When Will the Smoke Clear: Application of Waiver and Estoppel in Missouri Insurance Law

Jeremy P. Brummond

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When Will the Smoke Clear?:
Application of Waiver and Estoppel in
Missouri Insurance Law

Shahan v. Shahan¹

I. INTRODUCTION

Waiver is generally referred to as the voluntary (or intentional) relinquishment of a known right.² Estoppel does not involve the intentional relinquishment of a right, but rather, involves action (intentional or unintentional) by one party inducing another party to rely on that action.³ In insurance law cases, the doctrines of waiver and estoppel are frequently confused and often used interchangeably.⁴ On April 13, 1999, the Missouri Supreme Court added to the confusion through its application of a rule that “finds its roots”⁵ in the doctrines of waiver and estoppel.⁶

Generally, insurance law states that “an [insurance company (“insurer”)], having denied liability on a specified ground, may not thereafter deny liability on a different ground.”⁷ In Missouri, to gain the benefit of this rule, an insurance policyholder (“insured”) must show (1) that the insurer expressly waived its right to deny liability on a different ground at a later time, (2) that the insurer conducted itself in a way that clearly and unequivocally showed a purpose by the insurer to relinquish its right to deny liability on a different ground at a later time (i.e., an implied waiver), or (3) that the insurer, initially denying liability on one ground and then subsequently denying liability on a different ground, would

¹ 988 S.W.2d 529 (Mo. 1999).
² See ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 25E(a), at 148 (2d ed. 1996); see also 1 EUGENE R. ANDERSON ET AL., INSURANCE COVERAGE LITIGATION § 3.6, at 130 (1997); ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 6.1, at 617 (Student ed., 1988); BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 2.06(a), at 70 (9th ed. 1998); JEFFREY L. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 5.01, at 5-3 (2d ed. 1999); 1 ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS § 2.25, at 84 (3d ed. 1995 & Supp. 1998).
³ See OSTRAGER & NEWMAN, supra note 2, § 2.06(b), at 72; see also JERRY, supra note 2, § 25E, at 148; KEETON & WIDISS, supra note 2, § 6.1, at 617-18; STEMPEL, supra note 2, § 5.02, at 5-8. See generally WINDT, supra note 2, § 6.33, at 461-62.
⁴ See KEETON & WIDISS, supra note 2, § 6.1, at 617; see also STEMPEL, supra note 2, § 5.01, at 5-3 (“The terms waiver and estoppel are often used interchangeably but erroneously by courts, counsel, adjustors, and claimants.”).
⁶ See Shahan, 988 S.W.2d at 529.
⁷ Brown, 776 S.W.2d at 386 (quoting Stone v. Waters, 483 S.W.2d 639, 645 (Mo. Ct. App. 1972)); see also ANDERSON, supra note 2, § 3.8, at 133-34.
prejudice the insured. In the traditional application of this rule, prejudice under the third prong was presumed by the announcement of a specific defense in that the insured was prepared to meet that defense, and not the subsequent defense. After the Missouri Supreme Court's decision in Shahan v. Shahan, however, prejudice under this general rule is no longer presumed.

What is interesting about the court's decision in Shahan is the approach the court used to achieve the desired result. In insurance law, generally, a court cannot use the doctrines of waiver and estoppel to create coverage where coverage did not previously exist under the express terms of the insurance policy. The court in Shahan, notwithstanding Missouri's adherence to the majority approach, underwent an analysis of a rule that was based on waiver and estoppel despite the fact that a favorable ruling for the insured would contradict the general principle that estoppel and waiver cannot be used to create coverage. Because the majority failed to adhere to the traditional application of the rule and presume prejudice when an insurer denies liability on one ground and subsequently tries to deny liability on a different ground, contradiction of the general principle that waiver and estoppel cannot create coverage would have to wait for another day. Under Shahan, however, one could argue that creating coverage through waiver and estoppel is not prohibited in Missouri; but unfortunately for insureds in Missouri, proving waiver and estoppel after Shahan will not be an easy task.

II. FACTS AND HOLDING

In 1991, Andrew Shahan ("Andrew") was injured in an automobile accident involving a pickup truck driven by his half brother, Todd Shahan ("Todd"). At the time of the accident, Andrew was riding in the back of the truck; the injury occurred when negligent operation of the truck caused the truck to leave the roadway, hit a ditch, and overturn twice. The owner of the vehicle, Leo Hunolt, carried two insurance policies on the pickup: (1) an automobile insurance policy with bodily injury coverage of up to $100,000, and (2) an umbrella liability policy with a $1,000,000 limit. State Farm Mutual Automobile Insurance ("State Farm") issued both policies to Nancy and Leo

8. See Brown, 776 S.W.2d at 388.
9. Id. at 389.
10. See JERRY, supra note 2, § 61(a), at 344.
13. Id.
14. Shahan, 988 S.W.2d at 532.
Hunolt, Andrew’s mother and stepfather respectively. At the time of the accident, Andrew was residing with the Hunolts.

As next friend for Andrew, Nancy Hunolt filed an action for personal injuries against Todd in March 1992. In November 1992, State Farm filed a declaratory judgment action seeking a declaration that it had no duty to defend Todd. State Farm argued that Todd was not a permissive user, and therefore, was not an “insured” under the automobile policy. The declaratory judgment court, however, found that Todd was a permissive user and that State Farm had a duty to defend. The personal injury action then proceeded in the Circuit Court of Adair County, the trial court of Judge Bruce Normile.

In August 1995, State Farm filed a motion to withdraw from the personal injury action as counsel for Todd, asserting that the household exclusions in both policies precluded Andrew from recovering. Judge Normile initially denied

15. Id.
16. Id. Todd is not related to the Hunolts and was living elsewhere. Id.
17. Id.
18. Id.
19. Id.
20. Id.
22. Id. The household exclusion in the personal liability umbrella policy excluded coverage “for personal injury to the named insured, spouse, or anyone within the meaning of part a. or b. of the definition of insured.” Id. at *2. The policy’s definition section states:

5. ‘insured’ means:
   a. the named insured;
   b. the following residents of the named insured’s household:
      1. the named insured’s relatives; and
      2. anyone under the age of 21 under the care of a person named above.

7. ‘named insured’ means the person named in the Declarations and the spouse.

13. ‘relative’ means any person related by blood, adoption, or marriage to the named insured.

Id. The household exclusion in the automobile insurance policy excluded coverage “for any bodily injury to... any insured or any member of an insured’s family residing in the insured’s household.” Id. at *5 (emphasis omitted).

The automobile insurance policy defined “insured” as:
1. you;
2. your spouse;
3. the relatives of the first person named in the declaration;
4. any other person while using such a car if its use is within the scope of...
State Farm's motion and issued an order stating that the household exclusion in the automobile policy did not apply to Andrew. Subsequently, State Farm was allowed to withdraw as counsel even though Judge Normile had not changed his view that the household exclusion did not apply.

