

Applying Waiver and Estoppel Principles to Insurance Contracts

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This article examines how waiver and estoppel apply in cases involving insurance contracts.

Colorado has long applied waiver and estoppel principles to insurance contracts. This article summarizes the leading waiver and estoppel cases, discusses the application of these principles to insurance versus other contracts, and examines current trends relevant to applying these principles.

Waiver

“Waiver is the intentional relinquishment of a known right or privilege.”¹ Whether a party has waived its rights “may be determined as a matter of law only when the material facts are not in dispute . . . ; otherwise, waiver is a factual determination”² Waiver does not require consideration or detrimental reliance

by the insured.³ Waiver may be explicit, where “a party directly states its intent to abandon an existing right,”⁴ or it may be implied by a party’s unambiguous conduct that clearly manifests an intent not to assert the right, or is inconsistent with assertion of the right.⁵

In the seminal Colorado case *Hartford Live Stock Insurance Co. v. Phillips*, the insurer issued a

property policy insuring a bull, with an exclusion for any loss resulting from the death of any bull “not in absolute health when this policy is delivered”⁶ The parties did not dispute that the bull was in poor health when the insurer delivered the policy or that it died as a result of preexisting disease or injury. The trial court ruled that the insurer “had sufficient knowledge that the bull was suffering from a physical ailment, and that by issuing the insurance policy without a thorough investigation” of the bull’s condition, it waived the policy’s coverage limitations.⁷

The Colorado Supreme Court reversed the judgment, holding,

[T]he doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom Thus, 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. . . . [T]he 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.⁸

This proposition that implied waiver and estoppel generally cannot bring within coverage risks not included by a policy’s terms has been repeated often and applied to many kinds of insurance policies in cases like *Hartford* that involve a claim of implied, rather than express, waiver.⁹ Notwithstanding this weight of Colorado authority, insurance contracts typically provide that *any* policy modification, which would seem to include express waiver, must be made in writing and signed by the insurer’s authorized representative.

Hartford also held that an insured may avoid a coverage forfeiture arising from the insured’s failure to comply with policy conditions if the insurer waives such noncompliance.¹⁰ Thus, *Hartford* distinguished between the effect of implied waiver on a coverage forfeiture resulting from an insured’s noncompliance with policy conditions versus the conferral of coverage not contemplated by or excluded under the policy.

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Estoppel

Two distinct estoppel theories—equitable estoppel and promissory estoppel—may affect enforcement of insurance contracts. Equitable estoppel (estoppel in pais¹¹) applies when

1. the party to be estopped by its conduct knows the facts;¹²
2. the party to be estopped intends that its conduct be acted upon, or acts so the party asserting the estoppel is justified in believing the conduct is so intended;
3. the party asserting estoppel is ignorant of the true facts; and

4. the party asserting estoppel detrimentally relies on the other party’s conduct.¹³

As with waiver, *Hartford* held an insured may rely on equitable estoppel to avoid a coverage forfeiture despite the alleged breach of a policy condition, but not to “bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom”¹⁴

Promissory estoppel applies when

1. a promisor makes a promise “that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party”;
2. “the promisee or third party reasonably and detrimentally relied” on the promise; and
3. the promise “must be enforced . . . to prevent injustice.”¹⁵

Promissory estoppel claims usually involve an allegation that an insurer or its legal agent promised, but failed, to issue a policy on certain terms.¹⁶

Breach of Policy Conditions and Coverage Forfeiture

As noted above, under *Hartford*, even though implied waiver and estoppel generally cannot bring uncovered or excluded risks within a policy’s coverage, both doctrines may excuse an insured’s breach of policy conditions and avoid coverage forfeitures.¹⁷ The distinction between the proper avoidance of a coverage forfeiture based on waiver or estoppel and an improper expansion of covered risks can be difficult to discern, and sometimes is a “mere matter of phraseology.”¹⁸

Colorado courts have applied waiver and estoppel under certain circumstances to excuse insureds from providing late notice of claims,¹⁹ untimely payment of premiums,²⁰ an inaccurate representation in a proof of loss,²¹ and failing to obtain an insurer’s consent to settle.²²

Treatment of Insurance Contracts Versus Non-Insurance Contracts

Many Colorado cases hold that “[a]n insurance policy is a contract which should be interpreted consistently with the well settled principles of contractual interpretation.”²³ General contract law provides that “when a party to a contract

has refused to comply with the contract on a particular basis, any other possible basis for refusal is waived.”²⁴ Thus, it seems to follow that when an insurer denies coverage on particular grounds and later seeks to deny coverage on other grounds, waiver and estoppel might apply depending on the facts, such as the state of the insurer’s knowledge (waiver) and prejudice to the insured arising from the insurer’s conduct (estoppel).

However, in *Extreme Construction Co. v. RCG Glenwood, LLC*, the Colorado Court of Appeals observed that “[o]ne exception to the applicability of the estoppel doctrine in contract actions concerns insurance contracts.”²⁵ The Court noted *Hartford’s* distinction between applying waiver and estoppel doctrines to insurance contracts depending on whether the insured seeks to obtain coverage not available under a policy, or to avoid forfeiture of a policy’s benefits due to noncompliance with policy conditions. The Court held that in cases involving the construction of an ambiguous contractual provision *unrelated to coverage*, equitable estoppel “can preclude a party from contesting a particular interpretation of that provision,” if all of the elements of the doctrine have been satisfied.²⁶ Thus, some differences appear to exist in Colorado between applying waiver and estoppel principles to insurance and non-insurance contracts. Why this distinction exists is less clear.

Why the *Hartford* Rule?

Colorado courts have not fully articulated why they apply implied waiver and estoppel differently depending on whether the insured tries to obtain coverage not available under a policy or to avoid a forfeiture of the policy’s benefits due to noncompliance with policy conditions. Instead, this Colorado rule simply follows what for many years has been the majority rule (although, as discussed below, this rule may be eroding). The main rationales courts have cited for the rule are that (1) courts cannot create a new contract for the parties, (2) estoppel should not require an insurer to pay a loss for which it charged no premium, and (3) courts should not impose a risk upon an insurer that it might have declined.²⁷

Hartford’s central holding (“doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded”) is a direct quote from 29A *American Jurisprudence Insurance* § 1135 (1960), the only authority on which the case relied. That legal encyclopedia’s current edition now includes the following more nuanced discussion:

There are some cases that support the view that, either expressly or by implication, an insurer may waive or be estopped from asserting particular policy provisions even though the effect may be to bring within the coverage of the policy risks not covered by its terms or expressly excluded therefrom. Specifically, promissory estoppel may create insurance coverage where to refuse to do so would sanction fraud or other injustice.

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Although there are cases to the contrary, insurers may be estopped from disclaiming coverage where, after timely notice, adequate opportunity to investigate a claim, and knowledge of the basis for denying or questioning coverage, the insurer fails for an unreasonable time to inform the insured of a potential disclaimer, and legal action is subsequently brought against its insured. Estoppel may also exist where, with knowledge of a defense to coverage of the policy, the insurer acts as if the policy applies and the insurer relies on such actions, such as where the insurer continues its representation of the insured for an unreasonable length of time.²⁸

Evolution of Colorado’s Insurance Law

In the 57 years since *Hartford* was decided, Colorado insurance law has undergone significant developments. A number of statutes and regulations governing insurance claims handling and policy interpretation have been adopted. Common law recognition of an insurer’s implied covenant of good faith and fair dealing, and imposition of bad faith tort liability, have evolved. Together, these changes have resulted in greater protection of insureds’ interests.

For example, while courts generally resolve contractual ambiguities by determining the

parties’ intentions,²⁹ they construe insurance contract ambiguities and coverage in favor of the insured as matters of law without resort to parol evidence.³⁰ Similarly, Colorado has adopted special rules relaxing “prompt notice of claim” requirements because of the “adhesive nature of insurance contracts.”³¹ But, as discussed below, while Colorado continues to recognize *Hartford’s* majority rule, this rule has been re-examined by many courts outside Colorado. As one commentator has observed, “it is obvious that an insurance company should not be held incapable of the ‘intentional relinquishment of a known right’ or of ‘inducing an ignorant party into a deleterious change of position’ simply because a question of coverage is involved”³²

Colorado Exceptions to the *Hartford* Rule

Colorado courts have acknowledged at least three exceptions to the general rule described in *Hartford*. First, promissory estoppel may preclude an insurer’s coverage defense where the insurer (or its authorized agent) misrepresented the extent of coverage, inducing the insured to purchase coverage that did not in fact cover the disputed risk.³³ Second, waiver or estoppel may preclude an insurer’s coverage defense where the insurer defended an action on behalf of an insured, with knowledge of facts that would provide a coverage defense, but without a timely and adequate reservation of right to deny coverage.³⁴ Third, the inadvertent delivery of incomplete policy forms may lead to coverage where the insurer claims none was intended.³⁵

In a leading Colorado case, an insurer defended the insured for two and one-half years before disclaiming coverage based on a policy exclusion one month before trial. The Court of Appeals held that fact questions existed whether the insurer had waived its right to rely on the exclusion, or was estopped from doing so.³⁶ This case, like others that follow the same principle (discussed below), involved an insurer assuming control of the insured’s litigation defense without timely reserving its right to disclaim coverage.³⁷

The Minority View: Erosion of the *Hartford* Rule Outside Colorado

A growing and “substantial minority”³⁸ of jurisdictions, led by comprehensive opinions from

New Jersey, Arizona, and Tennessee courts, have rejected the *Hartford* rule, instead holding that “either expressly or by implication, [an insurer may waive or be estopped from asserting particular policy provisions even though the effect may be to bring within the coverage of the policy risks not covered by its terms, or expressly excluded therefrom.”³⁹ The *Restatement of the Law of Liability Insurance* notes,

[a]lthough there are still cases asserting that the majority rule is that estoppel cannot expand coverage, the proposition is doubtful, given that there are so many widely acknowledged exceptions to the rule. Further, the majority rule is often cited in cases when the necessary elements for estoppel have not been presented.⁴⁰

Within some jurisdictions rejecting the majority rule, the holdings have been circumscribed, the case law is not always uniform, what is sometimes characterized as equitable estoppel is actually promissory estoppel, and, in a few cases, it is difficult to determine if the doctrines are being applied to expand coverage or to excuse the breach of a policy condition.⁴¹ Yet it seems fair to conclude, as did the Arizona Supreme Court, “[t]he ‘majority rule’ is eroding.”⁴²

In one of the leading minority cases, *Harr v. Allstate Insurance Co.*, the Supreme Court of New Jersey held that “equitable estoppel is available to bar a defense in an action on a policy even where the estopping conduct arose before or at the inception of the contract, and . . . the parol evidence rule does not apply in such situations.”⁴³ In rejecting the majority rule, the Court stated:

These decisions all proceed on the thesis that where an insurer or its agent misrepresents, even though innocently, the coverage of an insurance contract, or the exclusions therefrom, to an insured before or at the inception of the contract, and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage after a loss on a risk or from a peril actually not covered by the terms of the policy. The proposition is one of elementary and simple justice. By justifiably relying on the insurer’s superior knowledge, the

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insured has been prevented from procuring the desired coverage elsewhere. To reject this approach because a new contract is thereby made for the parties would be an unfortunate triumph of form over substance. The fact that the insurer has received no premium for the risk or peril as to which the loss ensued is no obstacle. . . . If the insurer is saddled with coverage it may not have intended or desired, it is of its own making, because of its responsibility for the acts and representations of its employees and agents. It alone has the capacity to guard against such a result by the proper selection, training and supervision of its representatives.⁴⁴

Likewise, the Louisiana Supreme Court held: [W]e conclude that the best view is that waiver may apply to any provision of an insurance contract under which the insurer knowingly and voluntarily elects to relinquish his right, power or privilege to avoid liability, even though the effect may bring within coverage risks originally excluded or not covered. Of course, reliable proof of such a knowing and voluntary waiver is necessary and the burden of producing it, as in the proof of obligations generally, falls on the party who demands performance.⁴⁵

In *Harbor Insurance Co. v. Continental Bank Corp.*, Justice Posner cast a new perspective on the majority rule by applying the “mend the hold” doctrine to an insurance coverage dispute.⁴⁶ “Mend the hold” is “a substantive doctrine especially applicable to insurance companies that change their reason for refusing to pay a claim . . .”⁴⁷ While *Harbor Insurance Co.* applied the doctrine to an insurer that changed its coverage position during litigation, estopping it from raising new coverage defenses, Judge Posner explained that the doctrine is consistent with enforcing an insurer’s duty of good faith and fair dealing, and there is no reason not to apply it to pre-litigation conduct.⁴⁸

Another line of authority holds that an insurance company’s misconduct unrelated to representations about the scope of coverage may estop it from denying coverage even when the policy may have contained otherwise valid limitations. For example, Arizona courts have held that insurers’ use of confidential infor-

mation obtained from the insured through insurer-retained defense counsel to disclaim coverage may result in the insurer being estopped to deny coverage as a matter of law.⁴⁹

And a few courts have held that an insurer may be estopped to deny coverage based on representations made by an insurance policy drafting organization to state regulatory authorities about the breadth of that coverage during submission of a new policy form for approval.⁵⁰ However, a number of courts have rejected this so-called “regulatory estoppel” theory.⁵¹

The Duty of Good Faith and Fair Dealing

Arguably, enforcement of waiver and estoppel principles incentivizes insurers to conduct reasonable and adequate claim investigations.⁵² A few courts outside Colorado have held that the majority view undermines an insurer’s duty to reasonably investigate a claim by permitting the insurer to shirk this duty with few or no consequences, sometimes to the insured’s detriment. Therefore, some have observed that an insurer’s duties of good faith and fair dealing provide strong policy reasons for diverging from the majority rule.⁵³ Thus, in *Harbor Insurance Co.*, the Seventh Circuit related the “mend the hold” doctrine discussed above to a contracting party’s duty to act in good faith: “A party who hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith.”⁵⁴

In New Jersey, as in many other jurisdictions, the insurer’s duty of good faith and fair dealing requires that it investigate a claim within a reasonable time and make fair and full disclosure of its coverage position to its insured. As a result of these obligations,

once an insurer has had a reasonable opportunity to investigate, or has learned of grounds for questioning coverage, it then is under a duty promptly to inform its insured of its intention to disclaim coverage or of the possibility that coverage will be denied or questioned. Unreasonable delay in disclaiming coverage, or in giving notice of the possibility of such a disclaimer, even

before assuming actual control of a case or a defense of an action, can estop an insurer from later repudiating responsibility under the insurance policy.⁵⁵

While the New Jersey Supreme Court found that the circumstances justified the “imputation of prejudice sufficient to raise an estoppel against the insurer,” it cautioned that “it may be appropriate in . . . other contexts not to impute conclusive prejudice but to impose a rebuttable presumption of prejudice which the insurer must disprove in order to overcome the bar of estoppel.”⁵⁶

Other courts have relied on an insurer’s implied covenant of good faith and fair dealing to reach similar results.⁵⁷ While Colorado recognizes this same implied covenant,⁵⁸ Colorado’s appellate courts have not addressed the interplay between this obligation and application of waiver and estoppel principles.

Deficient Reservation of Rights

Waiver and estoppel claims involving insurance policies commonly concern the adequacy and timing of a liability insurer’s reservation of its right to deny coverage while defending an insured. Generally, an insurer must raise or reserve “all defenses within a reasonable time after learning of such defenses, or those defenses may be deemed waived or the insurer may be estopped from raising them.”⁵⁹ To establish that an insurer is estopped from denying coverage for failure to timely raise its defenses, the insured must show that it relied upon the insurer’s conduct to its detriment.⁶⁰ No presumption of prejudice arises where the insurer disclaims coverage before trial.⁶¹

Consistent with these principles, the Colorado Court of Appeals has held that an insurer would be estopped to deny coverage if its insured relied on the insurer’s unconditional provision of a defense to its detriment and prejudice.⁶² However, the Court further held that while the insurer undertook the insured’s defense for approximately six months without a reservation of rights and then withdrew that defense, the record contained no facts showing that the insurer’s brief assumption of the defense prejudiced the insured. Thus, even assuming that the insured relied to its

detriment on its insurer’s conduct, the trial court properly granted summary judgment in favor of the insurer because the insured failed to demonstrate resulting prejudice.⁶³ (It is not clear how there can be detrimental reliance without prejudice, unless the detriment was *de minimus*.)

The U.S. District Court for the District of Colorado has held, applying Colorado law, that “an insurer may by its conduct be estopped from denying its policy provided coverage for a risk the insured was led honestly to believe was covered,” and “[w]here an insurer defends its insured unconditionally and without any reservation of rights, it may be estopped to deny coverage.”⁶⁴ The court also noted, “an insurer may be estopped to deny coverage even if it defends under a reservation of rights if the reservation was untimely and the insurer’s original intent in defending the action is in dispute.”⁶⁵ However, the court further held that while estoppel can defeat a coverage forfeiture, in Colorado the doctrine cannot create a primary liability and bring within coverage risks neither included in nor contemplated by the policy’s terms.⁶⁶ The court ultimately denied summary judgment pending a determination of whether the policy excluded coverage for “completed operations.”

The Tenth Circuit has held that even if an insurer’s coverage denial had not specifically identified the exclusions relied upon to deny coverage, that failure would not estop the insurer from relying on those exclusions because *Hartford* “makes clear that while an insurer can waive a defense that amounts to a ‘forfeiture of a policy,’ coverage and exclusion issues are not subject to waiver.”⁶⁷ In a later case, the Tenth Circuit stated that estoppel “usually cannot create coverage for risks falling outside of the insurance policy,” and then held that proof of three facts creates an exception to this limitation based on estoppel: (1) the insurer “knew of the non-coverage”; (2) the insurer “assumed defense of the action without a reservation of rights”; and (3) “the insured relied to its detriment on the insurer’s defense.”⁶⁸ However, on the record before it, the court held that even if the insurer had failed to reserve its rights when assuming the defense, there was no evidence of prejudice.⁶⁹

Counterbalancing Considerations

Despite the changes in the law outside Colorado, insurers can be expected to argue the continuing adherence to the *Hartford* rule because

1. insurance policies are notoriously complicated contracts, and exhaustively investigating coverage can be a cumbersome, time-consuming, and expensive endeavor; advising the insured that the insurer is reserving its right to deny coverage is sufficient to put the insured on notice that coverage may be denied later in whole or in part;
2. lower-level employees are often unschooled in the fine legal nuances affecting coverage and cannot reasonably be expected to identify and articulate all possible reasons for denying coverage;
3. in a third-party liability claim, investigating the relevant facts against a complex record may duplicate the effort and expense already ear-marked toward defending the underlying claim;
4. applying waiver and estoppel could require an insurer to insure risks for which it charged no premium or that it would have declined to insure; and/or
5. allowing estoppel and waiver to expand coverage may reduce insurers' ability to maintain control over the risks they assume, driving up premiums, and creating incentives for policyholders to misrepresent agents' conduct to obtain coverage.⁷⁰

As to the first four arguments, policyholders may counter that insurers (and their employees) should be obligated to understand their own insurance contracts and expend necessary resources to reasonably investigate and analyze coverage, consistent with the insurers' implied covenants of good faith and fair dealing, and to timely advise insureds of the reasons for coverage denial (or reservation of the right to deny coverage) so insureds can reasonably evaluate their future actions. Further, there is no valid reason to apply waiver and estoppel principles differently to insurance versus other types of contracts, especially given the typical disparity in sophistication, knowledge, and resources between insurers and their insureds.

