Legal Briefing

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ESTOPPEL IN CLAIMS HANDLING

1. The insurer's best or worst ambassador

The whole raison d'être of an insurance policy revolves around the indemnity, whether that be in the form of monetary compensation following a loss, or assistance following a mishap or a situation where a service is required -repair, travel assistance, health care, etc.- that the insurer will provide. Once the insured party has shifted a certain risk to the insurer under the parameters set out in the insurance contract, when a loss covered under the policy occurs, the insured party deserves a positive response from the insurer.

With losses, however, things are never black and white. Fraud attempts notwithstanding, many losses require an investigation, not only of their causes, but also of the extent of their consequences. This is in addition to the fact that sometimes different insurance policies might cover the same loss, there is a lack of information, or the damage is continuous and cannot be properly assessed without a certain margin of time.

It is in this work, from the receipt of news of a potential loss to the resolution thereof, that the work of claims handlers is key. It is in the handling of a claim that a policyholder can and often does have the most contact with the insurer, with the claims handler often being the ambassador par excellence of the insurer. Restraint, intelligence and empathy are key to the orderly handling of claims, and the claims handler often suffers from pressures and reactions that are at odds with their vital role.

2. We are prisoners of our words

In few fields is the saying that one is master of one's silence and prisoner of one's words more valid than in claims handling. Under this premise, the claims handler, on the one hand, must gather all possible information on the loss in order to form a definitive opinion on whether it is covered and the scope of such cover. On the other hand, they try to provide answers on such matters in the shortest possible time, since article 18 of Law 50/1980, of 8 October, on Insurance Contracts ("**LCS**"), is clear in this respect -and the 40 days for the "payment of the minimum amount" that may be due depending on the circumstances-, and the obligation to pay default interest established in article 20 of the LCS may even arise.

An example of this caution could be the acceptance of cover for the loss. This has traditionally been a complex issue, where it could be concluded that once such cover had been accepted, and assuming subsequent discussions on the amount of compensation eventually led to

litigation, the question of whether or not such cover was appropriate could not be revisited, the subject matter of the proceedings necessarily being focused on the amount to be paid[1].

In this context, the insurer may even be trapped by estoppel during the handling of the loss. In the end, there is an expectation of "future behaviour that is consistent to someone who has at a certain moment observed a conduct that objectively should generate in the other a confidence in that consistency" (see SCJ of 8 January 2009), which is entirely based "on the protection of trust and the principle of good faith" that governs our legal system (see SCJ of 6 October 2016). This doctrine reproaches the "contradiction between a previous conduct and the subsequent claim" (see SCJ of 5 May 2016), although case law emphasises that the conduct that is considered inconsistent due to subsequent acts must be "objectively assessable as showing a definitive attitude in a given legal situation" (see SCJ of 13 January 2015).

For example, estoppel is not deemed to arise if the insurer does not respond to a request for an extension of cover, consisting of a higher sum insured: not responding to it - by issuing a supplement to the policy- does not imply a tacit acceptance, nor an incidence of estoppel that can later be held against the insurer (see SCJ of 13 November 2013). The same goes for accepting in a given year that an annuity is covered despite a delay in the payment of the premium, as this "does not constitute a definitive and unequivocal attitude of consenting that the effects of art. 15.2 of the LCS do not operate in the event of a delay in the "following premiums", as "it cannot be inferred that said previous conduct could have generated a legitimate expectation for the policyholder", even if for a previous annuity the policy had not been cancelled due to such a delay (see SCJ of 30 January 2017 and concordant judgments, referring to cover of the Spanish Insurance Compensation Consortium).