Andrew was awarded a judgment in the amount of $225,000. Andrew then filed a "Request and Order for Execution/Garnishment" naming State Farm as the Garnishee. The garnishment court concluded that Judge Normile's previous determination that the household exclusion in the automobile insurance policy did not apply to Andrew was "law of the case" and ordered State Farm to pay the policy limit for the automobile policy.

On appeal to the Missouri Supreme Court, State Farm argued that the garnishment court erred in determining that the household exclusion in the automobile insurance policy did not apply to Andrew. In response to this assertion, Andrew claimed that the doctrines of collateral estoppel, res judicata, law of the case, waiver, and estoppel precluded consideration of whether the household exclusion did or did not apply. The court held that State Farm's actions in the declaratory judgment action and Judge Normile's ruling in the personal injury action in response to State Farm's motion to withdraw did not

consent of you or your spouse; and
5. any other person or organization liable for the use of such a car by one of the above insureds.

Id. In accordance with Missouri's Motor Vehicle Financial Responsibility Law ("MVFRA"), State Farm tendered $25,000 to the court registry before filing the motion for leave to withdraw. See Mo. REV. STAT. §§ 303.010-.370 (1994); Shahan v. Shahan, 988 S.W.2d 529, 532 (Mo. 1999); see also Halpin v. Am. Family Mut. Ins. Co., 823 S.W.2d 479, 482-83 (Mo. 1992) (holding that the exclusionary provisions in insurance policies did not apply to the limits of liability imposed by Sections 303.010-.370).

23. Shahan, 988 S.W.2d at 532.
24. Id. The dissent asserted that the motion to withdraw was granted only "when State Farm made clear to the court that it would no longer pay for counsel's time, even if the court required him personally to continue to defend Todd Shahan." Id. at 538.
25. Id. at 532.
26. Id.
27. Id. The garnishment court judge, Judge Lewis, also concluded that Andrew could not recover under the umbrella policy. Id. Andrew was both under twenty-one and in the care of a "named insured" within the meaning of the policy definition. See Shahan v. Shahan, Nos. WD53825, WD53826, 1998 WL 169776, at *2 (Mo. Ct. App. Apr. 14, 1998). For the relevant text of the household exclusion in the umbrella policy, see supra note 22.
28. A motion for transfer to the Missouri Supreme Court was sustained on August 25, 1998 after a previous denial. See Shahan, 1998 WL 169776, at *1.
29. See Shahan v. Shahan, 988 S.W.2d 529, 532 (Mo. 1999).
30. Id.
preclude an examination of the household exclusion in the automobile policy. After a determination that the court could consider the household exclusion, the court held that the household exclusions of both policies barred coverage.

III. LEGAL BACKGROUND

The court in *Shahan* faced arguments based on collateral estoppel, res judicata, law of the case, waiver, and estoppel. The arguments involving collateral estoppel, res judicata, and law of the case, however, were easily dismissed by the majority opinion and the majority’s analysis as to these arguments was not disputed in the dissent. Thus, this Note will focus on the law of waiver and estoppel in insurance cases, and Missouri courts’ interpretation of the relevant household exclusion in the automobile policy.

A. Waiver and Estoppel in Insurance Law and Missouri’s Application of the Two Doctrines

Waiver and estoppel are distinct legal theories. However, application of both doctrines interchangeably has led to confusion in the law. Waiver involves the intentional relinquishment of a known right and may be either expressed or implied. Generally, negligence or mistake provide insufficient grounds for finding a waiver. An express waiver could be made through a statement or letter by the insurer. For example, the statement “under the policy, we have the right to refuse your proof of loss because it’s late, but given your continued business with our company, we agree to consider it” would be strong.
evidence of an express waiver. Implicit waiver, on the other hand, can occur through conduct by the insurer. For example, the court may imply a waiver when the insurer accepts a premium with full knowledge that the insured has already breached a warranty in the policy. Occasionally, courts will take a broad view of implicit waiver in favor of the less powerful insured. In Companion Life Insurance Co. v. Whitesell Manufacturing, Inc., for example, the court held the insurer's initial litigation responses worked as evidence that the insurer had impliedly waived its right to forced arbitration. Although usually the insurer's silence is insufficient to imply a waiver, there may be circumstances where, in all fairness the insurer should communicate with the insured about a situation. Under those circumstances, the court may imply a waiver despite the insurer's silence.

Unlike waiver, estoppel does not involve the intentional relinquishment of a right by the insurer. Rather, in estoppel, the insurer simply has taken some action and the insured has relied on that action to his detriment. Although it is recognized that estoppel takes on more than one form, when insurance cases refer to "estoppel" and nothing more, they are generally referring to the doctrine of equitable estoppel. To establish equitable estoppel in the insurance law

39. See STemple, supra note 2, § 5.01, at 5-4.
40. See JERRY, supra note 2, § 25E(b), at 148.
42. 670 So. 2d 897 (Ala. 1995).
43. See STemple, supra note 2, § 5.01, at 5-4 & n.6.
44. See JERRY, supra note 2, § 25E(b), at 148-49.
45. See OSTRAGER & NEWMAN, supra note 2, § 2.06(b), at 72; see also KEETON & WIDISS, supra note 2, § 6.1, at 618 (arguing that intent should be irrelevant in establishing estoppel). Estoppel, according to Keeton and Widiss, is based instead on "the nature of either the insurer's actions or the effect of the insurer's actions on the insured." KEETON & WIDISS, supra note 2, § 6.1, at 618.
46. See STemple, supra note 2, § 5.02, at 5-8 to 5-9. STemple takes on a discussion of both promissory and equitable estoppel. The difference between the two, according to STemple, lies in the nature of the remedy provided for by each kind of estoppel. See STemple, supra note 2, § 5.02, at 5-8 to 5-9. Whereas equitable estoppel will provide for enforcement of the underlying contract or preclusion of enforcement of a contract term, promissory estoppel creates a new or modified contract. See STemple, supra note 2, § 5.02, at 5-8 to 5-9.
47. See STemple, supra note 2, § 5.03, at 5-11. This observation correlates with the general principle that "while waiver or estoppel may bar a defense to a right the insured once had, such will not create a new coverage or rights not found in the contract." Macalco, Inc. v. Gulf Ins. Co., 550 S.W.2d 883, 891 (Mo. Ct. App. 1977). As noted earlier, promissory estoppel would create new coverage if applied to insurance cases. See STemple, supra note 2, § 5.02, at 5-8 to 5-9.
context, the insured must show "(1) an admission, statement, or act inconsistent with the claim afterwards asserted [by the insurer] ... (2) action by [the insurer] on the faith of such admission, statement, or act, and (3) injury to [the insured], resulting from allowing the first party to contradict or repudiate the admission, statement, or act." Generally, it is not necessary for an insurer to intentionally mislead the insured or for the insurer to have knowledge of the true facts for an insured to establish estoppel; however, a minority of courts have made intent to mislead an element of estoppel. Admittedly, when intent is made an element of estoppel, the difference between implied waiver and estoppel is difficult to discern.

