

Texas Supreme Court Holds that Waiver and Estoppel Cannot Be Used To Expand Coverage

October 2008

The Texas Supreme Court has held that the doctrines of waiver and estoppel cannot be used to re-write a contract of insurance and provide coverage for risks not insured. *Ulico Casualty Co. v. Allied Pilots Assoc.*, 2008 WL 3991083 (Tex. Aug. 29, 2008). Thus, the court concluded that an insurer was not obligated to reimburse a policyholder for defense costs arising from a claim noticed after the expiration of a claims-made-and-reported policy, although the insurer initially agreed to reimburse the policyholder for defense expenses. Wiley Rein LLP filed an *amicus* brief in the case in support of the insurer.

The insurer issued a claims-made-and-reported policy that required, as a condition precedent to coverage, that the policyholder provide notice of a claim during the policy period or extended reporting period. The policyholder was served with a suit during the policy period but did not notify the insurer of the suit until after the policy expired. The insurer initially issued two letters in which it agreed to reimburse the policyholder for defense expenses, pursuant to a reservation of rights. The insurer later sought a declaratory judgment that it had no coverage obligations.

The trial court found that the insurer was barred from asserting that the policy did not provide coverage by the doctrines of waiver and estoppel. The intermediate appellate court affirmed on the basis of the so-called *Wilkinson* exception enunciated in an earlier intermediate appellate court case. *Farmers Tex. County Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520 (Tex. Civ. App. 1980).

The Texas Supreme Court reversed, holding that the doctrines of waiver and estoppel cannot be used to expand the contractual coverage of an insurance policy. The court explained that "'noncoverage' of a risk is [not] the type of right an insurer can waive and thereby effect coverage for a risk not contractually assumed." This is true even when an insurer takes up "the insured's defense with knowledge of facts indicating noncoverage and without obtaining a valid reservation of rights or non-waiver agreement."

Although "estoppel does not work to create a new insurance contract that covers a risk not agreed to by the contracting parties," the court acknowledged that "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." The court, however, held that an insured cannot establish prejudice merely by pointing to the "apparent conflict of interest that might arise when the insurer represents the insured in a lawsuit against the insured [while] simultaneously formulat[ing] its defense against the insured for noncoverage." According to the court, this is insufficient justification for "judicially rewriting the parties' agreement."