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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ALOHA PACIFIC, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Defendant and Respondent.	B130555 (Super. Ct. No. BC 196063) ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:*

Appellants' petition for rehearing is denied.

It is ordered that the opinion, filed February 28, 2000, be modified as follows:

1. Insert after the first sentence in section II on page 8 the following:

Appellants also contend principles of waiver and estoppel apply to CIGA because it defended the federal action following Canadian's insolvency without issuing a reservation of rights letter and delayed its denial of appellants' claim.

2. Delete footnote 12 on page 13.

3. Insert after the first full paragraph and footnote on page 17 the following:

C. Appellants' Waiver and Estoppel Contentions

Appellants contend CIGA waived the right to assert, or is equitably estopped to assert, that appellants' claim was not within the coverage of the Canadian policy by (a) defending the federal action following Canadian's insolvency without issuing a reservation of rights letter or (b) delaying its denial of appellants' claim.

Appellants have made no showing that CIGA intentionally relinquished a known right after knowledge of the facts (see *Waller* v. *Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31), and their waiver argument is, accordingly, not well taken.

Appellants' reservation of rights letter contention is also without merit. A liability insurer may become estopped from setting up a ground of noncoverage by defending its insured without disclaiming liability and giving notice of its reservation of rights. (See, e.g., *Miller* v. *Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 755.) One rationale for this exception to the general rule that estoppel cannot be used to create coverage is that "[t]he insurer's undertaking defense of the third party suit creates a high potential for *misleading* the insured, by creating the impression the insurer is not disputing coverage. And, the insured may rely thereon by failing to retain independent counsel to negotiate or defend the action." (Croskey et al., Cal. Prac. Guide: Insurance Litigation (The Rutter Group 1999) ¶ 7:712, citations omitted, italics in original.) In this case, however, the insured (Island) was liquidated in 1990 and freed from any liability to appellants by the latters' agreement to look solely to the Canadian policy to satisfy any judgment they might obtain. By the time CIGA picked up Canadian's defense obligation after that insurer's insolvency, the insured was no longer at risk and could not have been misled by the absence of a letter from CIGA reserving rights.

For their estoppel contention appellants rely on *California Ins. Guarantee Assn.* v. *Workers' Comp. Appeals Bd.* (1992) 10 Cal.App.4th 988 (*CIGA* v. *WCAB*).[15] The estoppel found in that case arose from the non-issuance of a workers' compensation policy to an insured that had been repeatedly assured by the insolvent insurer's agent that a policy had issued, and the court's holding was based in part on the Guarantee Act's definition of covered claims: "'the obligations of an insolvent insurer . . . (i) imposed by law and arising out of an insurance policy of the insolvent insurer . . . [and] (vi) in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the Workers' Compensation Law of this state . . . .'" (*Id*. at p. 995, quoting from section 1063.1, subdivision (c)(1)(i), (vi), italics omitted.)[16] The special workers' compensation insurance provisions of section 1063.1, subdivision (c)(1)(vi) were critical to the *CIGA* v. *WCAB* court's analysis, those provisions of the Act are inapplicable to this claim, and appellants' reliance on that case is misplaced: the case does not hold that *every* estoppel affixed to an insolvent insurer will also be imposed upon CIGA. Moreover, appellants did not obtain, in their action against Canadian, a ruling that the insurer was estopped to deny coverage. (See *Canadian* v. *Rusty's*, *supra*, 36 Cal.App.4th at p. 496 [ruling based on waiver].)

We are likewise unpersuaded by appellants' estoppel contention based on the claimed delay by CIGA in denying the claim. Appellants made no showing in

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[15] To invoke equitable estoppel an insured must plead and prove: "'(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" (*CIGA* v. *WCAB*, *supra*, 10 Cal.App.4th at p. 997, quoting from *Driscoll* v. *City of Los Angeles* (1967) 67 Cal.2d 297, 305.)

[16] The court in *CIGA* v. *WCAB* construed the form of section 1063.1, subdivision (c)(1)(i) in effect before the 1987 amendment. (See text at fn. 10, *supra*.)

the court below that they relied to their detriment on anything done or not done by CIGA. At oral argument, when asked what appellants would have done differently had they known CIGA would ultimately deny their claim, counsel for appellants asserted that he would have gone back to the judge who presided over the federal action and sought revisions in that court's findings of fact in an effort to bring appellants' claim within coverage. The 1992 judgment obtained in the federal action, entitling appellants to damages on their Lanham Act claims and their California unfair competition claim, was based on evidence introduced by appellants before Canadian became insolvent. Appellants argued the effect of that evidence and sought the findings that were made by the federal court, and they have demonstrated no legal basis for estoppel insofar as CIGA is concerned.

4. Change the subsection designation on page 18 from C to D.

This modification does not effect a change in the judgment.

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*VOGEL (C.S.), P.J. EPSTEIN, J. DAU, J.**

**Assigned by the Chairperson of the Judicial Council.