Even in a majority jurisdiction, however, (where intent to mislead is not an element of estoppel), drawing the distinction between waiver and estoppel has not been an easy task for courts. With that stated, two pertinent differences between waiver and estoppel (in a majority jurisdiction) are worth reiterating from the discussion above: (1) generally, estoppel does not involve an intent by the insurer to mislead, and (2) waiver does not require a showing that the insured was prejudiced. Keeping these distinctions in mind, it is safe to proceed to a discussion of some of the rules that have evolved involving waiver and estoppel in insurance law.

One example of a rule based on waiver or estoppel is the principle that an insurer, having undertaken the insured's defense without a reservation of rights, is precluded from raising any policy defense that it had notice of at the time it assumed the insured's defense. This rule was illustrated in *Safeco Insurance*

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49. See *STEMPLE*, supra note 2, § 5.03, at 5-16 to 5-17.

50. See generally *STEMPLE*, supra note 2, § 5.03, at 5-14 ("Because the waiver is so often implied rather than express, this prompts many to mischaracterize the decision as flowing from equitable estoppel."). Stemple distinguishes implied waiver and equitable estoppel in the following statement: "Despite the implicit nature of the insurer's conduct, if the insurer appears to know of a right and to have voluntarily passed up a chance to enforce it, the insurer can be held to have waived that right." *STEMPLE*, supra note 2, § 5.03, at 5-14 (emphasis added). In a jurisdiction that requires knowledge or the intent to mislead to establish estoppel, however, Stemple's explanation sheds little light on the difference between implied waiver and equitable estoppel.

51. See generally *Brown*, 776 S.W.2d at 388 (finding frustration in the law of waiver and estoppel).

52. See *STEMPLE*, supra note 2, at § 5.03, at 5-16 to 5-17.

53. See *Brown*, 776 S.W.2d at 388 ("Prejudice plays no part in long-accepted definitions of waiver.").

54. See *OSTRAGER & NEwMAN*, supra note 2, § 2.02, at 45; see also *Shahan v. Shahan*, 988 S.W.2d 529, 537 (Mo. 1999) (citations omitted) ("In Missouri, as elsewhere,
Missouri Law Review, Vol. 66, Iss. 1 [2001], Art. 13

Co. of America v. Stone & Sons, Inc., 55 where the court stated in dicta that the insurer had lost any claim that the policy had been cancelled by the mailing of a cancellation notice when it undertook and maintained for eighteen months the exclusive defense of a lawsuit against the insured. 56 The court expressed the reasoning behind the rule in the following statement:

By assuming its policy right to control the defense of the lawsuit, Safeco precluded its insured from undertaking its own defense and from attempting to negotiate an amicable settlement at the early stages of the litigation. This is sufficient prejudice to estop Safeco from asserting the cancellation of the policy under the terms of which it continued to act. 57

It is unclear which of the two doctrines that the rule illustrated by Safeco is based on. Conceivably, this rule could be based on the doctrine of estoppel. 58 However, the insurer generally must know of defenses to coverage at the time it undertook the defense in order for this rule to apply. The requirement of knowledge by the insurer would lead one to believe that, in a majority of jurisdictions, this rule is primarily applied through the doctrine of waiver. 59

Another important rule involving waiver and estoppel in insurance cases states that "an insurer, having denied liability on a specified ground, may not thereafter deny liability on a different ground." 60 Typically, this rule is applied

56. Id. at 569.
57. Id.
58. A minority of jurisdictions makes knowledge by the insurer and/or intent to mislead an element of estoppel. See supra note 49 and accompanying text. In a jurisdiction justifying this rule on estoppel grounds, the insured will have to show prejudice. See generally Mendel v. Home Ins. Co., 806 F. Supp. 1206, 1215 (E.D. Pa. 1992) ("I[n the context of an insurer's failure to assert all possible defenses to coverage, the [Pennsylvania] courts apply an estoppel only when there is actual prejudice."). Indeed, because the Safeco opinion discussed why there was prejudice, it is likely that the Safeco court believed that the rule was based on estoppel. See Safeco, 822 S.W.2d at 569.
59. See supra note 2 and accompanying text.
in situations where an insurer fails to mention a specific defense in the initial disclaimer. For example, in Kammeyer v. Concordia Telephone Co., the insurer initially denied coverage because the policy excluded coverage for injuries arising out of "completed operations" of the insured. Later on, at a garnishment proceeding, the insurer attempted to deny coverage because the policy only covered the partnership and did not insure the operations of a business conducted by an individual. The court held that the insurer could not raise the subsequent denial of coverage because the original denial was made with full knowledge of the facts. Furthermore, the court stated that an insurer "having denied coverage on a specified ground... may not thereafter deny coverage on a different ground."

According to the Missouri Supreme Court, the rule relied on in Kammeyer "finds its roots" in the doctrines of waiver and estoppel. Not surprisingly, the Missouri Supreme Court has limited the reach of this rule by stating "in the absence of either (1) an express waiver by the insurer or (2) conduct which clearly and unequivocally shows a purpose by the insurer to relinquish a contractual right [i.e., an implied waiver], the insured must show prejudice before the rule may be invoked." Generally, prejudice is presumed by the announcement of a specific defense in that the plaintiff has prepared to meet that defense, and not the subsequent defense. However, some courts have required a showing of additional prejudice.

ANDERSON, supra note 2, § 3.8, at 133-34.

See ANDERSON, supra note 2, § 3.8, at 133. Application of waiver and estoppel when an insurer denies on a specific ground and subsequently denies on a different ground, however, should not be limited to situations involving disclaimer letters. There is authority that states that a declaratory judgment action is the equivalent of a disclaimer. See generally OSTRAGER & NEWMAN, supra note 2, § 2.05(b), at 63 (noting that according to New York law, a declaratory judgment action fulfills the insurer's obligation to disclaim liability).

446 S.W.2d 486 (Mo. Ct. App. 1969).

Id. at 488.

Id.

Id. at 490.


Id. at 388. Therefore, the rule in Missouri actually reads as follows: an insurer, having denied liability on a specified ground, absent an express or implied waiver of rights, can deny liability on a different ground as long as the insured will not be prejudiced by the different denial.

Id. at 389.

Ostrager and Newman stated:
The cases which hold that an insurer waives the right to disclaim coverage for reasons other than those specifically identified in the original disclaimer letter
Coexisting with the rule that an insurer cannot initially deny liability on one ground and then subsequently deny liability on a different ground is the general principle that one cannot use waiver and estoppel to create coverage for risks that are not found in the express terms of the insurance contract. Facially, this principle seems to contradict the rule that an insurer having denied liability on one ground cannot thereafter deny liability on a different ground. The majority of courts, however, have mitigated this contradiction by only precluding an insurer from raising those defenses based on the policy's conditions of forfeiture if they had previously denied the claim on a different basis, and have not precluded defenses that go to coverage.

cannot always be reconciled with the concept of waiver as the voluntary and intentional relinquishment of a known right. . . . Thus, a number of courts have held that an insurer's failure to include in its disclaimer letter all possible grounds for disclaimer will create a waiver or estoppel only where the insured is able to show some prejudice resulting from the omission.

