THE USE OF WAIVER AND ESTOPPEL AGAINST FIDELITY BOND SURETIES

This paper will address the use of waiver and estoppel against fidelity bond sureties and insurers and the effect of these doctrines on sureties' ability to raise defenses under fidelity bonds and policies in coverage disputes, claims, and litigation. The focus of the paper will be action or inaction on the surety's part in the underwriting and/or claims process which have been or may be held to amount to waiver or estoppel and which therefore may prevent or hinder the surety from raising defenses to which it would otherwise be entitled.[1]

I. Waiver And Estoppel Defined

Waiver is the intentional or voluntary relinquishment of a known right, claim, or privilege.[2] **Estoppel** or **equitable estoppel**, on the other hand is a principle that provides that a party is barred from denying or alleging a certain fact or state of facts or from taking a position because of that party's previous conduct, allegation, or denial.[3] The effect of an estoppel is that a party is prevented by his own acts from

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[1] In this paper, we will, for convention's sake, utilize "surety" to refer to a fidelity bond surety or fidelity insurer. We will utilize "insured" to refer to the party on whose behalf a fidelity bond or fidelity insurance policy has been issued.

[2] 28 Am.Jur.2d, "Estoppel and Waiver", Section 154. Black's Law Dictionary (6th Ed.) defines waiver as follows:

> "The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure or forbearance to do which is inconsistent with the right, or his intention to rely upon it..."

[3] Black's Law Dictionary (6th Ed.).

claiming a right to the detriment of the other party who was entitled to rely on such conduct and acted accordingly.[4]

II. Waiver And Estoppel Applied To Sureties

No longer "favorites of the law", commercial surety companies are now treated by most courts and legislative bodies as conventional insurance companies. Thus, for example, surety companies are usually on a par with conventional insurance companies when it comes to state regulation of their claims and underwriting practices and state "vexatious refusal to pay" statutes, all of which have developed as a result of perceived and real abuses on the part of insurance companies. The net effect of these (predominantly) state[5] statutes and administrative regulations is that sureties, which are viewed merely as specialty line insurors, are treated not as "favorites of the law", but rather as "deep pocket" predators that need to be kept in line by the full force of the law. The common law made by courts across the country has by and large mirrored this hostile view of insurance companies and sureties.[6] This legal hostility is, at the very least, a challenge to the ability of sureties to raise and exercise their traditional rights and defenses. One example of this, and the subject of this paper, is

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[4] Equitable estoppel has also been defined as: (1) conduct amounting to a false representation of material facts with the intention or expectation that it be acted upon by the other party; (2) with the intention or expectation that such conduct be acted upon by the other party; (3) to a person with lack of knowledge or the means of knowledge of the truth; (4) who relies, in good faith thereon; and (5) takes action or fails to take action based thereon to his injury or detriment. "How To Prevent Loss of Fidelity Insurers' Rights By Waiver and Estoppel", Skillern, Frank I., 10 The Forum 301 (1974), citing 28 Am.Jur.2d 640-41, "Estoppel and Waiver", Section 35.
[5] Regulation of the business of insurance is, because of the McCarran-Ferguson Act, 15 U.S.C. 1012 (1958), primarily a responsibility of the states.
[6] 50 Am. Jur., Suretyship, Section 347.

the use of the law of waiver[7] and estoppel to thwart the ability of fidelity bond sureties to utilize provisions in fidelity bonds and policies which exclude, limit, or condition coverage[8] as defenses in coverage disputes and claims.[9]

A. Introduction

The burden of proof as to claims of either waiver or estoppel in a fidelity case is on the party claiming waiver or estoppel.[10] Furthermore, in order for a claim of

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[7] In Baird v. Northwestern Trust Co., 217 N.W. 538 (N.D. 1928), the court held that:

> "The test of a waiver is whether the words, acts and conduct of the insurer, or all of these taken together, are inconsistent with an intention to insist on a compliance with the terms of some particular provision or provisions of the insurance contract."

[8] Couch On Insurance 2d, Section 49B:1, provides:

> "Provisions in contracts of insurance requiring notice and proofs of loss, injury, death, claim against the insured, etc., may, like all other provisions or conditions which are inserted by insurers for their benefit or protection, be waived by them, or by their authorized agents, and since waiver of notice and proofs matures the insured's rights of action on the policy, it thereby effects the same result as though the condition requiring notice and proofs were struck out of the policy, even though it is a prescribed standard policy or a statute expressly provides for written notice and proofs."

[9] Even before considering any waiver or estoppel, the ability of sureties to utilize these "policy defenses" is hampered by the construction of any ambiguities in such policy provisions against the surety. M.S. Walker, Inc. v. Travelers Indemnity Company, 470 F.2d 951 (1973); Western National Bank of Kasper v. Hawkeye-Security Insurance Co., 380 F. Supp 508 (1974); Feutz v. Massachusetts Bonding & Ins. Co., 85 F.Supp 418 (1949); Massachusetts Bonding & Insurance Co. v. Feutz, 182 F. 2d 752 (1950); First National Bank of Fort Walton Beach v. United States Fidelity and Guaranty Company, 416 F.2d 52 (1969); Century Bank v. St. Paul Fire & Marine Ins. Co., 482 P.2d 193 (Cal. 1971); Cary v. National Surety Co., 252 N.W. 123 (Minn. 1933). Also, see "The Doctrine of Contra Proferentem in Fidelity Coverage Cases", 10 The Forum 75 (1974).

estoppel to prevail, there is the additional requirement that the party pleading it must have been misled to his injury: if there is no damage or disadvantage to the insured, a claim of estoppel will not trump an otherwise valid policy defense.[11]

B. Actions Of Sureties In The Fidelity Claims Process Which Result In Waiver And Estoppel

The most common fidelity bond provisions deemed to be subject to waiver and estoppel are those provisions dealing with the time for which notice of a fidelity loss must be given and the time for filing a proof of loss. Although such provisions are generally held to be valid and binding,[12] courts have liberally applied the principles of waiver and estoppel to prevent sureties from raising non-compliance with such provisions to defeat the claims of their insureds.[13] The rationale for this is that these provisions require action **subsequent** to the loss and rarely increase the surety's risk.[14]

Courts have also applied waiver and estoppel to prevent sureties from raising a number of other provisions in fidelity bonds and policies which exclude, limit, or condition coverage as defenses in coverage disputes and claims. The following actions on the part of surety, treated in separately numbered sections of this paper

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[10] Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993); Reynolds v. Detroit Fidelity & Surety Co., supra.
[11] Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993); Bankers' Trust Co. v. American Surety Co., 191 P. 845 (Wash. 1920).
[12] 29 Am.Jur., Insurance, Section 1100.
[13] See, Annot: "Effect of failure to give notice, or delay in giving notice or filing of proofs of loss, upon fidelity bond or insurance", 23 ALR2d 1065; Imperial Insurance, Inc. v. Employers' Liability Assurance Corp., 442 F.2d 1197 (D.C. Cir. 1970).
[14] Standard Accident Insurance Co. v. Ponsell's Drug Stores, Inc., 202 A.2d 271 (Del. 1964).