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As to the insurer's last argument, policyholders may counter that given the insured's burden of proving detrimental reliance, expansion of coverage is less of a concern when applying estoppel rather than implied waiver because “[f]irst, it limits insurers' involuntary assumption of risk to cases in which the insured can prove that the countervailing concern—harm to the insured—in fact occurred. Second, it serves an evidentiary role. The fact of detrimental reliance makes more credible the insured's assertion that the agent made the promise that the insured seeks to enforce.”⁷¹

Closer Examination of the *Hartford* Rule

Hartford is generally considered settled Colorado law. However, in light of developing case law outside Colorado applying waiver and estoppel to confer coverage where it might not otherwise exist, counsel for both insurers and insureds may wish to consider whether Colorado courts might reexamine or limit *Hartford* in future cases. For example:

- If a loss falls within a coverage grant, and the question arises whether an insurer has waived or is estopped to assert a policy exclusion upon which it bears a statutory⁷² or common law burden of proof,⁷³ is the *Hartford* rationale for refusing to apply ordinary contract principles of waiver and estoppel sustainable?
- Does it matter whether the insurer first raises a new coverage defense after the insured has expended resources to file or defend against litigation based on the insured's understanding of the insurer's different, initial coverage defense, or whether the insured has been exposed to an uncovered or excess judgment during trial of an underlying liability claim?
- Does the *Hartford* rule undermine insurers' duties of good faith and fair dealing by allowing them to conduct untimely or inadequate claim investigations, only to raise newly discovered or late-disclosed coverage defenses to their insureds' surprise and possible prejudice?
- Does the main rationale for the *Hartford* rule, that waiver and estoppel should not

require an insurer pay a loss for which it charged no premium, make sense? In many other kinds of contract disputes where waiver or estoppel apply, courts may impose an obligation, monetary or otherwise, for which the contracting party did not receive additional consideration.⁷⁴

Colorado insurers and insureds will likely offer different answers to these questions. An early Colorado Supreme Court case appears to have answered some of these questions in the negative, while later cases have not gone as far. *Federal Life Insurance Co. v. Wells* held that where an insurer denies coverage citing specific grounds, it waives its right to deny coverage on other grounds not previously disclosed:

[R]elying upon the fact that the sole reason assigned for the denial of liability was that the claim does not come within the “coverage” of the policy, the plaintiff incurred the expense of employing an attorney and commencing suit. She well might have believed that the only defense would be that the policy does not cover death by lightning, and have confidently relied upon her ability to meet and overcome that defense.⁷⁵

This case acknowledges the potential unfairness that arises when an insurer denies a claim on improper grounds, forcing the insured to expend money and time suing the insurer for policy benefits, only to have the insurer raise new and possibly well-founded coverage defenses in the lawsuit. In Colorado, insurers owe a duty to reasonably investigate and adjust claims in the first instance,⁷⁶ thus exacerbating the potential for unfairness arising from the late assertion of alternative coverage defenses.

Cases like *Union Insurance Co. v. Kjeldgaard* suggest that such perceived unfairness may not be dispositive. There, the Colorado Court of Appeals held that a 50-page insurance policy attached to the complaint could not serve as a substitute for material averments, and the trial court erred in entering judgment in favor of the insurer based on a policy exclusion not raised in the complaint.⁷⁷ After remand and a subsequent appeal, the Court found the trial court acted within its discretion in permitting the insurer to amend its complaint to rely on additional exclusions not previously raised in defense

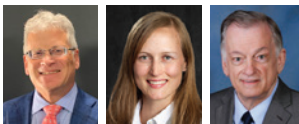
of coverage.⁷⁸ The Court based its decision on the Rules of Civil Procedure; it was not asked to apply common law waiver or estoppel to preclude the late-asserted defense, although it did reject the insured’s laches argument.⁷⁹

Conclusion

Hartford is the law in Colorado; implied waiver and estoppel generally cannot create a primary liability and bring within coverage risks not included by a policy’s terms. But Colorado has long recognized exceptions to this general rule where these doctrines serve to avoid a coverage forfeiture arising from alleged noncompliance with a policy condition or when a liability insurer assumes its policyholder’s defense and fails to timely and adequately disclose its reasons for denying coverage to the policyholder’s detriment. In addition, under proper circumstances and proof, promissory estoppel may apply to expand coverage.

However, a significant and growing minority of jurisdictions have rejected the *Hartford* rule, finding that it improperly deviates from ordinary contract law principles, discourages insurers from completing timely and through claim investigations and informing their insureds why they may disclaim coverage, or undermines enforcement of the insurer’s duty of good faith and fair dealing.

Practitioners should stay abreast of developing case law on the *Hartford* rule, as Colorado courts could change course on or limit the rule’s application. CL



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NOTES

1. *Dep’t of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984).
2. *NationBank of Georgia v. Conifer Asset Mgmt. Ltd.*, 928 P.2d 760, 763 (Colo.App. 1996) (citations omitted). See also *Nikolai v. Farmers Alliance Mut. Ins. Co.*, 830 P.2d 1070, 1073 (Colo.App. 1991) (“[A]n insurer may engage in conduct which operates as a waiver of its rights.”). Cf. *Pueblo Country Club v. AXA Corp. Solutions Ins. Co.*, No. 05-cv-01296, 2007 WL 951790 at *4 (D.Colo. Mar. 28, 2007) (where insurer voluntarily decided to pay its remaining policy limits, it waived its right to assert a counterclaim for reimbursement).
3. See generally 2-8 *Appelman on Ins. Law and Practice Archive*, § 8.1 (Matthew Bender 2011) (“The majority of jurisdictions support the doctrine that no consideration is essential to support a waiver by an insurer . . .”).
4. Grund et al., 8 *Colo. Prac., Personal Injury Torts and Ins.* § 47:7 (West Sept. 2019).
5. *Donahue*, 690 P.2d at 247.
6. *Hartford Live Stock Ins. Co. v. Phillips*, 372 P.2d 740, 741 (Colo. 1962).
7. *Id.* at 742.
8. *Id.* (quoting 29A *Am. Jur. Ins.* § 1135 (1960)), followed in *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 620 (Colo. 1999) (alleged waiver would not affect loss of coverage for uncovered joint venture operations). See also *Empire Cas. Co. v. St. Paul Fire and Marine Ins. Co.*, 764 P.2d 1191, 1198 (Colo. 1988) (insurer “may have waived its right to suspend its insurance policy based upon the failure of [the insured] to maintain the required underlying limits. However, this waiver cannot have created liability where none existed under the policy.”); *RK Mech., Inc. v. Travelers Prop. Cas. Co. of Am.*, 944 F.Supp.2d 1013, 1029-30 (D.Colo. 2011) (even where insurer paid insured for replacement of two cracked flanges, waiver could not create coverage for replacement of other flanges if such coverage did not otherwise exist).
9. See, e.g., *Empire Cas. Co.*, 764 P.2d 1191, 1198 (professional liability); *Gallegos v. Safeco Ins. Co. of Am.*, 646 F. Appx. 689, 695 (10th Cir. 2016) (homeowners); *RK Mech., Inc.*, 944 F.Supp.2d 1013, 1019-20 (builders’ risk); *Commercial Union Ins. Co. v. Roxborough Vill. Joint Venture*, 944 F.Supp. 827, 837 (D.Colo. 1996) (comprehensive general liability and umbrella); *Sellers v. Allstate Ins. Co.*, 82 F.3d 350, 353 (10th Cir. 1996) (automobile); *Crazy Willy’s Inc. v. Valley Forge Ins. Co.*, No. 13-cv-03154, 2015 WL 898878 at *6 (D.Colo. Mar. 2, 2015) (business); *Liberty Ins. Underwriters, Inc. v. Westport Ins. Corp.*, No. 04-cv-01856, 2006 WL 2130728 at *2 (D.Colo. July 28, 2006) (commercial property), vacated on other grounds, No. 04-cv-01856, 2007 U.S. Dist. Lexis 49178 (D.Colo. July 9, 2007); *Montez v. Allstate Fire and Cas. Ins. Co.*, No. 11-cv-01894, 2013 WL 389074 at *4 note 2 (D.Colo. Jan. 31, 2013) (underinsured and uninsured motorist coverage); *Rivelli v. Twin City Fire Ins. Co.*, No. 08-cv-01225, 2008 WL 5054568 at *25

