

# Estoppel and waiver – altering the contractual position



## CLYDE & CO

It is worth remembering actions and communications, both pre- and post-placement, can have an effect on policy construction in the event of a dispute.

In the existing economic climate, with fiercely fought coverage disputes common, we are seeing a marked increase in reliance upon waiver and estoppel arguments. This makes it increasingly important underwriters and claims handlers are aware of the impact their communications can have on the outcome of a coverage dispute.

Waiver by election arises most frequently in relation to non-disclosure/misrepresentation, and is based on the premise an insurer's action/inaction amounts to an abandonment of a right under the policy. The insurer must have actual knowledge of all matters giving rise to the right in question but nevertheless take some step which is consistent only with treating the contract as continuing.

Essentially, the policyholder has to demonstrate the insurer has unequivocally elected to continue the policy in circumstances where it could have been avoided. Thus, if the insurer paid a claim or continued to accept premium in the knowledge the policyholder had misrepresented a material fact, it would likely be held to have waived its right to rely on that misrepresentation to avoid the policy at a later date.

Conversely, the doctrine of estoppel does not require any actual knowledge on the part of the insurer, but only a clear and unequivocal, actual or implied representation the insurer will not rely on its right.

Estoppel seeks to prevent an inequitable result where one party has relied on a statement, act or the conduct of another party to its detriment. The other party is then prevented from acting inconsistently with that statement, act or conduct. For example, where it is clear from

correspondence the insurer did not intend a particular policy interpretation at placement and the policyholder relied on that fact to its detriment (perhaps by failing to take out another insurance policy), the insurer may be estopped from later seeking to rely on that interpretation.

Waiver and estoppel are particularly relevant when insurers are unsure whether there has been a policy breach. In such circumstances it is important insurers do not lose their right to rely on such matters and it is often appropriate to formally reserve rights. To be effective, the reservation must be explicit in preserving insurers' rights to use all available defences and should expressly state the basis upon which insurers wish to reserve their rights.

Thereafter, insurers should be alive to the possibility that any subsequent actions might prevent them from relying on their rights later.

It is therefore imperative insurers take care in communications with the policyholder while investigations are ongoing. In particular, insurers must not proceed with administrative matters such as demanding or accepting premium, especially where premium may be tendered via market systems which may make payment more difficult to identify. It may be appropriate to confirm in writing insurers will not accept premium on the policy until further notice.

Reserving rights is, of course, not the end of the matter. Reservations are not indefinite and insurers must ensure that there is no delay in communicating the final coverage decision to the policyholder once investigations are complete. In extreme cases, delay can result in waiver/estoppel if the insured has grounds to believe that the claim will be met. ■

*David Abbott is a partner and Carly Gray an associate at Clyde & Co*