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of the surety or its agents as to the existence or extent of coverage which are contrary to the terms of coverage itself.

Except for the last category, all of these actions involve actions of the surety or its agents in the *claims* process, including litigation of such claims, which result in waiver and estoppel. The last category involves representations or actions of the surety or its agents in the *underwriting* process which result in waiver and estoppel.

1. Waiver Or Estoppel By Acceptance Of Late Notice Or Late Proof Of Loss

One of the most common ways that a fidelity bond surety has been held to waive, or to be estopped to assert, a bond defense is by accepting a claim or proof of loss notwithstanding the fact that notice of the claim or filing of the proof of loss is not timely, i.e. is made later than is provided for in the bond. In such cases, acceptance of the late notice or proof of loss is generally held to be a waiver of (or to act as an estoppel against the surety from raising) the bond requirements regarding the time for giving notice under the bond and for filing a proof of loss.[15]

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[15] Royal Loan Corp. v. American Surety Co. of New York, 173 N.E.2d 17 (Ill.App. 1961) (**waiver of notice and proof of loss requirements** by accepting proof of loss and agreeing to pay after expiration of time limit); New Amsterdam Cas. Co. v. W.D. Felder & Co., Inc., 214 F.2d 825 (5th Cir. 1954) (**waiver of insufficiency of proof of loss** by accepting proof of loss without objection, fully investigating insured's claim, and denying liability on merits thereof, not on grounds of insufficiency of proofs of loss); National Surety Co. v. Fletcher Sav. & Trust Co., 169 N.E. 524 (Ind. 1930) (**waiver of late proof of loss** by inviting insured to file proof of loss out of time); People's Loan & Savings Co. v. Fidelity & Casualty Co., 147 S.E. 171 (Ga. App. 1929); Docking v. National Surety Co., 252 P. 201 (Ks. 1927) (**waiver of late proof of loss** by accepting late proof of loss without objection and by failing to raise in answer when issue was raised for first time at trial); Goldman v. Fidelity &

2. **Waiver Or Estoppel By Continuing Investigation Of A Claim Notwithstanding A Late Notice Or Proof Of Loss**

A surety's continuing investigation of claim notwithstanding late notice of the claim or the late filing of a proof of loss has also been held to be grounds for holding such bond provisions to be waived or for estopping a surety from raising such provisions as a defense to coverage.[16] In determining whether or not a surety's

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Deposit Co. of Maryland, 104 N.W. 80 (Wis. 1905) (**waiver of late notice** where surety failed to object and where surety called on insured to make an effort to effect settlement with employee and then required him to submit itemized proof of loss and subsequently called on employer to take steps for criminal prosecution of employee); Crystal Ice Co. v. United Surety Co., 123 N.W. 619 (Mich. 1909) (**waiver of various breaches of bond** by surety's action in furnishing blanks for proof of loss and accepting such proofs without objection). However, see Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993) (no waiver despite failure to send to insured a reservation of rights or to comment upon insured's failure to file proof of loss where no reason existed for insurer to reiterate its allegiance to bond's prescriptive period, since it had done nothing to indicate willingness to deviate from it); Redington v. Hartford Accident and Indemnity Co., 463 F.Supp. 83 (S.D.N.Y. 1978) (no waiver of 2 year contractual limitations period by not promptly asserting it upon notification of claim more than 2 years after receipt of notice of loss where there was no evidence that surety intended to waive limitations period but gave numerous reminders when put on notice of claim that neither acceptance of notice of claim, proof of loss nor investigation of claim undertaken by it was to be construed as admission of liability or waiver of any rights or defenses).

[16] William H. Sill Mortgages, Inc. v. Ohio Casualty Ins. Co., 412 F.2d 341 (6th Cir. 1969) (**waiver of requirement that action be instituted within 12 months of discovery of loss** where insurer continued investigation for more than one year after insured informed it of suspected defalcation and did not advise insured of conclusion that loss was not covered); New Amsterdam Cas. Co. v. W.D. Felder & Co., Inc., 214 F.2d 825 (5th Cir. 1954) (**waiver of defense of insufficiency of proof of loss** by accepting proof of loss without objection, fully investigating insured's claim, and denying liability on merits thereof, not on grounds of insufficiency of proofs of loss); People's Bank of Queen City v. Aetna Casualty & Surety Co., 40 S.W.2d 535 (Mo. App. 1931) (**waiver of late notice provision** when, after notice was given, surety made full investigation and was given access to all records of insured without objecting to sufficiency of notice until after investigation and denial of claim);

investigation of claims gives rise to a waiver or estoppel, courts typically examine the length and nature of the surety's investigation. The more in depth the investigation conducted by the surety, the more likely it will be deemed to have waived a late notice or proof of loss. This is particularly true if the investigation prejudices the insured, either by (1) causing it to incur time, trouble and expense in assisting the surety in its investigation[17]; or (2) misleading or lulling the insured into a false sense of security by intimating that the claim will or may be paid or by taking actions which led the insured to reasonably believe that the claim would be paid.[18]

Nevertheless, there are a number of cases which have denied an insured's claim of waiver or estoppel, when all the surety did was to conduct a preliminary or

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Fitchburg Sav. Bank v. Massachusetts Bonding & Ins. Co., 174 N.E. 325 (Mass. 1931) (underwriter's asking for further information and not complaining regarding defect estopped insurer from claiming defective notice of loss) Exchange Bank of Novinger v. Turner, 14 S.W.2d 425 (Mo. 1929) (**waiver/estoppel of late notice/proof of loss provision** due to invitation of discussion and disclosure of substantive merits of claim and acknowledgment of some liability without intimating that it was standing on time limit fixed in bond for making of proof of loss; these action held to imply that surety was extending the time period for providing notice); Roark v. City Trust, Safe Deposit & Surety Co., 110 S.W.1 (Mo. App. 1908) (**waiver** of sufficiency of notice provision when surety requested additional information from claimant over the course of several months after loss occurred but had not made any complaints regarding notice).

[17] American Surety Co. of New York v. Blount County Bank, 30 F.2d 882 (5th Cir. 1929) (**waiver of late notice** by requiring or inducing insured to incur trouble or expense of proving employee embezzlement).

[18] Reynolds v. Detroit Fidelity & Surety Co., 19 F.2d 110 (6th Cir. 1927) (**waiver of limitations period** if the surety's conduct has been such as to mislead the insured, or to throw him off his guard and lull him into a false security, or if it has held out to the insured reasonable hopes of adjustment, or leaves the question of adjustment an open one, or induces delay in bringing suit to enable it to investigate the claim, provided that such action is the cause of delay in commencing suit); American Surety Co. of New York v. People's Bank, 189 S.E. 414 (Ga. App. 1936) (surety which had notice

cursory investigation of the claim by discussing the claim with the insured or by requesting more information about a claim.[19] Moreover, unless the insured has suffered some prejudice as a result of the surety's investigation, courts will generally not hold there to be a waiver or estoppel merely because the surety conducted an investigation of the claim.