(D.Colo. Nov. 21, 2008) (directors and officers liability insurance). The authors have been unable to locate any Colorado cases extending *Hartford's* ruling to express waiver.

10. *Hartford*, 372 P.2d at 742.

11. 28 *Am. Jur. 2d Estoppel and Waiver* § 27 (2019) (“equitable estoppel” is also known as “estoppel in pais”). Cf. *German Am. Ins. Co. v. Hyman*, 94 P. 27, 32 (Colo. 1908) (“[W]aiver and estoppel in pais are often employed in insurance law as synonymous terms, and used indiscriminately.”).

12. Cf. *Murray v. Montgomery Ward Life Ins. Co.*, 563 P.2d 20, 23 (Colo.App. 1977) (holding extent to which insurer knew the truth and its intent in issuing policy presented disputed factual questions).

13. *Bontrager v. La Plata Elec. Ass’n*, 68 P.3d 555, 561 (Colo.App. 2003) (following *Donahue*, 690 P.2d 243).

14. *Hartford*, 372 P.2d at 742, followed in *Mgmt. Specialists, Inc. v. Northfield Ins. Co.*, 117 P.3d 32, 37 (Colo.App. 2004) (citing *Compass Ins. Co.*, 984 P.2d 606, and *Empire Cas. Co.*, 764 P.2d at 1198). But see *Restatement of the Law of Liability Ins.* § 6 (ALI 2012-19) (“[I]f the elements of estoppel are satisfied, coverage is necessarily expanded beyond what it would have been in the absence of estoppel, and many courts have used estoppel doctrine to prevent an insurer from raising a ground for contesting coverage.”).

15. *Pinnacol Assurance v. Hoff*, 375 P.3d 1214, 1220-21 (Colo. 2016).

16. See, e.g., *Farmers’ and Merchants’ Ins. Co. v. Nixon*, 30 P. 42, 43 (Colo.App. 1892) (holding insurer’s agent may not waive policy provision to secure business, knowing of provision’s violation, acquiesce in it as long as no damage occurs, and, when damage occurs, insist upon provision’s applicability and want of agent’s authority to waive it). Cf. *Struble v. Am. Family Ins. Co.*, 172 P.3d 950, 957 (Colo.App. 2007) (under the reasonable expectation rule, “a hybrid of the common law doctrine of promissory estoppel,” “if an insurer wishes to avoid liability, it must use clear and unequivocal language expressing its intent to limit temporary coverage. When it does not do so, ‘coverage will be deemed to be that which would be expected by the ordinary layperson, namely complete and immediate coverage upon payment of the premium.’”) (citations omitted).

17. Colorado looks askance at the “disproportionate forfeiture” of policy benefits due to an insured’s breach of policy conditions. See *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 232 (Colo. 2001) (holding insurers may only deny benefits for late notice of claim under “occurrence” policy upon proof of resulting prejudice).

18. Crais, Annotation, “Doctrine of Estoppel or Waiver as Available to Bring Within Coverage of Insurance Policy Risks Not Covered by its Terms or Expressly Excluded Therefrom,” 1 *A.L.R. 3d* 1139, § 2c (Lawyers Coop. Publ’g 1965 and Supp. 2019) (also noting parties should consider potential personal liability of

insurance agent for negligent failure to secure additional coverage); *Sugden v. Bock*, 641 N.W.2d 693, 698 (Wis.Ct.App. 2002) (Courts have “struggled, largely unsuccessfully, to generate a general principle that distinguishes forfeiture from coverage clauses.”).

19. See *Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11, 15 (Colo.App. 1985) (insurer waived right to assert late forwarding of suit papers as a defense where it denied liability on basis of coverage, not late notice, until after judgment). But see *Haller v. Hawkeye-Sec. Ins. Co.*, 936 P.2d 601, 605 (Colo.App. 1997) (holding insurer did not waive notice defense when it raised the issues in its timely denial letter).

20. See *Reliance Life Ins. Co. v. Wolverton*, 296 P. 793, 795 (Colo. 1931) (upholding trial court finding that insurer waived timely payment requirement by accepting late payment without conditions).

21. See *Concordia Fire Ins. Co. v. Koretz*, 60 P. 191, 192 (Colo.App. 1900) (insurer waived right to deny coverage for alleged misrepresentations when it adjusted the loss and made a specific agreement to pay under the policy).

22. See *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 336 (Colo.App. 2012) (upholding jury’s finding that insurer waived its right to require consent to settlement because insured reasonably believed insurer denied coverage on other grounds); *Gosman v. State Farm Mut. Auto. Ins. Co.*, No. 06-cv-00688, 2008 WL 239571 at *6 (D.Colo. 2008) (holding that insurer’s failure to refer to “consent-to-settle” clause until long after coverage had been denied for other reasons was circumstantial evidence that insurer intended to waive this defense, and genuine issues of fact remained to be determined by jury). For an extensive compilation of other “waivable” policy conditions, see 44A *Am. Jur. 2d Ins.* § 1557 (West 2019).

23. See, e.g., *Compass Ins. Co.*, 984 P.2d at 613 (quoting *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990)).

24. *Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967, 970 (Colo.App. 1996), *aff’d on other grounds*, 955 P.2d 1008 (Colo. 1998), (citing *Colard*, 709 P.2d 11); *Metro. Paving Co. v. City of Aurora*, 449 F.2d 177 (10th Cir. 1971); *Bicknell v. Vollmuth*, 147 P.2d 478 (Colo. 1944); and *Fed. Life Ins. Co. v. Wells*, 56 P.2d 936 (Colo. 1936).

25. *Extreme Constr. Co. v. RCG Glenwood, LLC*, 310 P.3d 246, 251 (Colo.App. 2012).

26. *Id.* at 251-52.

