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Insurance Law Update: Traps and Foibles, Including *Stowers*

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Insurance Law Update: Traps and Foibles, Including *Stowers*[1]

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While it is sometimes said that an insurance company cannot "create coverage" by waiver or estoppel, this statement is not without its exceptions.[3] In addition, "conditions" of the policy, as opposed to coverage provisions, are certainly waivable and in fact are often waived.[4]

I. CONDITIONS

There are several "conditions" of the insurance policy which insurance companies can and do waive often. In general, a "condition" is any provision of the policy requiring an act to be performed by the insured as a prerequisite to payment or coverage under the policy. Most property policies have a separate section called "conditions," containing several numbered sections which, as conditions, are matters that can be waived by the insurance company, or that the company can be estopped to assert. While insurance carriers often argue that it is the policyholder's burden to show compliance with conditions precedent in the policy in order to recover,[5] there is substantial authority that failure of a condition does not *bar* recovery but only

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[1] The 2103-14 version of this Insurance Update article appeared in Volume 66 of *The Advocate*, a publication of the State Bar of Texas. The current article adds analysis of important decisions rendered in the past four years and appears in substance as "Insurance Law Update: Traps and Foibles, Including *Stowers*" 37 CORP. COUNS. REV. 65 (2018).

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[3] Gen. Life & Accident Ins. Co. v. Lightfoot, 737 S.W.2d 953, 957 (Tex. App.—El Paso 1987, writ denied). For exceptions, see USAA Tex. Lloyds Co. v. Menchaca, No. 14-0721, 2018 WL 1866041, *13 (Tex. 2018) (citing Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 775 (Tex. 2008)). *See also* Texas Cnty. Mut. Ins. Co. v. Wilkinson, 601 S.W.2d 520, 523 (Tex.Civ.App.—Austin 1980, writ ref'd n.r.e.).

[4] Republic Ins. Co. v. Silverton Elevators, Inc., 493 S.W.2d 748, 754 (Tex. 1973); Nielson v. Allstate Ins. Co., 784 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1990, no writ); Aetna Cas. & Sur. Co. v. Clark, 427 S.W.2d 649, 658 (Tex. Civ. App.—Dallas 1968, no writ).

[5] Grimm v. Grimm, 864 S.W.2d 160, 161 (Tex. App.—Houston [14th Dist.] 1993, no writ).

requires abatement until the condition is satisfied.[6] In addition, substantial compliance is usually all that is required in connection with conditions precedent of a policy.[7] Discussion of specific conditions that are commonly encountered follows. A recent exposition and analysis of this area of the law can be found in the Fifth Circuit's opinion in *Cox Operating Co. v. Surplus Lines Ins. Co.*[8]

A. Notice of Loss

1. Requirement of Notice

Many policies provide that in case of loss, the insured should give prompt written notice of the facts relating to the claim. Note that there is usually no requirement to "make a claim" but only to give "notice of facts." Some policies do not even require that the notice be in writing. Most often the notice is called in to the agent by the insured, and the agent submits an appropriate ACORD form[9] to the carrier in writing, on behalf of the insured. As with any other condition, this requirement can be waived by any action by the carrier inconsistent with relying upon the notice.[10] This could include acknowledging the claim in writing without requesting further written notice, beginning an investigation, or making payment.[11] Again, acceptance of late, written notice by the insurer or any conduct by the insurer inconsistent with an intention to rely on such notice to avoid liability accomplishes a waiver.[12] By analogy to cases involving the condition requiring a proof of loss, many actions by the insurer will waive any requirement of prompt written notice or else create an estoppel where the insurer cannot rely upon such failure to avoid the claim. Such

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[6] *See* State Farm Gen. Ins. Co. v. Lawlis, 773 S.W.2d 948, 949 (Tex. App.—Beaumont 1989, no writ) (per curiam) (citing Humphrey v. Nat'l Fire Ins. Co., 231 S.W. 750 (Tex. 1921)).
[7] Home Ins. Co. v. Greene, 443 S.W.2d 326, 330-31 (Tex. Civ. App.—Texarkana 1969), *aff'd*, 453 S.W.2d 470 (Tex. 1970); Home Ins. Co. v. Scott, 152 S.W.2d 413, 414 (Tex. Civ. App.—El Paso 1941, writ dism'd); Century Ins. Co. v. Hogan, 135 S.W.2d 224, 228 (Tex. Civ. App.—Austin 1939, no writ).
[8] 795 F.3d 496 (5th Cir. 2015).
[9] "ACORD" is an acronym for "Association for Operations Research and Development." This association is a non-profit developer of standards for the insurance industry and publishes forms for many insurance needs.
[10] *E.g.*, *Aetna Cas. & Sur. Co. v. Clark*, 427 S.W.2d at 658 n.3.
[11] Nat'l Sur. Corp. v. Wells, 287 F.2d 102 (5th Cir. 1961).
[12] Sparks v. Aetna Life & Cas. Co., 554 S.W.2d 228, 230 (Tex. Civ. App.—Dallas 1977, no writ); Hanover Ins. Co. of N.Y. v. Hagler, 532 S.W.2d 136, 138 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

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