3. Waiver And Estoppel By Making A Settlement Offer

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of claim and which led insured to believe that claim would be paid without suit not entitled to raise limitations period in bond).

[19] Farm Credit Bank of Texas v. Fireman's Fund Insurance Co., 822 F.Supp. 1251 (W.D. La. 1993) (no waiver of time limitation period through acknowledgments of receipt of information and investigative inquiries); Baird v. Northwestern Trust Co., supra. (surety did not waive provision of bond restricting liability to losses discovered within six months following expiration of the bond by sending an accountant to review the insured's books nor by the accountant's statements while checking the books as to whether the bank did or did not have a meritorious claim); Sheet Metal & Roofing Contractors' Ass'n v. Liskany, 369 F.Supp. 662 (W.D. Ohio 1974) (acts or conduct of insurer giving rise to waiver or estoppel must have occurred within time limitation for notice of loss, proof of loss, and filing of suits rather than after such limitations have run, and such a waiver or estoppel situation will not be related back where time limitation has lapsed); and Standard Accident Insurance Co. v. Ponsell's Drug Stores, Inc., 202 A.2d 271 (Del. 1964) (surety's request for more information regarding claim was not waiver of proof of loss requirement); Ace Van & Storage Co. v. Liberty Mutual Insurance Co., 336 F.2d 925 (D.C. Cir. 1964) (no waiver of proof of loss where insurer accepted untimely presented proof of loss, continued discussion of matter, and gave memorandum saying it "will continue investigation to as prompt a disposition of this matter as is reasonably possible"); U.S. Shipping Board Merchant Fleet Corp. v. Aetna Casualty & Surety Co., 98 F.2d 238 (D.C. Cir. 1938) (no waiver and estoppel where surety accepted late notice and made its own independent investigation); National City Bank v. National Security Co., 58 F.2d 7 (6th Cir. 1932) (no waiver or estoppel by surety's acknowledgment of receipt of delayed notice of loss and asking to be kept advised of progress of case).

A surety's actions in attempting to negotiate the settlement of a fidelity claim may result in waiver and estoppel of policy defenses, particularly if such negotiations mislead or prejudice an insured.[20]

4. Waiver And Estoppel By Denial Of Coverage On Other Ground

A surety's denial of a claim on one basis will frequently lead to waiver of and/or estoppel to assert another defense as an additional basis for denial.[21] As the

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[20] Forrester v. Aetna Casualty and Surety Co., 478 F.Supp. 42 (N.D. Ga. 1979) (if negotiations for settlement of claim have led insured to believe that claim would be paid by insurer without suit, such conduct will constitute **waiver of time requirement of policy**); Royal Loan Corp. v. American Surety Co. of New York, 173 N.E.2d 17 (Ill.App. 1961) (**waiver of notice and proof of loss requirements** by accepting proof of loss and agreeing to pay after expiration of time limit); Home Indemnity Co. v. Midwest Auto Auction, Inc., 285 F.2d 708 (10th Cir. 1960) (**estoppel to raise contractual limitation period** as a result of surety's making several settlement offers, one or more of which occurred after expiration of contractual limitation period for bringing suit); Fidelity and Deposit Co. of Maryland v. Bates, 76 F.2d 10 (8th Cir. Iowa 1935) (**waiver of proof of timeliness of proof of loss** when adjuster continued his investigation without objection to the sufficiency or timeliness of notice or proof of loss and stated that any loss shown to be result of dishonest act of cashier would be paid without suit); Knights Of The Ku Klux Klan, Inc. v. Fidelity & Deposit Co. of Md., 169 S.E. 514 (Ga. App. 1933) (**estoppel to raise contractual limitations period** as a result of acts in negotiating for settlement of loss, leading obligee to believe claim would be paid without suit).

[21] H.S. Equities, Inc. v. Hartford Accident and Indemnity Co., 661 F.2d 264 (2nd Cir. 1981) (denial of claim on ground that loss is not covered operates as **waiver of notice requirements of policy**); Delmar Bank of University City v. Fidelity & Deposit Co. of Md., 428 F.2d 32 (8th Cir. 1970) (**waiver of defense that loss was not result of forgeries** by surety when it denied liability on ground that checks giving rise to loss did not bear forged endorsements within meaning of bond, but failed to assert defense that loss was not result of forgeries); Standard Accident Insurance Co. v. Ponsell's Drug Stores, Inc., 202 A.2d 271 (Del. 1964) (conduct of insurer in informing insured that it was not going to do anything about claim could be construed as denial of liability and accordingly a waiver of requirement of proof of loss); Standard Brass & Manufacturing Co. v. Maryland Casualty Co., 153 So.2d 475 (4th Cir. 1963) (**waiver of untimely proof of loss** where surety declined claim on basis of insufficient proof of dishonesty but agreed to consider further evidence of same since

cases cited herein indicate, a denial of a fidelity claim on substantive grounds or for the reason that a claim is otherwise not covered under the bond frequently results in a waiver of procedural provisions of the bond, such as the provisions requiring timely

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this lulled insured into a false sense of security); Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Md., 202 F.2d 794 (7th Cir. 1953) (**waiver of defense of insufficiency of proof of loss** by denial of liability on grounds that acts of principal's employee were not covered by bond); New Amsterdam Cas. Co. v. W.D. Felder & Co., Inc., 214 F.2d 825 (5th Cir. 1954) (**waiver of defense of insufficiency of proof of loss** by accepting proof of loss without objection, fully investigating insured's claim, and denying liability on merits thereof, not on grouds of insufficiency of proofs of loss); Star Fastener v. American Employers' Ins. Co., 96 N.E.2d 713 (Mass. 1951) (denial of all liability would estop surety from requiring insured to file sworn claim within 90 days after notice of loss if denial is made within such 90 day period; however, if denial occurs after time within which insured could file sworn claim, insurer would not be estopped from raising requirement that insured file sworn claim within 90 days after notice of loss); Fuller v. Home Indemnity Co., 60 N.E.2d 1 (Mass. 1945) (denial of liability or refusal to pay not predicated on failure to furnish proof of loss is a waiver of any objection on that ground); Docking v. National Surety Co., 252 P. 201 (Ks. 1927) (**waiver of notice provision** when surety denies claim on other grounds); Cary v. National Surety Co., 251 N.W. 123 (Minn. 1933) (**waiver of defense of notice provision** by surety when it disclaimed all liability; surety could not later raise defense of noncompliance with the bond's provisions—which noncompliance had never been previously raised by the surety, particularly where the insured acted in good faith and in a reasonable manner and where surety was not prejudiced by the acts or omissions of the insured); Masters v. Massachusetts Bonding and Insurance Co., 84 N.W.2d 462 (Mich. 1957) (**waiver of notice requirements** by denial of claim for reasons of lack of proof of the principal's wrongdoing without asserting lack of proper notice as a grounds for denial); Farmer's Produce Co. v. Aetna Casualty & Surety Co., 213 N.W. 685 (Mich. 1927) (**waiver of notice requirements** by denial of claim for reasons of lack of proof of the principal's wrongdoing without asserting lack of proper notice as a grounds for denial); Piedmont Grocery Co. v. Hawkins, 104 S.E. 736 (W.Va. 1920) (**waiver of insufficient notice** by denial of liability solely on other grounds); Deleware State Bank v. Colton, 170 P. 992 (Ks. 1918) (**waiver of timely notice of loss** by conduct of surety in placing its enial of liability upon other distinct grounds); Equitable Surety Co. v. Bank of Hazen, 181 S.W.279 (Ark. 1915) (**waiver of notice provision** through unconditional denial of all liability); T.M. Sinclair & Co. v. National Surety Co., 107 N.W. 184 (Iowa 1906); T.M. Sinclair & Co. v. National Surety Co., 107 N.W. 184 (Iowa 1906) (**waiver of proof of loss requirement** where surety denies all liability).