27. See *Harr v. Allstate Ins. Co.*, 255 A.2d 208, 218 (N.J. 1969) (discussing origins of the rule and rationales for it); 46 *C.J.S. Ins.* § 1155 (Supp. Sept. 2019) (accord); 44A *Am. Jur. 2d Ins.* § 1552 (West Supp. 2019) (accord). One court rejecting the “no premium charged” argument countered: “We are not unmindful of the force of the argument that the insurer should not be liable for coverage for which it has received no consideration. However, the same argument can be made against the vicarious liability of all principals for

the tortious acts of their agents. When the misrepresentation of the agent is viewed as an action in tort, the absence of additional consideration to the insurer is irrelevant.” *Bill Brown Constr. Co. v. Glens Falls Ins. Co.*, 818 S.W.2d 1, 12 (Tenn. 1991).

28. 43 *Am. Jur. 2d Ins.* § 471 (West Supp. 2019).

29. *Ad Two, Inc. v. City and Cty. of Denver*, 9 P.3d 373, 376 (Colo. 2000).

30. *Worsham Constr. Co. v. Reliance Ins. Co.*, 687 P.2d 988, 990-91 (Colo.App. 1984).

31. *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 646 (Colo. 2005). Insurance contracts are typically “not the result of bargaining” and are often imposed on a “take-it-or-leave-it basis.” *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 344 (Colo. 1998).

32. Crais, *supra* note 18 at § 2b.

33. See, e.g., *Struble*, 172 P.3d at 956-57 (“[A]n insurer may waive its right to void or cancel a policy by accepting premiums from the insured after it learned of the alleged grounds for cancellation of the policy”; holding fact issues existed whether insurer consented in writing to insure purported insured until March 30, either by issuing a cancellation notice effective March 30 or by issuing a certificate of insurance, and whether insurer’s conduct created a reasonable expectation of insurance in purported insured, so that it was estopped from denying coverage existed before March 30). See also *Nationwide Mut. Ins. Co. v. Filos*, 673 N.E.2d 1099, 1103-04 (Ill. App.Ct. 1996) (explaining this exception has been used “to create insurance coverage where to refuse to do so would sanction fraud or other injustice”) (citations omitted). Cf. *Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.*, 317 P.3d 1262, 1266, 1274 (Colo.App. 2012) (holding trial court erred in granting summary judgment on negligent misrepresentation claim against insurer seeking coverage, given evidence that insurer’s agent misrepresented the scope of coverage under a CGL policy and insured detrimentally relied on misrepresentations).

34. See *U.S. Fid. and Guar. Co. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 210 n.3 (Colo. 1992) (dicta). This exception to the general rule “is predicated upon the insurer’s conflict of interest: it is too likely to be defending the insured in the lawsuit while at the same time formulating policy defenses to deny coverage.” *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir. 1991). Courts have also justified this exception where the insurer’s actions deprive the insured of the right to control its defense. See, e.g., *Braun v. Annesley*, 936 F.2d 1105, 1111 (10th Cir. 1991) (“We do not believe the Supreme Court of Oklahoma would allow an insurer to defend an individual who might be covered and then permit the insurer to deny coverage after the individual is found liable. Such a result grants the insurer the unfettered right to induce an individual to relinquish control of his or her defense.” (applying Oklahoma law)).

35. See *Woodruff v. O’Dell*, 701 P.2d 112, 114 (Colo.App. 1985) (holding policy as delivered was the governing insurance contract); *Wheeler v. Reese*, 835 P.2d 572, 576 (Colo.

App. 1992) (insurer's error resulted in standard exclusions and exceptions omitted from policy).

36. *Gulf Ins. Co. v. State*, 607 P.2d 1016, 1019 (Colo.App. 1979). See also *Circle C Beef Co. v. Home Ins. Co.*, 654 P.2d 869, 870 (Colo. App. 1982) (insurer's post-loss waiver of policy conditions requiring proof of loss and suit filing within a certain period of time "constitute[s] a valid excuse" for non-compliance with such conditions, even if the policy purportedly required any waiver to be in writing).

37. See, e.g., *Mgmt. Specialists*, 117 P.3d at 37-38 (holding insurer may be estopped to deny coverage if its insured relies on insurer's defense to its prejudice; upholding summary judgment because insured presented no evidence showing insurer's brief assumption of defense caused prejudice); *Thor v. Am. Family Mut. Ins. Co.*, No. 14-cv-02927, 2015 WL 8267431 at *4 (D.Colo. Dec. 7, 2015) (applying Colorado law; finding a genuine factual dispute as to whether insurer waived right to contest coverage where reasonable jurors could conclude insurer assumed insured's defense and then abandoned his case before trial without informing him); *Lextron, Inc. v. Travelers Cas. and Sur. Co.*, 267 F.Supp.2d 1041, 1048 (D.Colo. 2003) (applying Colorado law; holding insurer not estopped from disclaiming duty to defend where insurer assumed insured's defense for only two months at early stage of litigation and insured did not allege resulting detrimental reliance); *Bd. of Cty. Comm'rs v. Guar. Ins. Co.*, 90 F.R.D. 405, 409-10 (D.Colo. 1981) (applying Colorado law; holding disputed facts existed whether insurer waived or was estopped from asserting its coverage defense: "The question remains whether [insurer's] disclaimer was timely enough given the degree of its involvement in the defense so as to preclude any prejudice to the [insured]."). See also generally Hursh, Annotation, "Liability Insurance: Insurer's Assumption of or Continuation in Defense of Action Brought Against the Assured as Waiver or Estoppel as Regards Defense of Noncoverage or Other Defense Existing at Time of Accident," 38 *A.L.R. 2d* 1148 (Lawyers Cooperative Pub. 1948 and Supp. 2019).

38. See *Bill Brown Constr. Co. v. Glens Falls Ins. Co.*, 818 S.W.2d 1, 10 (Tenn. 1991) (collecting cases). Note 39 lists cases from 26 states and Puerto Rico within this growing body of law as of the date this article was printed, subject to the uncertainties regarding this enumeration noted elsewhere in this article.