OSTRAGER & NEWMAN, supra note 2, § 2.05(b), at 67.

70. See JERRY, supra note 2, § 61(a), at 344. There are a minority of jurisdictions that do not follow this rule. See JERRY, supra note 2, § 61(a), at 345-46. Missouri, however, follows the majority approach. See Young v. Ray Am., Inc., 673 S.W.2d 74, 80 (Mo. Ct. App. 1984) (stating that waiver and estoppel cannot be used to extend the coverage of an insurance policy); Allstate Ins. Co. v. Northwestern Nat'l Ins. Co. of Milwaukee, 581 S.W.2d 596, 601 (Mo. Ct. App. 1979) (noting that waiver or estoppel may bar a defense to a right the insured once had, but they will not create a new coverage or grant a right not found in the contract).

71. To illustrate, consider the following "hypothetical": An insurer initially denies liability because the insured is not a permissive user. Subsequently the insurer raises the defense that the insured fell under the household exclusion. If the rule, i.e., that an insurer cannot subsequently deny a claim on a different basis if they had already asserted a specific denial, does not allow the insurer to raise the household exclusion (assuming the insured actually fell within that exclusion) then a law that was created from waiver and estoppel is allowing those doctrines to create coverage where it did not previously exist under the policy. See generally Beth C. Boggs, Just Say No: Avoiding the Pitfalls in Denial of Coverage, 52 J. Mo. B. 110, 111 (1996).

72. See id. at 112 ("In most states, estoppel will only apply to the policy's stated conditions of forfeiture, such as notice requirement, without affecting valid policy exclusions which were not set forth initially."); see also WINDT, supra note 2, § 2.25, at 85 ("In accordance with the general rule . . . that policy coverage cannot be created or enlarged by waiver, those courts have held that an insurance company's declination of coverage cannot constitute a waiver of any unmentioned defense that is based on a policy exclusion or on the terms of the insuring clause."); WINDT, supra note 2, § 2.24, at 22 (3d ed. Supp. 1998) (citing Waller v. Truck Insurance Exchange, 900 P.2d 619 (1995), modified on other grounds, 11 Cal. 4th 453a (1995) for the proposition that thirty-two out of thirty-three states to consider the issue agree that "[a]n insurer does not impliedly waive coverage defenses it fails to mention when it denies the claim").
The distinction between defenses involving conditions of forfeiture and defenses involving coverage can be illustrated by an examination of the following cases. In Macalo, Inc. v. Gulf Insurance Co., the insurance policy at issue did not provide coverage for student pilots. The agent for the insurer, however, listed a student pilot in the pilot clause, representing to the insurer that the pilot had been certified when in fact he was only a student. The court in Macalo did not allow the misrepresentation defense and required the insurer to provide coverage to the listed pilot because that was the coverage afforded under the policy.

The court found that the insurance agent was responsible for the misrepresentation and that the insurer could not avoid coverage because of this condition of forfeiture. Macalo can be contrasted with Young v. Ray America, Inc. In Young, the insureds argued that an insurance policy they were issued covered a corporation of which they were the sole shareholders. The corporation, however, was not listed as a named insured. The court refused to extend coverage to the corporation reasoning that "[t]o require the insurance company to provide coverage for an entity other than the named insured would have the effect of providing coverage where none existed under the policy's own terms." The distinction between defenses involving conditions of forfeiture and defenses as to coverage is a fine distinction that can easily become blurred.

Professor Robert Jerry has argued that in many cases, courts have defined "forfeiture provision" in such a way that the "ability of estoppel to broaden coverage is virtually unbounded." In Missouri, for example, failure to narrowly draw the distinction between forfeiture provisions and coverage provisions has increased the likelihood that a court will use estoppel to create coverage, and has added much confusion to the application of waiver and estoppel rules in insurance cases. Stone v. Waters illustrates Missouri's precedent. In Stone, the insurer's sole ground of

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73. 550 S.W.2d 883 (Mo. Ct. App. 1977).
74. Id. at 887.
75. Id. at 887-88.
76. Id. at 888.
77. 673 S.W.2d 74 (Mo. Ct. App. 1984).
78. Id. at 80.
79. Id.
80. Id.
81. See JERRY, supra note 2, § 61(a), at 346-47 ("Yet courts have long used estoppel to prevent insurers from asserting forfeiture provisions in situations where the insured has breached, and this is tantamount to insisting that an insurer reimburse a loss it did not plan to cover and for which it presumably collected no premium.").
82. JERRY, supra note 2, § 61(a), at 347.
83. See generally BOGGS, supra note 71, at 111.
84. 483 S.W.2d 639 (Mo. Ct. App. 1972).
denial initially was that the defendant was not a named insured because he did not reside in the same household as the policyholder.\textsuperscript{85} At trial, however, the insurer attempted to assert the additional defense that the automobile in question was not listed on the insurance schedule.\textsuperscript{86} The Missouri Court of Appeals for the Western District of Missouri held that the additional defense was precluded because the insurer had previously denied coverage on a specific ground, i.e., that the defendant was not a named insured.\textsuperscript{87} Arguably, this holding implies that, in Missouri, courts will not limit their use of waiver and estoppel to preclude only those defenses based on conditions of forfeiture. Rather, Missouri courts will use waiver and estoppel to preclude all defenses to coverage.\textsuperscript{88}

\section*{B. The Household Exclusion}

The relevant household exclusion in \textit{Shahan} in the automobile insurance policy excludes coverage for "any bodily injury to . . . any insured or any member of an insured's family residing in the insured's household."\textsuperscript{89} The insurance policy defines "insured" as:

1. you [the named insured or insureds];
2. your spouse;
3. the relatives of the first person named in the declarations;
4. any other person while using such car if its use is within the scope of consent of your spouse;

\begin{itemize}
\item \textsuperscript{85} \textit{Id.} at 642.
\item \textsuperscript{86} \textit{Id.} at 645.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} Some Missouri authority would disagree; those courts have distinguished \textit{Stone} by asserting that \textit{Stone} involved a "defense" to coverage for what otherwise was a covered risk, and that cases not allowing waiver or estoppel to preclude a defense by an insurer all involve "express exclusions of coverage for certain risks or policies which unambiguously do not provide coverage for certain risks." Safeco Ins. Co. v. Marion, 676 F. Supp. 197, 200 (E.D. Mo. 1987); \textit{see also} Lawrence v. N.Y. Life Ins. Co., 649 S.W.2d 461, 465 (Mo. Ct. App. 1983). It is difficult to perceive, however, how the policy could have "less ambiguously" excluded coverage for vehicles not listed on the schedule in \textit{Stone}. Furthermore, subsequent Missouri Supreme Court authority that involves express exclusions has undergone a waiver/estoppel analysis, despite the possibility that a favorable ruling for the insured would enlarge coverage through the application of the two doctrines. \textit{See} \textit{Shahan} v. \textit{Shahan}, 988 S.W.2d 529 (Mo. 1999). The Missouri Supreme Court avoided creating coverage through waiver and estoppel, however, by failing to find either (1) an express waiver, (2) an implied waiver, or (3) prejudice to the insured in the facts of \textit{Shahan}. \textit{See id.} at 534 & n.1.
\item \textsuperscript{89} \textit{Shahan}, 988 S.W.2d at 535.
\end{itemize}
5. any other person or organization liable for the use of such a car by one of the above insureds.99