notice, timely proof of loss, or timely bringing of suit. Such waiver and estoppel will likely result unless such provisions and defenses are specifically set out in a reservation of rights letter or agreement at the earliest opportunity following receipt of notice of the claim and/or proof of loss and again, most certainly, in the denial of the claim.[22]

5. Miscellaneous Actions And Representations Giving Rise To Waiver And Estoppel

[22] Nevertheless, there is authority that a denial of a claim will not result in waiver or estoppel of other defenses unless the denial prejudiced the insured or otherwise induced the insured to take action. See People's Bank & Trust Co. of Madison County v. Aetna Casualty & Surety Co., 113 F.3d 629 (6th Cir. 1997) (no waiver or estoppel of defense of absence of manifest intent although insurers denied coverage for loss in question on single specific ground in years 1985 and 1986 respectively, and did not raise any other defenses until suit was filed in 1994); New York University v. Continental Insurance Co., 662 N.E.2d 763 (N.Y. 1995) (no waiver of defense based on inventory shortage exclusion despite fact that insurer failed to include this defense in either of the disclaimer letters sent to insured: failure to disclaim based on an exclusion will not give rise to coverage that does not exist; although an insurer may waive right to disclaim based on insured's noncompliance with condition precedent, its right to disclaim coverage based on policy exclusion can be defeated only by estoppel); State Bank of Viroqua v. Capitol Indemnity Corp., 214 N.W.2d 42 Wis. 1974) (where insurer did not deny coverage within time notice of loss was required to be given and did not induce bank to postpone giving notice by promises or action upon which bank relied, but denied liability only after expiration of time within which notice should have been given, insurer was not estopped to raise defense of failure to give timely notice and did not waive such defense because it denied liability); Oakley Grain & Supply Co. v. Indemnity Insurance Co., 173 F.Supp. 419 (S.D. Ill. 1959) (insurer's inaction and general denial of any liability on ground that evidence failed to point to loss resulting from acts enumerated in bond did not give rise to waiver of notice and proof of loss defense where denial of liability occurred after time for furnishing proof of loss had expired); Murray v. American Surety Co. of N.Y., 69 F.2d 147 (5th Cir. 1934) (no waiver or estoppel as to provision requiring notice within ten days of after discovery of loss by surety denying liability for loss on ground that one year time limit for discovery of loss had expired where notice defense was not disclosed until time of suit on bond at which time surety promptly took advantage of it).

There are various other actions or representations by the surety which may result in a defense being waived or the surety being estopped from raising such defense to a fidelity claim. What these actions or representations have in common is that in each, the surety or its agents takes actions or makes representations which lead the insured into believing that the claim will be paid or that a defense is waived.[23]

[23] Forrester v. Aetna Casualty and Surety Co., 478 F.Supp. 42 (N.D. Ga. 1979) (provision limiting time to sue to 12 months after inception of loss may be **waived** by insurer by conduct which would reasonably lead insured to believe that strict compliance with limitation provision would not be insisted upon); New Amsterdam Casualty Co. v. Basic Building & Loan Ass'n of City of Newark, 60 F.2d 950 (3rd Cir. 1932) (**waiver of proof of loss requirement** where surety knew of loss and cooperated to protect itself against loss); Ceylon Farmers' Elevator Co. v. Fidelity & Deposit Co. of Maryland, 203 N.W. 985 (Minn. 1925) (**waiver of proof of loss requirement** where surety's agent assisted insured in preparation of claim forms and where surety failed to object to presentation of claim during the investigation); Hartford Accident & Indemnity Co. v. Luper, 421 P.2d 811 (Okla. 1966) (**waiver of limitations period for filing proof of loss** by surety whose agent wrote several letters stating that claim would not be paid as long as employee maintained he was innocent of charge of dishonesty); Maryland Casualty Co. v. Tucker, 96 P.2d 80 (Okla. 1939) (**waiver of proof of loss requirement** by surety where extent of loss from embezzlement could not be immediately determined and agent of surety suggested that matter be allowed to lie dormant until loss could be determined, but mailed forms for proof of loss to insured); American Surety Co. of New York v. Peoples Bank, 189 So. 414 (Ga. App. 1936) (surety which led insured to believe that claim would be paid without suit if insured would force estate, from deposit of which cashier as administrator transferred funds to his personal account, to exhaust bond of cashier as administrator before calling on bond of cashier as such, held not entitled to take advantage of provision requiring that action on bond be brought within stated time); Thomas v. Standard Accident Ins. Co. of Detroit, Mich., 7 F.Supp. 205 (D. Mich. 1934) (agreement that suit should be brought immediately to determine liability under bond waived formal proof of loss); Borough of Nanty-Glo v. American Surety Co. of New York, 175 A. 536 (Penn. 1934) (surety **estopped from raising conditions regarding notice of loss, filing of claim, and timely suit** where it was held to have misled insured as to the necessity of performing the condition in the policy where the surety undertook an independent investigation for more than a year, twice requested indulgence from the insured and never requested further notice of loss or any proof of claim); Inter-City Express Lines, Inc. v. Hartford Accident & Indemnity Co., 178 So.