39. Crais, *supra* note 18, § 4a (citing cases). See also *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 399-401 (Ariz. 1984); *Mut. Benefit Life Ins. Co. v. Bailey*, 190 A.2d 757, 759-61 (Del. 1963); *Warren v. Dept. of Admin.*, 554 So. 2d 568, 574 (Fla. Dist.Ct.App. 1989); *Peninsular Life Ins. Co. v. Wade*, 425 So.2d 1181, 1183-84 (Fla. Dist. Ct.App. 1983); *United Pac. Ins. Co. v. Meyer*, 305 F.2d 107, 114-15 (9th Cir. 1962) (applying Idaho law); *Nutmeg Ins. Co. v. E. Lake Mgmt. and Dev. Corp.*, 260 F. Appx. 914, 916 (7th Cir. 2008) (predicting Illinois law); *Huff v. Travelers*

Indem. Co., 363 N.E.2d 985, 992-93 (Ind. 1977); *Vill. Furniture, Inc. v. Associated Ins. Managers*, 541 N.E.2d 306, 308 (Ind.Ct.App. 1989); *Tate v. Charles Aguillard Ins. v. Real Estate, Inc.*, 508 So.2d 1371, 1374-75 (La. 1987); *Clauson v. Prudential Ins. Co.*, 195 F.Supp. 72, 81-82 (D. Mass. 1961), *aff'd*, 296 F.2d 76 (1st Cir. 1961) (applying Delaware and Massachusetts law); *Cty. Forest Prods. v. Green Mountain Agency, Inc.*, 758 A.2d 59, 66 (Me. 2000); *Meirthew v. Last*, 135 N.W.2d 353 (Mich. 1965); *Lee v. Evergreen Regency Coop. and Mgmt. Sys.*, 390 N.W.2d 183, 186-87 (Mich.Ct.App. 1986); *but see Smit v. Kaechele*, 525 N.W.2d 528, 532 (Mich. Ct.App. 1994); *Shannon v. Great Am. Ins. Co.*, 276 N.W.2d 77, 78 (Minn. 1979); *Harr*, 255 A.2d at 218-19 (N.J. 1969); *King v. Travelers Ins. Co.*, 505 P.2d 1226, 1232-33 (N.M. 1973); *Ind. Ins. Co. of N. Am. v. Charter Oak Ins. Co.*, 653 N.Y.S.2d 135 (N.Y.App.Div. 1997); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1374-75 (11th Cir. 1982) (applying New York law) (citing *Joseph Schultz and Co. v. Camden Fire Ins. Ass'n*, 106 N.E.2d 273, 275 (N.Y. 1952)); *Turner Liquidating Co. v. St. Paul Surplus Lines Ins. Co.*, 638 N.E.2d 174, 179 (Ohio Ct.App. 1994); *Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 679 P.2d 879, 882 (Or. Ct.App. 1984); *Barth v. State Farm Fire and Cas. Co.*, 257 A.2d 671, 675-76 (Pa.Super.Ct. 1969); *King v. TL Dallas and Co.*, 270 F.Supp.2d 262, 267-68 (D.P.R. 2003) (applying Puerto Rico law); *Preferred Risk Mut. Ins. Co. v. Thomas*, 372 F.2d 227, 230-31 (4th Cir. 1967) (applying South Carolina law); *Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 392 S.E.2d 460, 462 (S.C. 1990); *Farmers Mut. Auto. Ins. Co. v. Bechard*, 122 N.W.2d 86, 91 (S.D. 1963); *Bill Brown Constr. Co.*, 818 S.W.2d at 10-13 (Tenn. 1991); *Youngblood v. Auto-Owners Ins. Co.*, 111 P.3d 829, 835 (Utah Ct.App. 2005); *Columbia Fire Ins. Co. v. Boykin and Tayloe, Inc.*, 185 F.2d 771, 732-33 (4th Cir. 1950) (applying Virginia law); *but see Ins. Co. of N. Am. v. Atlantic Nat'l Ins. Co.*, 329 F.2d 769, 775-776 (4th Cir. 1964) (applying Virginia law); *Dodge v. Aetna Cas. and Sur. Co.*, 250 A.2d 742, 744 (Vt. 1969); *Sugden v. Bock*, 641 N.W.2d 693, 700 (Wis.Ct.App. 2002); *Marlin v. Wetzel Cty. Bd. of Educ.*, 569 S.E.2d 462, 472 (W.Va. 2002); *Westfield Ins. Co. v. Paugh*, 390 F.Supp.2d 511, 529-30 (N.D.W.Va. 2005) (applying West Virginia law); *Hunter v. Farmers Ins. Grp.*, 554 P.2d 1239, 1243 (Wyo. 1976). Cf. *Modica v. Hartford Accident and Indem. Co.*, 46 Cal. Rptr. 158 (Cal.Ct.App. 1965) (holding where insured believed policies covered risks not expressed in policies and that such mistake was known by insurer and agent, policy properly reformed to include disputed coverage).

Some cases have also distinguished between waiver and estoppel, holding that the latter may have the effect of expanding coverage while the former may not. Crais, *supra* note 18, § 4a (citing cases).

40. *Restatement of the Law of Liability Ins.*, *supra* note 14 at § 6(e).

41. See generally 2-8 *Appleman on Ins. Law and Practice Archive*, § 8.1 (Matthew Bender 2011).

42. *Darner Motor Sales v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 400 (Ariz. 1984) (citing 16C *Appleman on Ins.*, § 9166 at 153-58, § 9167

at 162-65 (1981)). See also cases cited in note 39, *supra*.

43. *Harr*, 255 A.2d at 218.

44. *Id.* at 219. See also *Leeand*, 390 N.W.2d at 186 (holding waiver or estoppel may expand coverage "where the inequity of forcing the insurer to pay on a risk for which it never collected premiums is outweighed by the inequity suffered by the insured because of the insurance company's actions").

45. *Tate v. Charles Aguillard Ins. and Real Estate*, 508 So.2d 1371, 1375 (La. 1987).

46. *Harbor Ins. Co. v. Cont'l Bank. Corp.*, 922 F.2d 357, 362-65 (7th Cir. 1990) (applying Illinois law).

47. *Id.* at 363.

48. *Id.* at 363-64.

49. *Parsons v. Cont'l Nat'l Am. Grp.*, 550 P.2d 94, 97 (Ariz. 1976) (insurer deprived of intentional act exclusion and held liable for judgment in excess of policy limits); *Lake Havasu Cmty. Hosp. v. Az. Title Ins. and Trust Co.*, 687 P.2d 371, 384-85 (Ariz.App. 1984) (holding insurer's use of confidential information obtained by insurer-retained defense counsel so contrary to public policy as to deprive carrier of all coverage defenses, including policy limits, and supported punitive damage claim).

50. See, e.g., *Joy Techs., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W.Va. 1992) (holding where insurance industry represented to West Virginia insurance commissioner that exclusion merely clarifies and does not change policy coverage and intent, represented construction would be enforced); *Morton Int'l, Inc. v. Gen. Accident Ins. Co.*, 629 A.2d 831 (N.J. 1993) (declining to enforce the standard pollution-exclusion clause as written because to do so would contravene New Jersey's public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content, and condone industry's misrepresentation to regulators concerning clause's effect); *Tozzi v. Long Island R.R. Co.*, 651 N.Y.S.2d 270, 275 (N.Y.Sup.Ct. 1996) (holding party may be estopped from making a factual assertion in litigation contrary to a factual assertion it made during an administrative proceeding).