The policy defines "relative" as "a person related to you or your spouse by blood, marriage or adoption who lives with you."91

Missouri courts have interpreted this policy language on more than one occasion92 and the Missouri Supreme Court has declared this language to be unambiguous.93 The following will trace the evolution of the courts' interpretation of this policy exclusion and explain the courts' reasoning in construing the relevant language.

In State Farm Mutual Automobile Insurance Co. v. Carney,94 the Missouri Court of Appeals for the Eastern District of Missouri was asked to interpret the exclusion at issue. In Carney, the injured party was a passenger in a jeep driven by her husband.95 The injured party's husband was "an insured" under the policy language because he was given permission to drive the jeep by the policyholder.96 The insurer, State Farm, argued that the injured party was excluded from coverage because she was a member of "an insured's" (her husband's) family residing in "the insured's" (her husband's) household.97 The court in Carney recognized that whether the policy language at issue was ambiguous was a matter of first impression in Missouri.98 The court held that the language was ambiguous and that a court could read the language "any member of an insured's family residing in the insured's household" two ways: (1) a narrow reading that limited "the insured" to the named policyholder (and therefore requiring that the injured party reside with the policyholder in order to fall under the exclusion), or (2) a broader reading where "the insured" was simply referring to "an insured" or, in other words, the specific category of "insured" that applies to the situation.99 Accordingly, the Carney court construed the exclusion against State Farm.100

90. Id.
91. Id.
93. See Ballmer, 899 S.W.2d at 526 (overruling Carney, 861 S.W.2d at 665).
94. 861 S.W.2d 665 (Mo. Ct. App. 1993).
95. Id. at 666.
96. Id. One of the categories of "an insured" is "any other person while using such a car if its use is within the scope of consent of you or your spouse." Id.
97. Id. at 668.
98. Id.
99. Id. at 668-69.
100. Id. at 669 ("Insurance is designed to furnish, not defeat, protection to the
Carney’s holding that the relevant policy exclusion was ambiguous was short lived. In 1995, the Missouri Supreme Court decided State Farm Mutual Automobile Insurance Co. v. Ballmer, and not only held that the exclusion was not ambiguous, but a unanimous court agreed to give the exclusion a broad interpretation. Facing facts that were indistinguishable from Carney, the court reasoned that “because there are five categories included in the definition of ‘insured,’ the definite article ‘the’ is used in the household exclusion to refer to the specific category of ‘insured’ that applies to the situation.” Applying this interpretation, the court found that the loss was excluded because the injured party (the half-brother of the driver) was a member of “an insured’s” (the permissive driver’s) family residing in “the insured’s” (in this case, the permissive driver, his half-brother’s) household.

Ballmer, however, was not the last time Missouri courts were asked to clarify the possible ambiguities in this policy exclusion.

IV. THE INSTANT DECISION

In Shahan, the insured bombarded the Missouri Supreme Court with numerous legal theories in an attempt to preclude any analysis of the household exclusion in his automobile policy. Because of the number of theories presented, the opinion did not address any single doctrine in great detail; rather, the court took on a mini-analysis of all of the insured’s arguments. The following will focus primarily on the issues that were contested in the dissent, i.e., the application of waiver and estoppel and the court’s interpretation of the household exclusion in the automobile insurance policy.

insured, and the insurance company is in the best position to remove ambiguity from the contract.

101. 899 S.W.2d 523 (Mo. 1995).
102. Id. at 526. Needless to say, the court in Ballmer took a different approach to the policy exclusion than the court in Carney did. Where the Carney court started with the principle that ambiguous policy provisions are construed against the drafter, the Ballmer court premised its analysis with the following: “[i]f a term within an insurance policy is clearly defined, the contract definition controls.” Id. at 525-26 (citing McManus v. Equitable Life Assurance Soc’y of the United States, 583 S.W.2d 271, 272 (Mo. Ct. App. 1979)).
103. Id. at 526.
104. Id. at 524. In Ballmer, the permissive driver (“an insured”) was the half-brother of the injured party; the driver and the half-brother lived together. Id.
105. Id. at 526.
106. Id.
107. See generally Shahan v. Shahan, 988 S.W.2d 529 (Mo. 1999).
108. See id.
A. The Majority Opinion

At the beginning of the majority opinion, the court in *Shahan* recognized that before they could examine the exclusion in the automobile policy, the court would have to address Andrew’s claims that the doctrines of collateral estoppel, res judicata, law of the case, waiver, and estoppel precluded examination of the relevant household exclusion.\(^{109}\)

The court disposed of Andrew’s collateral estoppel,\(^ {110}\) res judicata,\(^ {111}\) and law of the case arguments with little effort.\(^ {112}\) The court then turned to Andrew’s argument that State Farm had waived the household exclusion defense or, in the alternative, that State Farm was estopped from asserting that the household exclusion applied in this case.\(^ {113}\) Noting that estoppel is the preferred theory when an insurer employs a policy defense, the majority analyzed Andrew’s estoppel arguments first.\(^ {114}\)

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109. *Id.* at 532-33.

110. *Id.* at 533. In determining whether collateral estoppel is applicable, courts should consider:

1. whether the issue decided in the prior adjudication was identical with the issue presented in the present action;
2. whether the prior adjudication resulted in a judgment on the merits;
3. whether the party against whom collateral estoppel is asserted was a party or was in privity with a party to the prior adjudication; and
4. whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

*Id.* at 532-33 (citing *Oates v. Safeco Ins. Co. of Am.*, 583 S.W.2d 713, 719 (Mo. 1979)).

Dismissing Andrew’s collateral estoppel argument, the court in *Shahan* held that the issues and the parties in the garnishment action and the personal injury action were different that Judge Normile’s ruling on the exclusion was not a judgment on the merits, and that State Farm did not have a full and fair opportunity to litigate. *Id.* at 533.

111. *Id.* Andrew’s res judicata claim was dismissed, it seems, for the sole reason that Andrew failed to undergo any res judicata analysis. *Id.* at 532-33.