6. Waiver Of Defenses By Failure To Timely Raise In Litigation

In most jurisdictions, policy defenses are in the nature of "affirmative defenses" to be raised by the surety in a suit on a fidelity bond or policy. The failure to raise such affirmative defenses in a timely and proper way may very well result in it being deemed waived.[24]

C. Actions Of Sureties In The Fidelity Bond Underwriting Process Which Result In Waiver And Estoppel

The above-cited cases generally involve actions by the surety in the *claims* process. In addition, there are a number of cases involving representations or actions

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280 (La. App. 1938) (surety **waived provision requiring notice be sent to home office** when insured was led to believe that notice to surety's agent was all that was required, settlement was discussed, and defense of improper notice was not raised until just before trial). However, see Sheet Metal & Roofing Contractors' Ass'n v. Liskany, 369 F.Supp. 662 (W.D. Ohio 1974) (for doctrines of waiver and estoppel to be applied against an insurer, with regard to delay in giving notice of loss and filing suit, insurer must have performed some act which in and of itself prevents insured from seeking a remedy in court; mere conversation, negotiation or discussion is not sufficient unless it deterred insured from his chosen course of action and misled insured to extent that it delayed filing of suit until limitation period had terminated); Public Warehouses of Matanzas v. Fidelity & Deposit Co. of Md., 77 F.2d 831 (2nd Cir. 1935) (that insured asked person without authority to grant extension of time to make proof of loss and were informed of reference of request to home office and of necessiy of certain additional proof before claim could be passed on held insufficient to show waiver of provision requiring proof of loss within 30 days of discovery of loss) .

[24] Masters v. Massachusetts Bonding and Insurance Co., 84 N.W.2d 462 (Mich. 1957); Hanover Insurance Co. v. Cameron Country Mutual Insurance Co., 730 F.Supp. 998 (E.D. Mo. 1990); Galotrade Shipping and Chartering, Inc. v. Travelers Indemnity Co., 706 F.Supp. 214 (S.D.N.Y. 1989); F.D.I.C. v. Central Air Control, Inc., 785 F.Supp. 898 (D. Kan. 1992); Stokors, S.A. v. Roth, 887 F.Supp. 265 (D. Kan. 1995); Davis v. Bryan, 810 F.2d 42 (2d Cir. 1987) (failure to raise statute of limitations at earliest possible moment results in its waiver).

of the surety or its agents in the *underwriting* process which may give rise to waiver or estoppel of provisions of the bond. Such representations or actions usually pertain to the existence or extent of coverage of the bond which are contrary to the terms of coverage itself. These actions or representations can be broken down into several categories:

- The surety's knowledge of facts, including the insured's expectations regarding the nature and extent of coverage, at the time of underwriting which are deemed to estop it from raising a particular defense to coverage or are deemed a waiver of such defense[25];

[25] Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., 318 F.Supp. 1301 (D. Fla. 1970), rev'd on other grounds, 463 F.2d 4 (5th Cir. 1972),523 F.2d 744 (5th Cir. 1975), 465 F.Supp. 478 (D. Fla. 1979) (**waiver of defense based on knowledge and discovery provision of bond** when surety knew at the time of underwriting that only one individual, who was the sole stockholder and alter ego of corporations, could steal anything of consequence and further knew that the only thing he could steal was the very substantial amount of premium deposits entrusted to care of his corporations and belonging to others); Frederick Inv. Co. v. American Surety Co. of New York, 169 A. 155 (Pa. 1933) (**waiver of definition of "employee" provision**—surety's knowledge of the risks which its insured wanted to cover and fact that otherwise independent contractor was listed as a "covered employee" demonstrated that individual was intended to be a covered employee, notwithstanding the fact that individual was not, properly speaking, an "employee" within the definition of the bond); Pennsylvania Car Co. v. Hartford Accident & Indemnity Co., 151 A. 664 (Del. Super. Ct. 1930) (surety **estopped** to deny liability on basis that dishonest individual was not an "employee actually in the service of the employer" where the individual covered by bond was engaging in the fraud of a subsidiary company that was under the supervision and direction of the holding company for whom the individual was employed, particularly when the individual's position was listed in the schedule of positions attached to the bond). However, see Employer's Administrative Services, Inc. v. Hartford Accident & Indemnity Co., 709 P.2d 559 (Ariz. App. 1985) (no estoppel to deny that two sole officers, directors and shareholders of a corporation were covered employees under the bond where (1) a member of an independent insurance agency who procured the bond for the corporation was acting as an insurance broker on behalf of the corporation so that his

- The surety's representations to the insured at the time of underwriting regarding the nature and extent of coverage which are deemed to estop it from raising a particular defense to coverage or are deemed a waiver of such defense[26];
- Other actions by the surety at the time of underwriting which are otherwise inconsistent with its raising a particular defense to coverage and are deemed to estop it from raising a particular defense to coverage or are deemed a waiver of such defense[27].

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knowledge could not be imputed to the surety; and (2) the independent agent did not intend that the individuals at issue be automatically covered; and (3) the surety was not aware that the individuals were the sole officers, directors and shareholders of the corporation).

[26] United States Fidelity & Guaranty Company v. Craig County Bank of Vinita, Oklahoma, 227 F.2d 799 (10th Cir. 1955) (**waiver and estoppel of termination provision of bond** where surety which had been promptly informed of previous banking irregularities advised insured that bond was in force and in effect and took actions, including extending the bond, which led insured to rely upon such actions and to take no action to obtain another bond); Davis Co. v. Hartford Accident & Indemnity Co., 425 S.W.2d 776 (Tenn. App. 1967) (**waiver of termination provision and estoppel to deny liability on bond** when surety was given notice by notice to surety's agent and neither surety nor agent thereafter notified insured that bond was forfeited or cancelled as to dishonest employee);

[27] T.M. Sinclair & Co. v. National Surety Co., 107 N.W. 184 (Iowa 1906) (where surety described individuals in the bond as brokers when securing their fidelity, surety was **estopped** from alleging that they were commissioned merchants: Surety chose its own language in describing them and knew of their actions; it cannot thereafter claim that it did not insure the individuals.); Research Equity Fund, Inc. v. Ins. Co. of North America, 602 F.2d 200 (9th Cir. 1979) (employee of investment adviser which was listed as named insured on declarations page of bond and which employee was listed as an employee of such investment adviser on application for bonds was covered by bond, notwithstanding the fact that he was not technically an "employee" within definition of bond);

The bottom line in regard to the above cases is that a defense to a fidelity claim raised by a surety which is inconsistent with an earlier action on the part of the surety or its agent at the time of underwriting is susceptible to being defeated by waiver or estoppel arguments.

III. Avoiding Waiver And Estoppel

The above cases make clear that the surety needs to act perspicaciously if it wants to preserve those defenses provided to it under its fidelity bond. Care is required in both the underwriting and claims processes lest the surety be deemed to have waived various policy defenses or to be estopped from raising those defenses. Since the results in waiver and estoppel cases are very factually dependent, it is difficult to discern more than a very few universally applicable principles or prescriptions from these cases. Nevertheless, it is clear, based on these cases, that sureties can take some measures to minimize the possibility that the principles of waiver and estoppel will be used against it.

- Sureties should have clear guidelines for their agents regarding the authority of such agents to make representations regarding the extent or nature of fidelity bond coverage.
- Bonds should contain specific provisions specifying and limiting the means by which coverage can be amended or extended. Such provisions should require a written endorsement from the home office and should provide that coverage may not be amended or extended, notwithstanding any representations of the agent to the contrary.

- Communication and coordination between the surety's underwriting department and its agents is important so that bond coverage provisions are not inconsistent with actions of the surety's agent in calculating or accepting premiums, the listing of covered individuals and entities on the bond application and/or declarations page. This is particularly important insofar as the bond limits coverage to certain entities and individuals: Special care should be devoted to ensure that individuals listed for purpose of coverage are not inconsistent with the bond's provisions regarding covered individuals, particularly the definition of "employee" under the bond.
- When first receiving notice of a claim, the surety's representative should acknowledge notice of the claim via a short letter. The letter should contain a reservation of rights.
- Extensions of time for the investigation and presentation of claims may be appropriate under the circumstances. However, these should be in writing and carefully drafted so as to prevent a waiver of claims. These also should include a reservation of rights.
- The surety's representatives and agent should make no promises or assurances until the claim has been fully investigated.
- The surety should avoid multiple lines of communication so as to avoid conflicting information being given to the insured.

- Every communication with the insured should be in writing. Oral communications with the insured (i.e. through telephone calls or face-to-face meetings) should be confirmed and memorialized by contemporaneous correspondence.
- The surety should investigate a claim thoroughly before denying a claim so as to be apprised of all available defenses. Any denial should be in writing and should include all grounds for denial of the claim. It should also reserve any and all rights and defenses available to the surety under the bond or otherwise.
- The surety should immediately point out to the insured any problem with notice and/or proof of loss.
- If the fidelity claim is clearly not timely, the surety should attempt to get a non-waiver agreement before making any further investigation of the claim. If this is impracticable, a full reservation of rights should be made.

Obviously, the above actions are only a general set of guidelines for sureties. Some of these guidelines may not be desirable in every case and in every jurisdiction. Indeed, there are many occasions when a surety will want to voluntarily waive certain technical defenses that it may have under its bond. On the other hand, these guidelines are necessarily generic, and may therefore be inadequate for a particular situation or jurisdiction. Accordingly, it is important to be familiar with the law regarding waiver and estoppel in the particular jurisdiction in question.

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1. M.S. Walker, Inc. v. Travelers Indemnity Company, 470 F.2d 951 (1973).
(absent exceptional circumstances, look to the policy itself, not witnesses; ambiguity, construction against drafter)
District court should have opportunity to admit previously excluded statements and to give statements such weight as it determines with the other evidence that either party wishes to introduce relative to the alleged losses and the appropriate amount of recovery, to construe and apply the provisions and limitations of the policy.

2. Western National Bank of Kasper v. Hawkeye-Security Insurance Co., 380 F. Supp 508 (1974).
(blanket bond coverage, construction against drafter)
If there is any doubt, a blanket bond is to be construed against insurer; the term blanket bond itself indicates wide coverage, however Banker's blanket bonds are generally not viewed as being contracts made for the benefit of third party beneficiaries.

3. Montgomery Ward & Co. Inc., v. Fidelity & Deposit Co. of Maryland, 162 F.2d. 264 (1947).
(a bond for indefinite term is not altered by notation on back of bond; ambiguity)
Upon its face the bond represents a continuous and continuing liability, if reference is not made in the bond agreement to the condition on the back of the bond, the condition on the back must be ignored in the construction of the agreement.

4. Weinhaus v. Massachusetts Bonding & Insurance Co (1948).
(enforcement of bond or contract by third party; ambiguity)
A bond or contract made between two parties may be enforced by a third party, when the bond or contract was entered into for his benefit, despite the fact that the third party is not named in the bond or contract.

5. Feutz v. Massachusetts Bonding & Ins. Co., 85 F.Supp 418 (1949).
(ambiguity, construction against surety)
Ambiguities, if any, in a bond and contract as in a policy of insurance, are to be resolved against the surety company and construed most strongly in favor of the plaintiff.

6. Massachusetts Bonding & Insurance Co. v. Feutz, 182 F. 2d 752 (1950).

(ambiguity, construction against compensated surety,)

A compensated surety in the interpretation of a contract is construed most strongly against the surety and in favor of the indemnity, unlike a voluntary or accommodation surety which is regarded as favored by the law and the rule of strictissimi juris.

7. Standard Title Insurance Company v. United Pacific Insurance Company, 364 F.2d 287 (1966).

(ambiguity, provisions of contract must be accepted as intent of parties)

In a written contract if it not ambiguous, the intent of the parties must be determined from the language in the contract; this commercial blanket bond issued to indemnify against loss through dishonest acts of an agent did not require that agency agreement be in writing.

8. First National Bank of Fort Walton Beach v. United States Fidelity and Guaranty Company, 416 F.2d 52 (1969).

(ambiguity, banker had no real freedom of choice or bargaining power to determine terms of the bond)

In contract law, where one party has no real power to affect the terms of the agreement, ambiguities will be interpreted against the drafter.

9. First National Bank of Decatur v. Insurance Company of North America, 424 F.2d 312, (1970).

(ambiguity, blanket bond terms)

It is not conceivable that in a blanket bond to cover the assets of a bank containing the word "property," would not be defined broad enough to include intangible as well as tangible property.

10. Fidelity & Deposit of MD. v. Usaform Hail Pool Inc., 318 F.Supp 1301 (1970).

(definition of employee, waiver of defense)

The repeatedly inconsistent statements by company regarding its position that its employee was not covered under the bond agreement constituted a waiver of its attempted defense of prior dishonesty.

11. Fidelity & Deposit of Maryland v. Usaform Hail Pool, Inc., 463 F.2d 4 (1972).

(definition, and dishonest act of employee)
Funds diverted for personal use of employees, or for any purpose that was not a legitimate purpose of the corporation, would represent a loss to the corporation, and the bonding company would be able to recover such amounts.

12. Fidelity & Deposit of Maryland v. Usaform Hail Pool, Inc., 523 F.2d 744 (1975).
(definition, and dishonest act of employee)
To recover on the bond it is necessary to prove that the employees committed fraudulent and dishonest acts which have caused a loss to the insured corporation through the dishonest act.

13. Fidelity & Deposit of Maryland v. Usaform Hail Pool, Inc., 465 F.Supp 478 (1979).
(set off affirmative defense)
Insurer's theory of unjust enrichment by allowing claimant's overlapping recovery of same money in two or more claims constitutes an affirmative defense that is untimely by thirteen years.

14. Research Equity Fund, Inc., v. Insurance Company of America, 602 F.2d 200 (1979).
(dishonest act of an employee)
When an employee knowingly pays more for an item than the item is worth with the intention of enriching the person from whom the purchase was made, this is theft for fidelity bond purposes.

