

**ALERT**

# Insurer Can Deny Coverage or Reserve Rights, But Not Both

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June 29, 2012

The Supreme Court of Georgia has held that an insurer cannot deny coverage on one ground while reserving the right to deny coverage on other grounds in the future. *Hoover v. Maxum Indem. Co.*, 2012 WL 2217040 (Ga. June 18, 2012).

An employee of the insured company suffered a serious brain injury when he fell off a ladder, descending from the roof of a worksite. The company did not report the incident to its commercial liability insurer at the time. