



By Amanda Hartley

When a Good Neighbor ‘Mends the Hold’—Using Estoppel Doctrines in Insurance Cases

In the early 1990s, the American Insurance Association filed an Amicus Brief claiming insurance companies spent—conservatively—one billion dollars a year on coverage litigation. Given the significant financial force of the insurance industry, we must use all available mechanisms to protect the rights of insureds.

Founded in equity, estoppel theories protect the integrity of the process, and accordingly, protect insureds from less than scrupulous carriers. To take full advantage of the multiple doctrines, we must understand the differences between the theories and the fundamental elements underlying each. While judicial estoppel and equitable estoppel are forms of estoppel in pais, promissory estoppel is a form of legal estoppel. Given the similar nature of all equitable doctrines, it is easy to confuse the various theories. This article highlights the basic application of a few useful estoppel doctrines.

Promissory Estoppel

Promissory estoppel applies when a party reasonably relies on a statement of another and materially changes his position in reliance on that statement. *Stephenson v. State Farm Ins. Co.*, 217 S.W.3d 878, 880 (Ky.App.2007). Detrimental reliance acts as a substitute for consideration. The doctrine of promissory estoppel is best invoked when a representative of the insurer “promises” to take a certain action or provide certain coverage.¹

For example, in *Stephenson*, the Kentucky Court of Appeals evaluated the issue of whether statements made by representatives of the plaintiff’s insurance carrier, American Family Mutual Ins. Co. (American Family), estopped the carrier from denying benefits. 217 S.W.3d at 879. Specifically, American Family told the plaintiff’s attorney that American Family would pay the plaintiff’s no-fault benefits. *Id.* After promising to pay the plaintiff’s no-fault benefits, American Family sent plaintiff’s counsel a letter stating it would not pay the plaintiff’s no-fault benefits. *Id.* at 880. In support of its change in position, American Family argued it was not registered with the Kentucky Department of Insurance; the

plaintiff was not a Kentucky resident and American Family had not filed a deemer with the state. *Id.* The plaintiff’s attorney filed suit claiming American Family was estopped from denying coverage. *Id.*

The Court of Appeals held American Family was estopped from denying no-fault benefits. *Id.* at 881. The court acknowledged American Family was not required to pay no-fault benefits under Kentucky law. *Id.* at 880. Nonetheless, the court found American Family’s *promise of payment* estopped American Family from later denying payment. *Id.* at 881. The court stated, “The Kentucky Supreme Court stated that promissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement.” *Id.* at 880 (internal citations omitted). When American Family promised to pay no-fault benefits, the plaintiff had the right to pursue a claim with the Assigned Claims Bureau, but did not do so due to the promise. *Id.*

“Mend the Hold”

“Mend the Hold” is derived from a nineteenth century wrestling term that means to get a better hold on your opponent.² For decades, courts rarely mentioned the doctrine, but mend the hold is making a comeback! It can prevent an insurance company from asserting inconsistent positions with respect to the meaning of a contract. The doctrine applies to bar insurance companies from introducing new or different reasons for denying coverage after the commencement of litigation.

In 1990, Judge Posner issued an opinion for the Seventh Circuit that provides a good, modern discussion of the doctrine’s application. *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357 (7th Cir. 1990). In that case, Harbor and Allstate insured Continental for wrongful acts committed by an officer or director. *Id.* at 359. Following the collapse of Penn Square Bank, Continental also collapsed and sought claims coverage under the policies issued by Harbor and Allstate. *Id.* Initially, Harbor and Allstate

denied coverage claiming the actions of the directors were so egregious that—even if their conduct fit within the good-faith provision of Continental’s charter—federal and state law would forbid indemnifying Continental’s directors. Continental, consequently, settled two securities cases for \$17.5 million and filed a claim against Harbor and Allstate seeking reimbursement. *Id.* At that point, Harbor and Allstate abandoned the position regarding the director’s conduct altogether. Instead, Harbor and Allstate denied coverage arguing Continental settled the claims prematurely. *Id.* at 360.