15. Pioneer National Title Insurance Co., v. American Casualty Company of Reading, Pennsylvania, 459 F.2d 963 (1972).
(definition of employee)
Guaranty's denial that its attorney was a Guaranty employee did not preclude plaintiff in its suit against defendant on fidelity bond from asserting that Guaranty's attorney was an employee as defined in the bond.

16. Woodale, Inc., v. Fidelity and Deposit Company, 378 F.2d 627 (1967).
(definition of employee)

Resort must be given to principles of the master-servant relationship under Iowa law in determining whether one is acting as "contractor" or as defined "employee" under the bond, furthermore, dual employment per se does not defeat coverage under the bond.

17. Employers' Liability Assur. Corporation, Ltd., of London, England, v. Wasson, 75 F.2d 749 (1935).

(definition of employee)

Under a blanket bond that a bank carried for all its employees, a person who received no remuneration from the bank was considered under the employment thereof when the employment or agency of the person was acted upon.

18. Fort Smith Tobacco & Candy Co. v. American Guarantee and Liability Insurance Company, 208 F. Supp. 244 (1962).

(Loss under prior bond or policy, estoppel properly invoked)

Estoppel may be asserted as a proper defense against shortages that occurred during the term of the prior policy but discovered within one year after the termination of the same policy.

19. Irvin Jacobs & Co. Fidelity & Deposit Co. of Maryland, 202 F.2d 794 (1953).

(proof of loss, waiver of defense, dishonest acts)

While proof of claim was sufficient, defendant waived any such defense by denying liability on the ground that the alleged acts were not covered by the bond and were therefore not dishonest within the meaning of that term of the bond.

20. Du Bois Nat. Bank v. Hartford Accident & Indemnity Co, 161 F.2d 133 (1947).

(definition of waiver and estoppel)

Insurer having voluntarily relinquished a known right, waiver was thereby complete because waiver is an intentional relinquishment of a known right by a party.

21. New Amsterdam Cas. Co. v. W.D. Felder & Co., Inc., 214 F.2d 825 (1954).

(Proofs of Loss accepted by insurer without objection)

Proofs of loss accepted by insurer without objection upon which insurer denied liability on the merits of the claim and not upon the ground of insufficiency of proofs of loss, waived the proof of loss requirement as required by the fidelity bond even if the proofs of loss were otherwise insufficient.

22. Grady v. United States, 98 F. 238, (1899)

(Proofs of Loss, dishonest act)

Principal shall comply with all the duties and trusts imposed on him either by law or by the rules and regulations of the post office department, the liability of the sureties is not only within the spirit, but the letter of the bond.

23. Oakley Grain & Supply Company v. Indemnity Insurance Company of North America, 173 F.Supp 419 (1959).

(Proof of loss, waiver by affirmative act)

In order to have a waiver there must be some affirmative act on the part of the defendant that amounts to a waiver of the proof of loss requirement; the burden is on the plaintiff to allege and prove the waiver.

24. Ace Van & Storage Co v. Liberty Mutual Insurance Company, 336 F.2d 925 (1964).

(Proof of loss, conduct to constitute waiver)

The basis for doctrine of waiver or estoppel is reliance upon the conduct before the deadline, furthermore, conduct after the deadline coupled with conduct occurring before the deadline may be evidence of waiver. In addition there is no waiver when the conduct was not designed to lure the (appellant) into any false sense of security.

25. United States Shipping Board Merchant Fleet Corp. United States v. Aetna Casualty & Surety Co., 98 F.2d 238 (1938).

(waiver, failure to give notice)

Surety that accepted notice of default under fidelity bond did not waive nor was estopped from claiming nonperformance when a condition of the bond which required that there be notice of default within 30 days and surety's denial of liability was predicated on failure to give notice.

26. Fidelity & Deposit Co. of Maryland v. Bates, 76 F.2d 160 (1935).

(waiver, dishonest acts)

Fraud and dishonesty are to be given broad significance as they extend beyond the criminal meaning and must be taken most strongly against the surety company, a jury would be justified in finding against the surety when there is substantial evidence that the defendant waived compliance with the bond requirements as to notice and proofs of loss.

27. Public Warehouses of Matanzas v. Fidelity & Deposit Co. of Maryland, 77 F.2d 831 (1935).

(definition of waiver, proofs of loss)

To constitute waiver as to the time for filing proof of loss, there must be a clear statement of the intention of the appellant to relinquish a known right and that statement must be made by an agent having authority to give such a waiver.

28. Murray v. American Surety Co, of New York, 69 F. 2d 147 (1934).

(waiver, discovery of loss)

Surety denying loss under canceled fidelity bond on ground that one year time limit for discovery of loss had expired did not waive nor was estopped to rely on the provision that required notice within ten days after discovery of loss.

29. Hansen & Roland, Inc., v. Fidelity & Deposit Co. of Maryland, 72 F.2d 151 (1934).

(limitation of liability)

The aggregate liability of fidelity insurer under two bonds for any loss, whether the loss was sustained under the first or the second bond, shall in no event exceed the larger or largest of the amounts carried under the bonds.

30. Mascara v. Firemans' Fund Insurance Company, 611 F.2d 338 (1979)

(waiver, proof of loss)

When no proof of loss was filed prior to the institution of the action, absent other circumstances, the mere act of forwarding a copy of the Complaint does not constitute filing a proof of loss and may have a bearing on the related issues of waiver and estoppel.

31. Imperial Insurance, Inc., v. Employers' Liability Assurance Corporation, 442 F.2d 1197. (1970)

(Waiver, Proof of Loss)

Provision in policy, giving instructions on waiver of time specified for proof of loss and not objected to by insurer at the early stage of the proceedings at which insurer's position had been rejected, reserved for review insurer's position on waiver, however, the time specified in the policy for proof of loss could be waived orally or by conduct.

32. William H. Sill Mortgages, Inc., v. Ohio Casualty Ins. Co., 412 F.2d 341(1969).

(Waiver, proof of loss)

In action on Fidelity bond containing no provision voiding coverage if proof of loss is not filed timely nor requiring waiver to be in writing; failure to file proof of loss did not bar plaintiff as defendant's conduct of investigating the claim waived the filing of proof of loss requirement time limited in the bond.

33. Home Indemnity Company v. Midwest Auto Auction, Inc., 285 F.2d 708 (1960).
(limitation on action, estoppel)
Defendant estopped to assert the strict 15 month contractual period of limitations for bringing an action as specified in bond when substantial evidence found that the employer covered by employee's indemnity bond suffered three separate losses as a result of fraud or dishonesty on part of employees.

34. Redington v. Hartford Accident and Indemnity Company, 463 F. Supp 83 (1978).
(waiver and estoppel)
Defendant did not waive period of limitations when prior to any legal proceedings not only negated any intent to waive that defense, but put plaintiff on notice that legal proceedings be commenced. Furthermore, defendant was not estopped from asserting defense of period of limitations by virtue of defendants "equivocal' conduct upon receipt of plaintiff's claim.

