

**3057 WAIVER**

Waiver means that a person is precluded from asserting a right, a claim or privilege because he or she has previously knowingly, voluntarily, and intentionally relinquished or given up that right, claim, or privilege.

Waiver must be a voluntary act and implies a knowing choice by a person to dispense with something of value or to forego a right or advantage which the person might have demanded and insisted upon. It only involves the conduct of the party against whom the waiver is asserted and consideration is not necessary for the doctrine to apply; nor need there be a detriment or harm to the party claiming the waiver.

The following elements must appear before the doctrine of waiver can apply:

1. That the person had a right, claim, or privilege in existence at the time of the claimed waiver.
2. That the person who is alleged to have waived such a right had knowledge, actual or constructive, of the existence of his or her rights or of the important or material facts which were the basis of his or her right.
3. That the person waiving such right did so intentionally and voluntarily.

Constructive knowledge is knowledge which one has the opportunity to acquire by the exercise of ordinary care and diligence. If a person is ignorant of a material or important fact, that is, if he or she lacks actual or constructive knowledge, a waiver is not possible.

The intent to waive can be inferred from the conduct of the party against whom the waiver is claimed. However, the conduct or act out of which the waiver is sought to be

established must have been done intentionally and with present knowledge of the rights involved, or of the material or important facts which are the basis of those rights.

Unreasonable delay in taking or not taking action may be taken into account in considering whether there has been conduct amounting to a waiver.

#### COMMENT

This instruction and comment were approved by the Committee in 1975. The comment was updated in 2018.

The doctrines of estoppel and waiver are related, but separate, doctrines. Knapke v. Grain Dealers Mut. Ins. Co., 54 Wis.2d 525, 532, 196 N.W.2d 737 (1972); 28 Am. Jur. 2d Estoppel and Waiver § 30; Perlick v. Country Mut. Cas. Co., 274 Wis. 558, 80 N.W.2d 921 (1957).

Waiver is the voluntary and intentional relinquishment of a known right. Bank of Sun Prairie v. Opstein, 86 Wis.2d 669, 681, 237 N.W.2d 279 (1979).

Ryder v. State Farm Mutual Auto Ins. Co., 51 Wis.2d 318, 326, 187 N.W.2d 176 (1971) (Failure of insurer to rescind because of misrepresentation is not estoppel because no reliance by insured; and not waiver because hearsay knowledge by agent not known to underwriter at time of reissuance of policy); Nolop v. Spettel, 267 Wis. 245, 64 N.W.2d 859 (1954) (Payment under cost-plus contract of wage claims is not waiver because of ignorance that wage rate included overcharges), 28 Am. Jur. 2d Estoppel and Waiver § 154.

Consideration not necessary: Perlick v. Country Mut. Cas. Co., 274 Wis. 558, 80 N.W.2d 921 (1957); Will of Rice: Cowie v. Strohmeyer, 150 Wis. 401, 468, 136 N.W. 956 (1912). See 17 Am. Jur. 2d Contracts § 391.

Knowledge: Attoe v. State Farm Mut. Auto Ins. Co., 36 Wis.2d 539, 545-56, 153 N.W.2d 575 (1967) (Insurer's answer without raising plea in abatement waived non-action defense); Nolop v. Spettel, 267 Wis. 245, 64 N.W.2d 859 (1954); Joplin v. John Hancock Mut. Life Ins. Co., 55 Wis.2d 650, 655, 200 N.W.2d 607 (1972).

Voluntary: 28 Am. Jur. 2d Estoppel and Waiver §§ 157, 158; Broadbent v. Hegge, 44 Wis.2d 719, 726, 172 N.W.2d 34 (1969); Bade v. Badger Mut. Ins. Co., 31 Wis.2d 38, 142 N.W.2d 218 (1966); Hanz Trucking, Inc. v. Harris Bros. Co., 29 Wis.2d 254, 138 N.W.2d 238 (1965).

Delay: Somers v. Germania National Bank, 152 Wis.210, 220, 138 N.W. 713 (1913). See also Thompson v. Village of Hales Corners, 115 Wis.2d 289, 319, 340 N.W.2d 704 (1983).