112. *Id.* at 533. A decision of a court is generally considered the “law of the case” for “all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not.” *Id.* (citing *Walihan v. St. Louis-Clayton Orthopedic Group, Inc.*, 891 S.W.2d 545, 547 (Mo. Ct. App. 1995)). The court in *Shahan* decided that Judge Normile’s initial determination that the household exclusion did not apply was not the “law of the case” for the garnishment action because State Farm was not a party to the personal injury case; further, the court held, State Farm was not an aggrieved party (“it obtained from Judge Normile the relief it sought”), and therefore, State Farm lacked standing to appeal. *Id.* at 533.

113. *Id.*

114. *Id.* (citing *Macalco, Inc. v. Gulf Ins. Co.*, 550 S.W.2d 883 (Mo. Ct. App. 1977)).
Estoppel, according to the court, requires that an insurer “first announce a specific defense and subsequently seek to rely instead on an inconsistent theory.” After setting forth this general rule, the majority elaborated on what an insured must show in order to preclude an insurer from raising a subsequent inconsistent defense. The court in *Shahan* set forth the following two requirements: (1) an insurer’s actions must induce the insured to rely on the original defense and cause the insured injury, and (2) the insured must show that he was prejudiced by the insurer’s actions before the court may invoke estoppel. The majority then noted that an insured must show prejudice beyond the “mere filing of a lawsuit” for estoppel to apply. Applying these principles, the majority held that estoppel did not assist Andrew. For Andrew to succeed in his estoppel argument, the court reasoned, “Andrew would have to show that in the personal injury case, State Farm announced a specific defense, then later in the garnishment action sought to rely upon an inconsistent theory.” According to the majority, Andrew had not met this burden.

115. *Id.* at 533-34 (quoting *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 388 (Mo. 1989)).

116. *Id.* at 534 (citing *Brown*, 776 S.W.2d at 388). This “elaboration,” however, is likely to muddle a reader’s understanding of the doctrine of estoppel. The majority treats “injury” and “prejudice” as if they were two distinct concepts. *Id.* Arguably, in cases like *Shahan*, the injury, and therefore, prejudice occurs because the announcement of a specific defense gives insufficient notice of other defenses. See generally *Brown*, 776 S.W.2d at 389. The insured needs preparation time to meet other defenses; hence, the announcement of a specific defense causes the insured to rely to his detriment. *Id.*


118. *Id.*

119. *Id.*

120. *Id.* In a footnote, the majority addressed the dissent’s argument that State Farm’s actions during the declaratory judgment action were grounds for estoppel. *Id.* at 534 n.1. The majority discarded the dissent’s argument for two reasons: (1) Andrew never argued that State Farm should be “estopped” because of its actions during the declaratory judgment proceeding, and (2) even if the argument proceeded, the dissent did not show how Andrew was prejudiced. *Id.* In that same footnote, the majority rebutted the dissent’s argument that State Farm was estopped from raising the household exclusion because it undertook Todd’s defense without a reservation of rights. The majority criticized the dissent for merging the doctrines of waiver and estoppel under this one argument. According to the majority, there was no waiver, and as discussed previously, the court stated that Andrew had failed to establish the prejudice necessary for estoppel. The dissent, in their opinion, argued that Andrew did not have to establish
Furthermore, the court noted, estoppel in this case was inapplicable because Andrew had not shown that State Farm's actions caused reliance, injury, or prejudice.  

The majority then addressed Andrew's arguments premised on the doctrine of waiver. At the outset, the court defined waiver, and recognized that waiver could be expressed or implied. As to Andrew's argument, however, the court found that State Farm's actions in seeking a declaratory judgment did not constitute a waiver. Rather, when State Farm sought to declare that it did not have a duty to defend Todd because Todd was not a permissive user of the automobile, the court concluded that State Farm did not intend to relinquish its right to raise the household exclusion.

The majority, having ruled against all of Andrew's arguments that the court was precluded from examining the policy language, then went on to interpret the household exclusion.

At the outset of its interpretation, the majority noted that "[c]ourts are not permitted to create ambiguities in order to distort the language of an unambiguous policy." Furthermore, the court stated, "[w]hen interpreting the language of an insurance contract, this Court gives the language its plain meaning." The court then noted that the exclusion at issue excluded coverage "for any bodily injury to . . . any insured or any member of an insured's family residing in the insured's household." Because the clause used the term "or" that he was prejudiced; rather, because he "stands in Todd's shoes" in the garnishment action, all Andrew needed to establish was that Todd was prejudiced. Id. The majority, under the assumption that Andrew did "stand in Todd's shoes," addressed the dissent's position, but failed to find that Todd was prejudiced. Id.

121. Id. at 534.
122. Id.
123. Id.
124. Id. "Waiver . . . is "the intentional relinquishment of a known right."" Id. (quoting Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 386-87 (Mo. 1989)).
125. Id. (citing Brown, 776 S.W.2d at 386-87).
126. Id.
127. Id. at 535.
128. Id. (citing Rodriguez v. Gen. Accident Ins. Co. of Am., 808 S.W.2d 379, 382 (Mo. 1991)).
129. Id. (citing Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505, 508 (Mo. 1997)).
130. Id.
131. Id. "The conjunction 'or' means 'an alternative between different or unlike things, states, or actions.'" Id. (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1585 (3d ed. 1993)).
the plain language of the policy provided for two distinct exclusions. First, the policy exclusion precluded coverage for "any insured," and second, the policy exclusion precluded coverage for "any member of an insured's family residing in the insured's household." Because Andrew was a relative of the first person named in the declarations, the court held that Andrew fell under the first exclusion, i.e., "any insured," and therefore he was precluded from recovering under the automobile insurance policy.

B. The Dissent

The dissent focused its arguments on the majority's application of waiver and estoppel, and the majority's interpretation of the household exclusion in the automobile policy. Attacking the majority's arguments on waiver and estoppel, the dissent expressed primary concern with the issue of what circumstances are sufficient to show "prejudice" to the insured. The dissent argued that the majority was mis-applying precedent to eliminate the traditional notion of prejudice used in cases similar to Shahan. Furthermore, the dissent argued that "the announcement of a specific defense itself prejudices the claimant merely by causing him or her to prepare to combat that particular defense and not others." In the case at issue, the dissent stated, State Farm initially denied coverage to Todd by filing a declaratory judgment action asserting that he was not a permissive user of the automobile. Thus, the prejudice to Andrew occurred when State Farm raised a completely different ground for denying coverage in its motion to withdraw from the personal injury action.