35. H.S. Equities, Inc., v. Hartford Accident and Indemnity Company, 661 F.2d 264 (1981).
(waiver, repudiation of liability)
A repudiation of liability by insurer through affidavit that the loss incurred is not covered by the policy operates as a waiver of the notice requirements contained in the policy.

36. Forrester v. Aetna Casualty and Surety Company, 478 F. Supp 42 (1979).
(waiver, limitation on action)
Provision in insurance policy limiting the time to sue to twelve months after the inception of the loss may be waived by the insurer when conduct, which would reasonably lead the insured to believe that strict compliance with the provision would not be insisted upon.

37. Sheet Metal and Roofing Contractor's Association of Miami Valley, Ohio v. Liskany, 369 F.Supp 662 (1974)
(time limitations for waiver and estoppel)
Acts or conduct giving rise to waiver or estoppel must have occurred within the time specified and limited by the indemnity policy; acts or conduct occurring after the time limitation has passed will not be related back when the time limitation has lapsed.

38. Prudence Co., Inc., v. Fidelity & Deposit Co. of Maryland, 77 F.2d 834(1935).
(waiver, condition of the bond)
Waiver of the condition of the bond, that required the waiver of any default or omission to be in writing for the purpose to consent to changes as substitutions or omissions, would release the appellant from such items as claims or damages, however, inferior substitutions

or omissions not consented to may be considered as items of damage.

39. Thomas v. Standard Accident Ins. Co. of Detroit, Mich, 7 F.Supp 205 (1934) (waiver of proof of loss)
Parties in good faith that agreed to bring suit immediately, without further preliminaries, to determine the question of liability waived the necessity of a formal proof of loss claim.

40. New Amsterdam Casualty Co. V. Basic Building & Loan Ass'n of Newark, 60 F. 2d 950 (1932).
(waiver, proof of loss)
When surety has actual notice and co-operates to protect itself from actual loss, the purpose of the bond requirement for proof of loss has been accomplished, thus the failure to file formal proof of loss does not constitute a defense and it is unnecessary to consider the adequacy of the proof of loss and the time within which it should have been filed.

41. National City Bank v. National Security Company, 58 F.2d 7 (1932).
(waiver and estoppel, denial of liability)
Where surety company denied liability, in absence of conduct creating estoppel, a waiver must be supported by an agreement founded upon valuable consideration, but when one party acts to mislead the other he is estopped thereby.

42. Fuller v. Home Indemnity Co. 60 N.E.2d 1, (1945)
(proof of loss and waiver)
Formal proof of loss was waived by bonding company after attorney for broker mailed to the bonding company a statement of loss designated as a "claim" signed and by attorney but not sworn to when liability was denied by the bonding company on the ground that the loss was not covered by the bond.

43. Piedmont Grocery Co. v. Hawkins 104 S.E. 736 (1920).
(waiver, notice requirements)
A fidelity company with knowledge of the facts in regard to notice requirements that denies liability on grounds other than notice will be regarded as having waived notice, and or will be estopped from asserting another claim not specified as a defense in said suit.

44. Royal Loan Corporation v. American Surety Company of New York, 173 N.E.2d 17 (1961).
(waiver of notice and proof of loss requirements)

The provisions in a bond or insurance policy as to notice and proofs of loss may be waived by the company if the insurance or bonding company admits its liability to pay the claim even when it is stated in the policy that no waiver shall be effective.

45. State Bank of Viroqua v. Capital Indemnity Corp., 214 N.W.2d 42 (1974).
(estoppel, failure to give timely notice)
Bonding company that denied liability after the expiration of the time within which notice is to be given is estopped to raise the defense of waiver or the failure to give timely notice because the bonding company denied liability.

46. National Surety Co. v. Fletcher Sav. & Trust Co., 169 N.E. 524 (1930)
(waiver of proof of loss requirement)
Plaintiffs gave notice at the earliest practical moment after they had reason to believe dishonest acts of employee resulted in a loss; thereafter defendants inviting plaintiffs to file proof of loss as was required by the policy waived the bond provision which required proof of loss to be filed in five days after the discovery of loss.

47. Fitchburg Sav. Bank v. Massachusetts Bonding & Ins. Co., 174 N.E. 324 (1931).
(estoppel, notice of loss)
Bonding company was estopped from setting up defense of defective form of notice when plaintiff sent two letters that were sufficient in form to give notice to the bonding company that there was an apparent loss which in turn enabled the bonding company to make the necessary investigation to determine the merits of the claim.

48. Farmers' Produce Co. v. Aetna Casualty & Surety Co., 213 N.W. 685 (1927).
(notice requirements not fully complied with constitute waiver)
In action against surety on a bond, to indemnify employer for losses resulting from dishonest acts of employee's, which required that notice of loss be given to surety within three months of discovery of loss, but if the requirements of notice are not fully met, the requirements are considered waived by the surety.

49. Docking v. National Surety Co. 252 P. 201 (1927)
(waiver of proof of loss; time)
When liability is denied on other grounds, and surety company made no objection that proof of loss was not made in time, but raised this defense for the first time at trial; the proof of loss defense is considered raised to late and is thereby waived.

50. Delaware State Bank v. Colton 170 P. 992 (1918).
(waiver of proof of loss; time)
Bank gave notice as soon as practicable to surety of its discovered loss which surety investigated and thereafter denied liability on one distinct ground with no complaint with respect to notice, and in doing so waived the bond requirement that immediate notice of proof of loss be given.

51. American Surety Co. of New York v. Peoples Bank, 189 S.E. 414 (1936).
(notice of proof of loss requirement)
Where surety company had notice of the alleged claim which it did not contest in terms of sufficiency, it cannot at trial claim that notice was insufficient; furthermore, if the allegations in the petition are proved, it follows that surety company waived its compliance with the terms of the bond relative to filing suit which estopped it from insisting on strict compliance with the terms

52. People's Loan & Savings Co. v. Fidelity & Casualty Co. 147 S.E. 171 (1929).
(proof of loss required time, waiver)
Insurer, in accepting proof of loss after the required time and expressly denying liability upon a ground other than insured's failure to furnish proof of loss within the required time waives any right to object to proof of loss not furnished in time, however, a statement by the insurer denying liability claiming the policy was invalid does not estop insurer in a suit brought afterwards from relying upon as a defense the failure of the insured, before this denial of liability, to comply with the provisions of the policy as to proof of loss.

53. Knights of the Ku Klux Klan v. Fidelity & Deposit Co. of Maryland, 169 S.E. 514 (1933).
(Compliance with proof of loss requirement)
Strict compliance with a fidelity bond provisions that requires proof of loss to be submitted to the surety within a specified time may be waived by the surety when the surety intends to insist upon strict compliance with the bond requirements but leads the insured to believe that the bond provisions will not be insisted upon.