Lawyer Insights

Court: You can Create Coverage by Estoppel if Insurer's Defense Prejudices the Insured

By Walter J. Andrews, Michael S. Levine and Yaniel Abreu
Published in Daily Business Review | February 11, 2020

Insurance companies oftentimes defend their insureds against lawsuits. It is important for attorneys and their insured clients to remain vigilant of the insurer's conduct throughout the defense. As we have seen too many times before, depending on how the liability action develops and what the insurer learns during discovery, the insurer might decide to withdraw its defense or ultimately deny indemnity for an adverse verdict. An insurer, however, may be estopped from denying coverage if its defense prejudices the insured.

For instance, a Florida appellate court held recently, in *Hurchalla v. Homeowners Choice Property & Casualty,* No. 4D18-2740 (Fla. App. Oct. 16, 2019), that coverage can indeed be created by estoppel under Florida law, even where the claim is not otherwise covered, when the insurer agrees to defend the claim and the defense prejudices the insured.

In *Hurchalla,* Margaret Hurchalla, a former Martin County, Florida commissioner, and her husband, James Hurchalla, were sued by neighboring developers, Lake Point. The complaint alleged that the Hurchallas tortiously interfered with agreements between Lake Point, the South Florida Water Management District (SFWMD) and Martin County (the tort litigation).

Initially, the Hurchallas' homeowner's insurer, Homeowners Choice Property & Casualty Insurance Co. (Homeowners Choice) defended the Hurchallas in the tort litigation for more than a year, after which Homeowners Choice filed a declaratory judgment against the Hurchallas, Lake Point, SFWMD and Martin County. Homeowners Choice sought a declaration that the Hurchallas' policy did not cover the damages sought in the tort litigation because the complaint alleged "intentional acts" and, therefore, lacked fortuitous claims because of bodily injury or property damage.

The tort litigation was tried to a jury, which found in favor of Lake Point. Specifically, the jury found that the Hurchallas tortiously interfered with a contract between Martin County and SFWMD for a mining and water treatment project near Lake Okeechobee. The jury awarded $4.4 million.

Following the verdict, Homeowners Choice moved for summary judgment in the coverage action. The insurer argued that there was no coverage because it provided coverage only for fortuitous bodily injury or property damage, not for intentional acts. The insurer argued that because the jury found the insured liable for intentionally interfering with a contractual relationship, there could be no dispute that the insured's liability was the result of intentional conduct.

Court: You Can Create Coverage by Estoppel if Insurer's Defense Prejudices the Insured
By Walter J. Andrews, Michael S. Levine and Yaniel Abreu
Daily Business Review | February 11, 2020

In their opposition, the Hurchallas argued that the insurer waived or was otherwise estopped from asserting a "fortuity" defense because the insurer failed to properly reserve its right to assert the defense under Florida law. Nevertheless, the trial court granted the insurer's motion for summary judgment. The court relied on *Doe v. Allstate Insurance*, 653 So. 2d 371 (Fla. 1995), in which the Florida Supreme Court held that an insurer's defense of a claim does not require indemnity where the claim is not covered under the policy. In the trial court's view, under *Doe*, the defense of estoppel could not expand the scope of coverage under the policy issued by Homeowners Choice. The Hurchallas appealed.

The Fourth District Court of Appeal reversed. The appellate panel found that the trial judge erred in granting summary judgment to Homeowners Choice because it did not negate the waiver and estoppel defenses raised by the Hurchallas in opposing the lawsuit by the insurer. Indeed, Homeowners Choice's motion for summary judgment failed to address any of the five defenses raised by the Hurchallas, all of which concerned the insurer's failure to properly assert and reserve its fortuity defense. The court explained that where the nonmovant has raised affirmative defenses, the moving party must factually refute those defenses or establish that they are legally insufficient before receiving summary judgment in its favor. Specifically, the court determined that the Hurchallas had asserted an equitable estoppel claim against Homeowners Choice that was legally sufficient.

The court also rejected the trial court's reliance on *Doe* in the context of this dispute. The court concluded that *Doe* did not support summary judgment in favor of Homeowners Choice because, under *Doe*, "an insurance company may be estopped from denying coverage, even where the policy does not cover the claim, where the insured has been prejudiced by the insurer's assumption of the insured's defense."

The Hurchallas alleged prejudice caused by the insurer. For instance, the Hurchallas argued that defense counsel appointed by the insurer refused to give any of the defense documents to their personal counsel. They also claimed that the insurer refused to make an offer of judgment despite requests by the Hurchallas. The insurer failed to conclusively refute those allegations. Accordingly, the appellate panel found that it was not entitled to summary judgment.

Hurchalla is a significant win for policyholders. The decision illustrates the importance of asserting appropriate fact-based defenses and how those defenses, when not sufficiently refuted, can defeat summary judgment for the party to whom they are asserted against, even where the motion is premised on an issue of contract interpretation. The decision also is significant because it highlights a critical exception to the general rule that coverage cannot be created by estoppel, illustrating that coverage may indeed be extended where the insurer's defense works to prejudice the interest of the insured.

Hurchalla is not alone. Florida courts have historically recognized that coverage can be created by estoppel. See, e.g., *Florida Municipal Insurance Trust v. Village of Golf*, 850 So. 2d 544 (Fla. 4th DCA 2003) (finding that insurer was estopped from denying coverage because the insurer's conduct had prejudiced the insured); *Cigarette Racing Team v. Parliament Insurance,* 395 So. 2d 1238 (Fla. 4th DCA 1981) (reversing summary judgment in favor of the insurer because the insured filed an affidavit specifying instances of prejudice in opposition to the insurer's motion); and *Sphinx International v. National Union Fire Insurance of Pittsburgh, Pennsylvania,* (M.D. Fla. Nov. 25, 2002) (denying insurer's motion for summary judgment because there was a genuine dispute of material fact as to whether the insurer's actions harmed the insured and, therefore, was estopped from invoking an exclusion). Accordingly, insureds should have their personal counsel monitor the conduct of insurer-appointed defense counsel to make sure that the insurer's chosen counsel does not prejudice the insured's defense.

Court: You Can Create Coverage by Estoppel if Insurer's Defense Prejudices the Insured
By Walter J. Andrews, Michael S. Levine and Yaniel Abreu
Daily Business Review | February 11, 2020

Walter J. Andrews *is a partner in the firm's insurance coverage group in the firm's Miami office. Walter's practice focuses on complex insurance litigation, counseling and reinsurance arbitrations and expert witness testimony. He can be reached at +1 (305) 810-6407 or wandrews@HuntonAK.com.*

Michael S. Levine *is a partner in the firm's insurance coverage group in the firm's Washington office. Mike has more than 20 years of experience litigating insurance disputes and advising clients on insurance coverage matters. He can be reached at +1 (202) 955-1857 or mlevine@HuntonAK.com.*

Yaniel Abreu *is an associate in the firm's insurance coverage group in the firm's Miami office. Yaniel advises companies in complex insurance coverage matters. This involves analyzing the company's risk profile to limit exposure and maximize recovery. He can be reached at +1 (305) 810-2504 or yabreu@HuntonAK.com.*