51. See, e.g., *E.I. du Pont de Nemours and Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1062 (Del. 1997) (holding regulatory estoppel inapplicable where contract language is clear and unambiguous); *Buell Indus. v. Greater N.Y. Mut. Ins. Co.*, 791 A.2d 489, 502 (Conn. 2002) (noting several courts have rejected regulatory estoppel doctrine; "regulatory estoppel appears to be another attempt to examine extrinsic evidence" concerning a clear and unambiguous term).

52. See, e.g., *Columbian Nat'l Life Ins. Co. v. Rodgers*, 116 F.2d 705 (10th Cir. 1940) (applying Kansas law).

53. See, e.g., *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 345 (Tex. 1995) (J. Spector, concurring) ("When an insurance company defends its misconduct on the basis of information discovered after the fact, an absolute rule barring any recovery undermines

the objectives of the duty of good faith and fair dealing.”).

54. *Harbor Ins. Co.*, 922 F.2d at 363, citing *Larson v. Johnson*, 116 N.E.2d 187, 191-92 (Ill. App.Ct. 1953).

55. *Griggs v. Bertram*, 443 A.2d 163, 168 (N.J. 1982) (citations omitted).

56. *Id.* at 171 and n.3.

57. See, e.g., *Potesta v. U.S. Fid. and Guar. Co.*, 504 S.E.2d 135, 150 (W.Va. 1998) (holding exception to general rule that estoppel may not be used to extend insurance coverage applies when insurer has acted in bad faith). Cf. *Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 447-48 (3d Cir. 2003) (applying New Jersey law; although not explicitly mentioning the implied covenant of good faith and fair dealing, holding insurer equitably estopped from denying indemnification obligation where it “engaged in inordinate delay before it announced to [its insured] that it would disclaim coverage, and the reasons for doing so”).

In a Tenth Circuit case predating development of the law concerning an insurer’s implied covenant of good faith and fair dealing, the court applied Kansas law and found an insurer was estopped to deny coverage under a life insurance policy due to its failure to adequately investigate the insured’s health:

There is no doubt but that an insurer may waive provisions inserted in the contract for its benefit, and may be estopped from asserting reasons ordinarily justifying a forfeiture of the policy. Knowledge of facts inconsistent with statements in an application may constitute an equitable estoppel against an insurer precluding it from asserting a ground for avoidance of the contract, and it is not essential that the knowledge be derived from the insured. An insurance company may be charged with knowledge of facts which it ought to have known.

Columbian Nat’l Life Ins. Co. v. Rodgers, 116 F.2d 705, 707 (10th Cir. 1940).

58. See, e.g., *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995) (holding “every contract includes an implied duty of good faith and fair dealing”); *Farmers Grp., Inc. v. Trimble*, 658 P.2d 1370, 1376 (Colo.App. 1982) (recognizing liability insurer’s tort liability for breaching its implied covenant of fair dealing), *aff’d*, 691 P.2d 1138, 1141 (Colo. 1984).

59. *U.S. Fid. and Guar. Co. v. Budget Rent-A-Car Sys., Inc.*, 842 P.2d 208, 210 n.3 (Colo. 1992) (dicta). See also *Pub. Serv. Co. of Colo. v. Wallis and Cos.*, 955 P.2d 564, 571 (Colo.App. 1997) (holding insurer who “denies coverage on specific grounds . . . waives the right later to assert additional defenses to coverage”), *rev’d on other grounds*, 986 P.2d 924 (Colo. 1999).

60. *Gulf Ins. Co. v. State*, 607 P.2d 1016, 1019 (Colo.App. 1979). Cf. *Gen. Accident Fire and Life Assurance Corp. v. Mitchell*, 259 P.2d 862, 868 (Colo. 1953) (non-waiver agreement precluded finding waiver or estoppel against insurer who assumed insured’s defense).

61. *Gulf Ins. Co.*, 607 P.2d at 1019.

62. *Mgmt. Specialists*, 117 P.3d at 38.

63. *Id.*

64. *Commercial Union Ins. Co. v. Roxborough Vill. Joint Venture*, 944 F.Supp. 827, 837 (D.Colo. 1996), citing *Pendleton v. Pan Am. Fire and Cas. Co.*, 317 F.2d 96, 99 (10th Cir. 1963).

65. *Commercial Union Ins. Co.*, 944 F.Supp. at 837, citing *Bd. of Cty. Comm’rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 409 (D.Colo. 1981).

66. *Id.* (citing *Hartford*, 372 P.2d at 742).

67. *Gallegos v. Safeco Ins. Co. of Am.*, 646 F. Appx. 689, 695 (10th Cir. 2016) (citations omitted).

68. *Evanston Ins. Co. v. Law Office of Michael P. Medved, P.C.*, 890 F.3d 1195, 1200-02 (10th Cir. 2018) (applying Colorado law).

69. *Id.*

70. See generally *Restatement of the Law of Liability Ins.*, *supra* note 14 at § 5.

71. *Id.*

72. See, e.g., CRS § 13-20-808(6), which applies to liability policies issued to construction professionals:

(6) If an insurer disclaims or limits coverage under a liability insurance policy issued to a construction professional, *the insurer shall bear the burden of proving by a preponderance of the evidence* that:

- (a) Any policy’s limitation, exclusion, or condition in the insurance policy bars or limits coverage for the insured’s legal liability in an action or notice of claim made pursuant to section 13-20-803.5 concerning a construction defect; and
- (b) Any exception to the limitation, exclusion, or condition in the insurance policy does not restore coverage under the policy. (Emphasis added.)

73. See *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991) (holding insurer must prove exclusion applies to avoid coverage).

74. See, e.g., *Zimmerman v. First Fed. Sav. and Loan Ass’n of Rapid City, S.D.*, 848 F.2d 1047, 1053-54 (10th Cir. 1988) (finding evidence sufficient to support \$1.5 million jury award on promissory estoppel claim where plaintiff alleged savings and loan provided less money than promised to finance a housing development, then wrongfully foreclosed on the project).

75. *Fed. Life Ins. Co. v. Wells*, 56 P.2d 936, 938 (Colo. 1936).

76. See, e.g., *Am. Family Mut. Ins. Co. v. Allen*, 102 P.3d 333, 342-44 (Colo. 2004) (holding common law imposes duty on insurer to act reasonably in handling first- and third-party claims; CRS § 10-3-1104(1)(h) defines an unfair claims settlement practice as, “among other things, refusing to pay claims without conducting a reasonable investigation based on all available information, or not providing a reasonable explanation of a denial of a claim”).

77. *Union Ins. Co. v. Kjeldgaard*, 775 P.2d 55, 55-56 (Colo.App. 1988).

78. *Union Ins. Co. v. Kjeldgaard*, 820 P.2d 1183, 1185-86 (Colo.App. 1991).

79. *Id.*

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