Writing for the court, Judge Posner explained *Railway Co. v. McCarthy*, 96 U.S. 258 (1877) first defined mend the

hold in specific terms. *Id.* The *Railway Co.* Court held,

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold.

Id. (internal quotations omitted)

Judge Posner went on to explain that courts from around the country applied mend the hold “as a substantive doctrine especially applicable to insurance

companies that change their reason for refusing to pay a claim.” *Id.* at 363.³

Judicial Estoppel

As Kentucky acknowledged decades ago, “the rule of law to the effect that a party to litigation will not be permitted to assume inconsistent or contradictory positions with respect to the same matter in the same or a successive series of suits is well grounded upon familiar principles of estoppel.” *Rowe v. Shepherd*, 283 S.W.2d 188, 190 (Ky. 1955). The rule of law to which the *Rowe* Court refers is judicial estoppel. Judicial estoppel prevents a party from asserting contradictory positions in

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successive litigation. *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422 (Ky.App. 2008). When applying the doctrine of judicial estoppel, courts consider:

1. Whether the party's later position is clearly inconsistent with its earlier position;
2. Whether the party succeeded in persuading a court to accept the earlier position; and
3. Whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. *Hisle*, 258 S.W.3d at 434-5.

In an *unreported* opinion, the Kentucky Court of Appeals invoked the doctrine of judicial estoppel to prevent an insurance company from asserting inconsistent positions regarding insurance coverage. *Countryway Insurance Company v. Oakes*, 2010 WL 2787915 (Ky.App. 2010). In *Countryway*, the plaintiff was injured while driving an automobile owned by her mother. *Id.* at 1. The plaintiff settled with the tortfeasor for the underlying liability policy limits. *Id.* As such, the plaintiff proceeded against her underinsured motorist (UIM) carrier, Countryway. *Id.* However, Cincinnati Ins. Co. insured the vehicle and provided UIM coverage. *Id.*

Throughout the underlying litigation, Countryway agreed it was responsible for damages on a *pro rata* basis. *Id.* at 2. Following judgment, the plaintiff settled with Cincinnati Ins. Co. for its *pro rata* share of her damages. Countryway, however, decided to change its position.

On appeal, Countryway again

argued it was only responsible for excess coverage. The Kentucky Court of Appeals, however, refused to consider the merits of Countryway's argument. Rather, the court held Countryway was judicially estopped from arguing its policy only provided excess coverage. *Id.* Even though the issue of judicial estoppel was not raised at the trial court level, the Kentucky Court of Appeals invoked the doctrine to estop Countryway from changing positions. Particularly, the court found Countryway "consistently agreed and argued before the court that its policy provided *pro rata* coverage." *Id.* Countryway further "stated that it agreed that it was responsible for a *pro rata* share of the damages awarded to [the plaintiff]." *Id.* As such, Countryway could not argue for the first time in support of a post-trial brief it was responsible for only excess coverage. *Id.* Given the facts, the court held, "under the circumstances, Countryway is judicially estopped from asserting an inconsistent position." *Id.*

As to the second factor listed above, the *Countryway* Court held, "the success in persuading the court requirement does not mean the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits . . . judicial acceptance means only that the first court has adopted the position urged by the party." *Id.* quoting *Colston Inv. Co.*, at 763.

Equitable Estoppel

Equitable estoppel operates to preclude a party from asserting a position inconsistent with a position previously taken by that party. *Weinberg v. Gharai*, 338 S.W.3d 307 (Ky. App. 2011). The doctrine absolutely precludes the assertion of the inconsistent position—which can prevent insurers from asserting (otherwise valid) terms and coverage limitations in insurance policies. Estoppel "offsets misleading

conduct, acts, or representations which have induced a person to rely thereon to change his position to his detriment." *Howard v. Motorists Mut. Ins. Co.*, 955 S.W.2d 525, 527 (Ky.1997). Establishing equitable estoppel involves the following elements:

1. Conduct, including acts, language and silence, amounting to a representation or concealment of material facts
 2. The estopped party is aware of these facts
 3. These facts are unknown to the other party
 4. The estopped party must act with the intention or expectation his conduct will be acted upon, and
 5. The other party in fact relied upon this conduct to his detriment.
- Id.*

As to the fourth element, a showing of actual intent to mislead is not necessary. *Id.* at 528. The court stated, "Requiring the party seeking to invoke estoppel to show actual intent to mislead, though, asks too much." *Id.* Rather, "The fact that the party to be estopped should have known or had reason to believe or expect [his actions] would have such an effect is enough." *Id.*

In *Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006), the insurance carrier hired an attorney to defend the tortfeasor. The insurance carrier was not a party. During litigation of the claim, the tortfeasor died, but the attorney did not disclose the death to opposing counsel. *Id.* at 299. Opposing counsel missed the one year statute of limitations to revive the claim. *Id.* The Kentucky Supreme Court held the actions of the attorney estopped 1) the insurance carrier and 2) the estate from relying on the statute of limitations. *Id.* at 307.

In support of the finding, the Kentucky Supreme Court noted, "one

may not stand by and make no objection to a proceeding in court with the anticipation that if it results favorably the benefits will be accepted, but that if it results unfavorably objections will be made.” *Id.* at 307. By failing to inform opposing counsel and continuing to participate in the litigation as though nothing changed, the attorney’s actions misled and deceived the plaintiff. *Id.* at 305. As the real party in interest, the attorney acted as an agent for the insurance carrier (even though the carrier was not a “party” to the litigation). *Id.* at 303. Due to the attorney’s failure to disclose, the carrier and the estate were estopped from asserting a statute of limitations defense. *Id.* at 307.

Similarly, in *Howard* (cited above), the Kentucky Supreme Court held the acceptance of premiums estopped the insurance carrier from denying coverage. *Howard*, 955 S.W.2d at 529. In *Howard*, the insurer cashed the insured’s check for an overdue premium and retained the money for two weeks without informing the insured of the conditional nature of acceptance and the right to refuse coverage. *Id.* at 528. After holding the money, the insurer (Motorist Mutual) returned a check to the insured. *Id.* On the exact same day Motorist returned the premium, the insured was in a collision. *Id.* at 526. Before the collision—on two occasions—Motorist accepted

late premiums and provided retroactive coverage. *Id.* at 527. The court, therefore, found Motorist’s prior actions indicated it would extend coverage. *Id.* Moreover, the insured assumed she had insurance because Motorist cashed her check. *Id.* at 528. The insured further testified, 1) she would not have driven if she knew she did not have insurance, 2) asked for a refund of the premium, and 3) sought insurance elsewhere. *Id.* Instead, the insured continued to drive believing she had insurance. *Id.* The court determined the insured relied to her detriment. Finding the elements of equitable estoppel satisfied, the court determined Motorist was precluded from denying coverage. *Id.* at 529.

Similarly, the Sixth Circuit recently held an insurer’s statements indicating it would pay \$75,000 under an insurance policy estopped the insurer from later denying it was responsible for paying \$75,000 in coverage. *Demolition Contractors, Inc. v. Westchester Surplus Lines Ins. Co.*, 381 Fed.Appx. 526 (6th Cir. 2010).

In yet another insurance context, Kentucky courts frequently apply the doctrine of equitable estoppel to prevent an insurance carrier from denying coverage to an insured in the absence of a reservation of rights. If an insurer fails to properly reserve its rights before assuming the insured’s defense,

equitable estoppel can preclude the insurer from denying coverage. See *American Casualty Co. of Reading, Pa. v. Shely*, 234 S.W.2d 303 (Ky. 1950); *Hood v. Coldway Carriers Inc.*, Ky.App., 405 S.W.2d 672 (1965), and *Universal Underwriters Ins. Co. v. The Travelers Ins. Co.*, Ky.App., 451 S.W.2d 616 (1970).