132. Id.
133. Id.
134. One of the definitions of "insured" was "the relatives of the first person named in the declarations." Id. "Relative" was defined in the policy as "a person related to you or your spouse by blood, marriage or adoption who lives with you." Id.
135. Id. The majority then addressed Andrew's appeal involving the umbrella liability policy and upheld the trial court's determination that Andrew could not garnish the proceeds of the umbrella policy with little discussion. See id. at 536.
136. See generally id. at 536-38.
137. Id. at 536-37 (arguing that the majority opinion misapplied the analysis used in Brown v. State Farm Mutual Automobile Insurance Co., 776 S.W.2d 384 (Mo. 1989)).
138. Id. at 537 (citing Brown, 776 S.W.2d at 389).
139. Id.
140. Id. Assuming, arguendo, that the majority was correct in requiring additional prejudice, the dissent argued that prejudice in this case was amply shown. Id. The prejudice, according to the dissent, was present because Andrew, as garnishor, "stands in the shoes of the judgment debtor," i.e., Todd. Therefore, because Todd was
Addressing the majority's interpretation of the household exclusion in the automobile policy, the dissent disagreed that the policy was "devoid of ambiguity." Rather, there were two ways a court could read the exclusion at issue. Although the dissent implicitly recognized the majority's reading of the exclusion as permissible, they reasoned that a more restrictive construction is preferred. That construction excludes coverage for injuries to "1) any insured residing in the insured's household and 2) any member of an insured's family residing in the insured's household." Following this interpretation, the dissent applied Missouri Supreme Court precedent to find that Andrew was not excluded under the automobile policy.

V. COMMENT

Confusion of the doctrines of waiver and estoppel, although frustrating for the retentive advocate, has served as a tool for courts that want to justify particular pro-insured results in insurance cases. In Shahan, however, the prejudiced, prejudice to Andrew was also established. Id. at 538 (quoting Wenneker v. Physicians Multispecialty Group, 814 S.W.2d 294, 296 (Mo. 1991)). The dissent gave two reasons why Todd was prejudiced by State Farm's actions: (1) State Farm took over Todd's defense with knowledge of facts that would give rise to noncoverage without a reservation of rights, and (2) State Farm's abrupt eve-of-trial withdrawal left Todd with representation that was only "secondary." Id. at 537-38.

141. Id. at 539.
142. Id.
143. Id. ("Since exclusions are construed narrowly, in favor of coverage, the more restrictive of the two possible constructions applies.").
144. Id. (citing State Farm Mut. Auto. Ins. Co. v. Ballmer, 899 S.W.2d 523, 525 (Mo. 1995)). In Ballmer, discussed previously, the Missouri Supreme Court, interpreting identical policy language, held that "the insured" referred to "the specific category of 'insured' that applies to the situation." Ballmer, 899 S.W.2d at 526; see supra notes 101-07 and accompanying text. In the case at issue, "the insured" was Todd (as a permissive user); because Andrew did not live with Todd, under the dissent's analysis, Andrew was not excluded from coverage. See Shahan v. Shahan, 988 S.W.2d 529, 539 (Mo. 1999). The majority, however, argued that Ballmer did not apply. Id. at 535-36. Under the majority's interpretation Andrew was not excluded because he was residing in "the insured's" house; rather, Andrew was excluded because he was "any insured" as defined in the policy. Id. at 535. Nothing in Ballmer, the majority reasoned, limited the exclusion to the household of the specific category of insured that applies to the situation. Id. at 536.

145. See generally JERRY, supra note 2, § 25E(a), at 147-49 ("[T]he application of the doctrines of waiver and estoppel is basically left to the discretion of judges. Accordingly, these doctrines are powerful tools for courts to use in their efforts to regulate the business of insurance."). See also KEETON & WIDISS, supra note 2, § 6.1,
Missouri Supreme Court applied the law of waiver and estoppel in a way that is adverse to insureds. Using an analysis that, on its face, seems to benefit insureds,\textsuperscript{146} the majority destroyed the presumption of prejudice (or presumption of implied waiver) that had long protected policyholders. The following comment will demonstrate the importance of the court’s analysis by illustrating an avenue the court could have chosen and examining \textit{Shahan}’s effect on Missouri precedent.

Generally, a court cannot create coverage through waiver or estoppel.\textsuperscript{147} Missouri purports to follow this principle.\textsuperscript{148} In \textit{Shahan}, State Farm faced arguments from Andrew involving waiver and estoppel because State Farm was trying to establish that Andrew could not recover under the household exclusion.\textsuperscript{149} However, defenses based on policy exclusions go to coverage. Under the approach used in a majority of jurisdictions (including Missouri’s), an insurer cannot waive (nor can they be estopped from asserting) those defenses that are not based on conditions of forfeiture.\textsuperscript{150} Hence, the court in \textit{Shahan} had the opportunity to hold that State Farm was incapable of waiving (or being estopped from asserting) the household exclusion because it was a coverage defense. Under this analysis, the court could have avoided a debate about whether there was express or implied waiver, or whether any of State Farm’s actions had prejudiced Andrew and simply proceeded to its interpretation of the household exclusion.\textsuperscript{151}

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\textsuperscript{146} at 617 (“Although factual circumstances which clearly involve acts that satisfy the requirements for establishing a waiver are relatively rare occurrences among insurance transactions, numerous judicial opinions declare that the existence of rights which are at variance with policy provisions is warranted on the basis of waiver.”).
\textsuperscript{147} See \textit{supra} note 88 and accompanying text.
\textsuperscript{148} See \textit{JERRY}, \textit{supra} note 2, § 61(a), at 344.
\textsuperscript{149} See \textit{Young v. Ray Am., Inc.}, 673 S.W.2d 74, 80 (Mo. Ct. App. 1984) (stating that waiver and estoppel cannot be used to extend the coverage of an insurance policy); \textit{Allstate Ins. Co. v. Northwestern Nat’l Ins. Co. of Milwaukee}, 581 S.W.2d 596, 601 (Mo. Ct. App. 1979) (noting that waiver or estoppel “may bar a defense to a right the insured once had, [but they] will not create a new coverage or grant a right not found in the contract”).
\textsuperscript{150} See \textit{Shahan}, 988 S.W.2d at 532.
\textsuperscript{151} See \textit{supra} note 62. There is also Missouri authority for this principle. See \textit{Safeco Ins. Co. v. Marion}, 676 F. Supp. 197, 200 (E.D. Mo. 1987) (noting that cases that do not allow waiver or estoppel to preclude a defense by an insurer all involve “express exclusions of coverage for certain risks”); \textit{see also} \textit{Lawrence v. N.Y. Life Ins. Co.}, 649 S.W.2d 461, 465 (Mo. Ct. App. 1983) (“The principles of estoppel cannot be used to protect the insured against risks the policy expressly excludes.”).
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The Missouri Supreme Court, however, chose a different analysis. Therefore, one could argue that this implies that, in Missouri, an advocate can use the doctrines of waiver and estoppel to create coverage where it had previously not existed for her client. All that advocate would have to do, according to the Missouri Supreme Court, is show "1) an express waiver by the insurer, 2) conduct which clearly and unequivocally shows a purpose by the insurer to relinquish a contractual right, [i.e., an implied waiver]," or 3) prejudice. Shahan, in this aspect, appears insured friendly. However, it should be noted that establishing an implied waiver or proving prejudice in

where waiver and estoppel were, arguably, inapplicable. See Whitney v. Actna Cas. & Sur. Co., 16 S.W.3d 729 (Mo. Ct. App. 2000). Whitney involved an insurer who had been asserting a policy exclusion defense at earlier proceedings and then raised a different policy exclusion defense for the first time at a garnishment action. Id. at 732. The Missouri Court of Appeals for the Eastern District of Missouri went through an analysis similar to the analysis used by the court in Shahan to decide (1) that the insured had failed to prove that the insured was prejudiced by the insurer raising the different policy exclusion during the garnishment action, and (2) that the insured had failed to prove that the insurer had waived its right to raise the different policy exclusion. Id. at 732-33. Unlike the court in Shahan, however, the court in Whitney recognized that, even if the insured could prove that they were prejudiced by the insurer raising the different exclusion, or that the insurer had waived its right to raise the different policy exclusion, the insurer would prevail and be able to assert the different exclusion because "waiver and estoppel may not be employed to create coverage where it otherwise does not exist." Id. at 733-34.

