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Georgia Supreme Court Changes Reservation of Rights Law

Kenan G. Loomis • 404.572.2028 • kloomis@cozen.com
Jennifer A. Kennedy-Coggins • 404.572.2066 • jkennedy-coggins@cozen.com
Victoria Morgan Carroll • 404.572.2021 • vcarroll@cozen.com

On June 18, 2012, the Supreme Court of Georgia issued *Hoover v. Maxum Indemnity Company*, Nos. S11S1681, S11G1683, 2012 WL2217040 (Ga. June 18, 2012), dramatically changing Georgia's "Reservation of Rights" law. In short, *Hoover* held insurers may no longer disclaim coverage under a specific policy provision, while reserving the right to do so under others. *Id*. at *3. The court held that a carrier waives coverage defenses that do not form the basis of the claim denial. *Id*. According to *Hoover*, a carrier cannot "both deny a claim outright and attempt to reserve the right to assert a different defense in the future." *Id*. at *2.

Hoover arose from a personal injury sustained by plaintiff James Hoover on October 20, 2004, while working for Emergency Water Extraction Services, LLC (EWES). EWES was aware of the accident when it occurred and even visited Hoover in the hospital; yet, EWES did not provide notice of this incident to its commercial general liability insurer, Maxum Indemnity Company (Maxum), at that time. Two years later, in September 2006, Hoover filed suit against EWES and other defendants. EWES tendered the lawsuit to Maxum on October 19, 2006. Maxum disclaimed coverage to EWES on October 23, 2006, relying upon the policy's Employer's Liability Exclusion, and also reserved its right to deny coverage based on EWES's failure to provide timely notice of the accident pursuant to the policy's notice provision.

Hoover obtained a $16.4 million judgment against EWES in the underlying tort case. EWES then assigned its breach of duty to defend and indemnify claims against Maxum to Hoover, who then filed suit. Maxum was granted summary judgment by the trial court, which held EWES did not provide timely notice under the policy. The trial court also granted Hoover's motion for partial summary judgment, finding that Maxum breached its duty to defend the underlying action. The Court of Appeals affirmed summary judgment for Maxum, but reversed summary judgment for Hoover on Maxum's duty to defend.

The Supreme Court of Georgia granted Certiorari to consider: (1) whether or not Maxum had waived the right to assert its notice defense; and, (2) whether or not timely notice was a prerequisite to Maxum having to defend EWES. The Supreme Court sided with Hoover on both issues. As to notice, the court found that Maxum waived its right to assert the notice defense by failing to properly advise EWES that it could be a potential bar to coverage. As to the duty to defend, the court held that because Maxum waived its notice defense, timely notice was not a prerequisite to Maxum's duty to defend. *Id*. at *1.

In so doing, *Hoover* recognized an insurer's three options upon receipt of a lawsuit against its insured, emphasizing that an insurer may either: (1) defend a claim thereby waiving its policy defenses; (2) "deny coverage and refuse to defend, leaving policy defenses open for future litigation"; or, (3) defend under a reservation of rights. *Id*. at *2. The court noted a reservation of rights allows an insurer to undertake a defense where the validity of coverage is in question, while preserving the right to ultimately deny coverage should it be determined that none is owed under the policy. This is considered the "safe" course of action when questions regarding coverage defenses exist. *Id*. at *3.

The Supreme Court then held that the Court of Appeals erred in finding that Maxum could deny coverage based on one coverage defense, and preserve additional coverage defenses later by purportedly reserving its right to do so in the disclaimer letter. The court noted a reservation of rights is only appropriate where the insurer is choosing to **defend**, not where an insurer is disclaiming outright. Again, where an insurer is unsure of its rights under the policy, the safe course of action is to defend the case under a reservation of rights,

and pursue a declaratory judgment action. A disclaimer, where an insurer chooses not to defend, cannot also include a reservation of rights for other potential defenses. This is because a disclaimer denies coverage outright; once a denial occurs, there is no need to reserve rights to deny on other grounds, as a proper denial indicates no coverage exists such that the carrier has no further duty under the policy.

Under these principles, *Hoover* determined that Maxum's attempt to reserve the right to deny coverage under the late notice provision was invalid. The fact that Maxum had not cited the notice provision in a declaratory judgment coverage action filed after claim denial (which was dismissed), and similarly failed to raise it in its summary judgment action filed in the underlying tort action, was also noted by the court.

Possible Implications for Insurers

Prior to *Hoover*, insurers have commonly issued coverage disclaimers based on the strongest perceived coverage defense(s) at the time of the disclaimer, while reserving its right to assert additional defenses to the extent they became apparent at a later time. *Hoover* holds this course of action is inappropriate and will not preserve the reserved upon defenses. In order to protect its interests when issuing a disclaimer, a carrier must now disclaim on each and every coverage defense that it might choose to assert at any time against the insured. *Hoover* thus requires carriers to carefully consider the bases of any denial, and assert only those that provide a "reasonable grounds to deny coverage," lest the insured allege bad faith.

Hoover does not impact the carrier's right to defend its insured under a reservation of rights while simultaneously filing a declaratory judgment action to challenge coverage. In that instance, the reservation of rights letter need not "'list each and every basis for contesting coverage in the reservation of rights letter before the company [can] raise such in the declaratory judgment action,'" provided the reservation preserves the right to assert other grounds and reasons for non-coverage in the future. *Kay-Lex Co. v. Essex Ins. Co.*, 286 Ga. App. 484, 491, 649 S.E.2d 602, 608 (2007) *quoting Gov't Employees Ins. Co. v. Progressive Cas. Ins. Co.*, 275 Ga. App. 872, 876 (3), 622 S.E.2d 92 (2005).

Please feel free to contact Kenan Loomis, Jennifer Kennedy-Coggins, or Morgan Carroll in our Cozen O'Connor Atlanta office if you have any questions or need assistance with the Georgia issue. Contact Kenan at kloomis@cozen.com or 404-572-2066, Jennifer at jkennedy-coggins@cozen.com or 404- 572-2066, and Morgan at vcarroll@cozen.com or 404-572-2021.