Likewise, in the case of claimants—*unrepresented by counsel*—the doctrine of equitable estoppel can prevent a defendant from relying upon the statute of limitations if there is “some act or conduct which in point of fact misleads or deceives the plaintiff and obstructs or prevents him from instituting [or protecting] his suit while he may do so.” *Harris*, 192 S.W.3d at 307. Settlement offers and promises to settle can estop a defendant from relying upon the statute of limitations in numerous contexts. See as examples *Montgomery v. Carter County, Tennessee*, 226 F.3d 758 (6th Cir. 2000); *Wilburn v. Pepsi-Cola Bottling Company of St. Louis*, 492 F.2d 1288 (8th Cir. 1974); and *Agricultural Ins. Co. of Watertown, NY v. Iglehart*, 386 P.2d 145 (Ok. 1963); *Economy Fire & Casualty Company v. GAB Business Services, Inc.*, 507 N.E.2d 896 (Ill.App. 1987); *Lyden v. Goldberg*, 490 P.2d 181 (Or. 1971), and *Shinabarger v. United Aircraft Corp.*, 381 F.2d 808 (2nd Cir. 1967).

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Though Kentucky has not examined a recent case directly on point and older cases employ different reasoning, the policy and spirit behind the UC-SPA and general equitable principles demonstrate Kentucky law is directly in line with the cases cited above. Kentucky law recognizes insurance companies enjoy a disproportionately large bargaining position and wealth of information not enjoyed by the average unrepresented, injured party.

Other Theories

In addition to the foregoing, there are a few other estoppel theories to keep in mind.

1. Plaintiffs can utilize the doctrine of collateral estoppel (issue preclusion) offensively to estop an insurance carrier from re-litigating issues that it previously, unsuccessfully litigated against a different plaintiff. Issue preclusion requires that at least one party to be bound in the second case was a party in the first case; the issue in the second case is the same as the issue in the first case; the issue was actually litigated; the issue was actually decided in that action; and the decision on the issue in the prior action was necessary to the court's judgment.
2. Representations to state regulators or administrative agencies by the insurance industry and/or insurance companies can estop carriers from asserting inconsistent positions, sometimes referred to as "regulatory estoppel."
3. Quasi-estoppel (not regularly identified by name in Kentucky) can apply when a party, litigating with knowledge of the facts, takes

a position inconsistent with the litigant's former position—to the disadvantage of another.

4. Administrative collateral estoppel can prevent an insurance company from re-litigating an administrative decision in court.
5. Fraud on the court applies to assertions in litigation that mislead a court. The doctrine is most frequently invoked when an attorney is involved in misleading the court, and it can serve as an exception to collateral estoppel.
6. A judicial admission is a formal statement regarding a material fact that is deliberate, clear, unequivocal and made during a judicial proceeding. A judicial admission is conclusive as to that fact.
7. Evidentiary admissions (as opposed to judicial admissions) are extra-judicial admissions that arise from a litigant's relevant statement. Unlike a judicial admission—which is conclusive as to the fact admitted—evidentiary admissions may be controverted or explained by the litigant.
8. Res judicata (claim preclusion) prohibits relitigation of claims that were litigated or could have been litigated between the same

parties in prior actions. Related to collateral estoppel, the doctrine of res judicata requires an identity of the parties, an identity of the causes of action, and a decision on the merits.

9. Though not speaking in terms of a specific doctrine, some courts find "bad faith" can lead to coverage by estoppel even if there is no coverage under an insurance policy. ⚖️

— *Amanda L. Hartley is an associate at DeCamillis & Mattingly, PLLC in Louisville.*

- 1 For the purposes of the various estoppel theories outlined herein, an insurer (and any attorney hired by the insurer) unquestionably acts as agent for the insured during the course of negotiations with a third party. *Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006). Not only is the relationship well recognized by Kentucky law, it is established by the insurance contract itself.
- 2 See *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357 (7th Cir. 1990).
- 3 There is some dispute regarding the hold's ability to prevent inconsistent positions pre- and post-litigation. Generally, the doctrine should (and often does) apply to prevent one position pre-litigation and a different position post-litigation.

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