The Whitney court, much like the court in Shahan, however, could have added clarity to the law of waiver and estoppel in insurance cases and saved a lot of time had it simply reversed its analysis. At the outset, courts should recognize whether the subsequent defense (e.g., policy exclusion) goes to coverage; if the subsequent defense is a coverage defense, then the waiver and estoppel analysis ends there—waiver and estoppel cannot be employed to create coverage. Id. However, if the subsequent defense is not a coverage defense, then the court should proceed to determine whether the insured has established that the insurer has waived its right or that the insurer is estopped from asserting the subsequent defense.

152. Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 388 (Mo. 1989). Although Shahan’s primary focus was on estoppel, there is nothing in the opinion that would indicate an intent to change Brown’s recognition that “[b]y stating the preference [for estoppel], we do not preclude the application of [the] waiver doctrine under appropriate circumstances.” Id.

153. The court in Shahan, however, does little to elaborate on what behavior “unequivocally shows a purpose by the insurer to relinquish a contractual right,” or elaborate on what constitutes “prejudice.” The court simply found that such behavior or prejudice was not present in Shahan’s facts. See Shahan v. Shahan, 988 S.W.2d 529, 534 (Mo. 1999).
Missouri after *Shahan* is virtually impossible.154 In this respect, the court's decision in *Shahan* has taken a pro-insurer approach and nullified the general rule that "an insured, having denied liability on a specified ground, may not thereafter deny liability on a different ground."155 As the dissent argued, and as *Brown* stated, the rationale behind this rule is that "the announcement of a specific defense itself prejudices the claimant merely by causing him or her to prepare to combat that particular defense and not others."156 The majority in *Shahan* ignored this rationale, and instead, required a showing of additional prejudice.157

In states that protect insureds through other vehicles, an anti-waiver and estoppel precedent like *Shahan* may have little impact on potential pro-insured decisions. For example, in a jurisdiction that adheres to a strong reading of the doctrine of reasonable expectations, a court may expand insurer liability despite a "lack of enthusiasm" for waiver and estoppel.158 Furthermore, in jurisdictions

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154. *See id.* After *Shahan*, it seems clear that prejudice is no longer presumed because the insurer initially announced a specific defense and then subsequently relied on an inconsistent theory. *Id.* Rebutting this contention, however, an advocate could argue that a court should limit *Shahan*'s analysis to those situations where the subsequent defense involved a policy exclusion, and therefore, little prejudice to the insured. *See OSTRAGER & NEWMAN, supra* note 2, § 2.05(b), at 68 (quoting ACF Produce, Inc. v. Chubb/Pac. Indem. Group, 451 F. Supp. 1095, 1100 n.2 (E.D. Pa. 1978) (proposing that an insurer's assertion of other defenses following the loss does not mislead a claimant as to what was expressly covered in the plain language of her insurance policy).

155. *See Brown*, 776 S.W.2d at 386 (quoting Stone v. Waters, 483 S.W.2d 639, 645 (Mo. Ct. App. 1972)).

156. *Shahan*, 988 S.W.2d at 537.

157. *Id.* at 534. Presumably, the majority based the requirement of additional prejudice on the court’s decision in *Brown*. *See id.* The dissent makes a persuasive argument, however, that the majority has applied *Brown*'s analysis out of context. *Id.* at 536-37. *Brown* was a situation where the latter defense was not a different denial, but rather, was a more specific version of the initial general denial. *Brown*, 776 S.W.2d at 389. The court in *Brown* held prejudice was not presumed (and arguably, could not be shown) when the insurer raised the latter, more specific, defense. *Id.* According to the dissent, *Brown* was not meant to reach cases like *Shahan* where the latter defense was not a more specific denial, but rather, a completely different denial altogether. *Shahan*, 988 S.W.2d at 536-37. Correlating to the majority's requirement of additional prejudice was its finding that Andrew was not prejudiced as garnishor because State Farm undertook Todd's defense without a reservation of rights. *Id.* at 534 n.1. Although the majority does not explicitly set forth its reasoning, this holding was presumably based on the majority's belief that failure to obtain a reservation of rights was, in itself, insufficient to establish a waiver or prejudice to Todd. *See id.*

158. *See JERRY, supra* note 2, § 61a, at 348. The strong form of reasonable expectations reads as follows: "'[T]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored
that aggressively employ contract interpretation techniques, e.g., contra proferentum,\textsuperscript{159} to create coverage where coverage did not previously exist, it is unlikely that a decision like \textit{Shahan} would affect the ability of judges to reach pro-insured results. Missouri, however, only applies the doctrine of reasonable expectations if a policy provision is ambiguous;\textsuperscript{160} and, as evidenced by the majority’s analysis in \textit{Shahan}, Missouri courts seem reluctant to find ambiguities in policy language so that rules of construction like contra proferentum and doctrines like reasonable expectations can become applicable. After \textit{Shahan}, the possibility for a Missouri court to use waiver and estoppel to reach a favorable result for the insured seems minimal. Slowly, the doors to extended insurer liability are closing.

\textbf{VI. CONCLUSION}

In \textit{Shahan}, the Missouri Supreme Court applied a waiver and estoppel analysis in a situation where, had the court ruled in favor of the insured, the doctrines of waiver and estoppel would have created coverage where coverage did not previously exist. Whether the court in \textit{Shahan} intentionally ignored the general rule that a court cannot use waiver and estoppel to create coverage, or whether this rule was never argued to the court, the majority seized the opportunity to adapt the previous state of the law. The result is a heightened burden for insureds and the destruction of a presumption that had traditionally protected policyholders. Although many courts have used waiver and estoppel to protect the interests of insureds, under \textit{Shahan}, a majority of the Missouri Supreme Court would rather limit the application of waiver and estoppel and protect insurers.

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\textbf{JEREMY P. BRUMMOND}
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\textsuperscript{159} Contra proferentum is the well known canon that states “an ambiguous provision [of a contract] is construed most strongly against the person who selected the language.” BLACKS LAW DICTIONARY 327 (6th ed. 1990).

\textsuperscript{160} See, e.g., Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo., 992 S.W.2d 308, 320-21 (Mo. Ct. App. 1999).\end{flushleft}