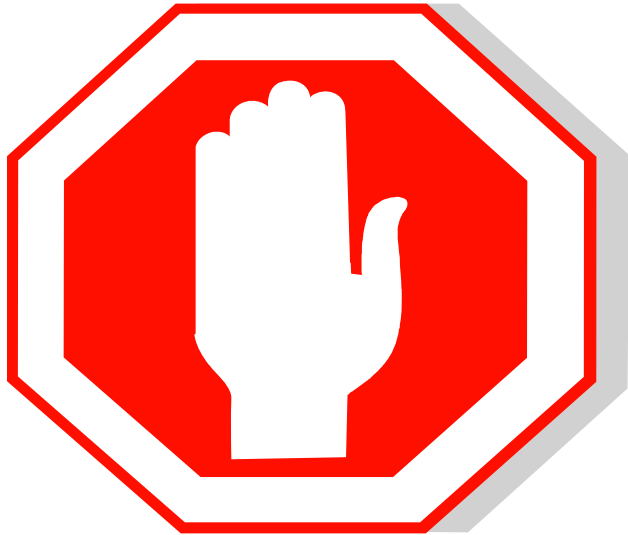
The Doctrines of Waiver and Estoppel

Waiver

- Waiver requires:
 - The insurer knows of the right it is giving up
 - The insurer knowingly and intentionally relinquishes that right
 - The insurer communicates the waiver to the insured



Estoppel



- Three Elements to Estoppel:
 - The person to be estopped engages in conduct which the law recognizes as unacceptable
 - The person to be estopped knew he should have acted otherwise
 - The other party is prejudiced

How Does Estoppel Work in the Insurance Coverage Context?

- **General Rule:** While estoppel may preclude the insurer's policy defense arising out of a condition or forfeiture provision, this doctrine does not normally operate to prevent the assertion of a defense of non-coverage.
 - Estoppel cannot create contract rights that do not otherwise exist.
- **The Wilkinson Exception:** If an insurer assumes the insured's defense without obtaining a reservation of rights and with knowledge of facts indicating non-coverage, all policy defenses are waived or the insurer may be estopped from raising them.

Ulico Casualty Co. v. Allied Pilots Association (Tex. Aug. 29, 2008)

- **Holding:** If an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered, but the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide contractual coverage for risks not insured.

What Exactly Gets Reserved?

- A carrier can reserve just about any right that may ultimately bar the insured's recovery under an insurance policy.
- Generally, there are two types of defenses to recovery under an insurance policy:
 - Procedural Aspects – “Conditions Precedent”
 - Defenses of Non-Coverage
 1. The insurer has neither a right nor a burden to assert non-coverage of a risk or loss until the insured shows that the risk or loss is covered by the terms of the policy.
 2. Once the insured does so, then it becomes incumbent on the insurer (the insurer then has the “right”) to assert any exclusions or limitations as affirmative defenses.



How Does One Go About Reserving Rights?

How To Reserve Rights

- Style
 - Think Trial Exhibit!
- Timing
 - Lamar Homes Timeline



Lamar Homes, Inc. v. Mid-Continent Casualty Co.

- In *Lamar Homes*, the Court found Tex. Ins. Code §542.051 applies to an insurer's duty to defend under a liability policy.
- Time Line
 - Acknowledge claim within 15 days of receipt.
 1. Include request for "all items, statements or materials" that evidence or support the claim.
 - Begin investigation by 15th day after receipt of claim.
 1. Request information from insured.
 2. Obtain policies/underwriting files.

Lamar Homes, Inc. v. Mid-Continent Casualty Co. *(cont.)*

- Time Line (cont.)
 - Within 15 days of receipt of defense bills:
 1. Accept defense, deny defense, or request further information.
 2. If you accept, pay bills within 5 days of accepting them.
 3. If you deny, you must explain why in writing.
 4. If unable to accept or deny within 15 days, you must notify insured of why more time is needed.



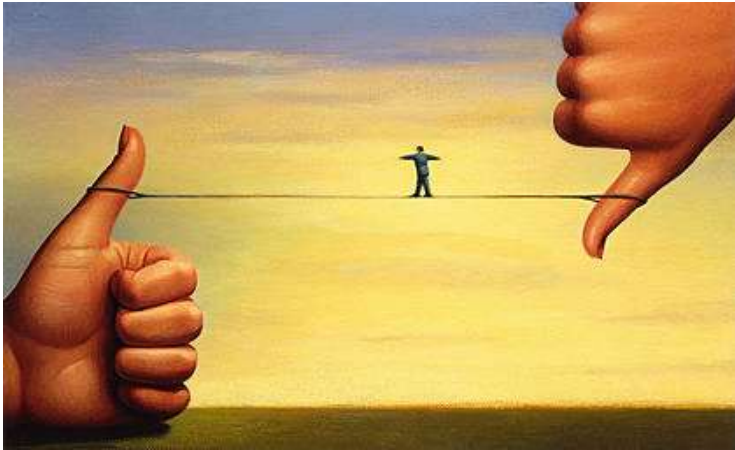
What Might The Insured Have to Say About it?

The Insured's Response

- Silence
 - By allowing the insurer to defend, the insured implies agreement that the insurer will not thereby waive its rights to later contest coverage.
- Questions
 - Carrier should answer the questions promptly, thoroughly, and in an open-ended way. Don't get boxed in.
- Rejection



If The Insured Rejects A Defense Under A Reservation Of Rights, The Carrier May...



- Defend unconditionally
- Deny coverage completely
- Continue defending
- Acquiesce to the insured's demand by permitting the insured to select independent counsel who will be the attorney for the insured only

What Happens When There Are Conflicts of Interest?



- The Right to Control The Defense
 - Not every reservation of rights grants the insured the right to independent counsel.
 - Liability facts and coverage facts must be the same.
- *N. Country Mut'l Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004)
- *Rx.com Inc. v. Hartford Fire Ins. Co.*, 426 F.Supp. 546 (S.D.Tex. 2006)



What If You Decide To Withdraw The Defense?

Withdrawing The Defense

- Never “jerk” a defense
- Provide full explanations
- Give the insured time and an opportunity to comment