3. Examples of estoppel in claims handling

It is not possible to set definite rules on where estoppel arises and where it does not in relation to the handling of claims beyond the principles outlined above, but clear examples can be found both in case law and in practice, where some patterns of conduct can be determined:

(i) **Estoppel does not arise when a settlement offer is made in a claim where cover has been declined.** The factual situation here is different to that of the SCJ of 26 January 2004: there is an unequivocal refusal of the cover, but the insurer decides to try to avoid a later confrontation or dispute by offering a settlement protected by Article 1809 and concordant articles of the Civil Code -for commercial reasons, because it is not absolutely sure of the fate of its arguments for refusal, etc.-. As the SCJ of 19 October 2019 points out, "it cannot be attributed to an offer of amicable settlement, which is not accepted, any of the characteristics that the case law envisages for the basic act whose contradiction with the subsequent conduct would give rise to the application of the doctrine of estoppel: an act of a transcendent nature, of the kind that causes status by unalterably defining the legal situation of its author, that has been contradicted (SCJs 16

1 See Judgment of the Supreme Court ("**SCJ**") of 26 January 2004.

February 1988, 5 April 1991, 7 April and 10 June 1994), etc. or an "unequivocal act, in the sense of creating, defining, fixing, modifying, extinguishing or clarifying without any doubt a certain legal situation affecting its author" which, interpreted in good faith, is incompatible with the current claim (SCJs 24 May 2001, 9 May, 25 July and 25 October 2000, 25 January 2002, among many others)".

Estoppel also does not arise due to the same settlement attempt when the action against the insurer has already been initiated by the insured or injured third party, at least when the claims handler warns that if their offer is rejected, the claim will be contested with all the consequences (see Judgment of the Court of Appeal - **"CAJ"**- of A Coruña of 16 July 2015); or in cases where a reasoned offer is rejected in the field of road accident claims, because if the "reasoned offer (is) not accepted in its entirety by the claimant, (this) does not prevent the insurer (from) being able to argue that it is not obliged to take responsibility for the claim, nor does it relieve the claimant of the burden of proving the defendant's liability for the injuries for the amount claimed" (see for example CAJ of A Coruña of 18 February 2014).

(ii) **Estoppel does not arise when cover for a loss is rejected on the basis of existing information, without prejudice to leaving open the possibility of a subsequent review.** This is a very common practical matter which is closely linked to the spirit of Article 18 of the LCS, which unequivocally refers to "upon completion of the necessary investigations and expert opinions" as the moment in which the insurer must determine its position with respect to the loss. Irrespective of the time limits that this provision determines, it is not contradictory for the insurer, lacking documentation and information that proves that a loss has occurred that could be covered, to refuse to cover it - in order to comply with its duties according to articles 18 and 20 of the LCS (since, regardless of the scarce procedural success of this element, what cause can be more justified for not providing compensation on time than that the insurer was totally or partially blind with respect to the circumstances of a loss?)- but remain willing to review such a position of refusal if reports emerge or are provided that allow it to review its position.

We have to agree that, in any case, the insurer is on delicate ground with such rejections. If the rejection is unequivocal and unconditional, to continue with the processing after the rejection may be contradictory, and, therefore, the expectations that such subsequent steps may have created for the insured party, if known to them, as well as the precautions and conditionality expressed in the rejection, must be taken into account.

(iii) **Estoppel does not arise when a decision is not appealed and a recovery action is initiated.** The fact that an insurer complies with a court decision against it, "can in no way be considered as an instance of estoppel", and certainly not one "that prevents a recovery action being initiated" (see SCJ of 20 September 2018). Once immersed in a

procedural logic, the loss becomes for the insurer a litigation where its right of defence prevails over other considerations.

In short, we are moving in the realm of logic and caution: the claims handler must take great care in written communications with the insured party, with the broker and, in general, with all those involved with the claim. In the same way, those who assist with the processing of such claims - experts, lawyers, etc.- must be cautious in generating expectations that could be considered a definitive position in relation to a situation where, unfortunately, practical complexity and a lack of information leads to a step-by-step process needing to be followed and to not being able to immediately satisfy the requests for a position and for action that are made to the insurer in the event of a loss.

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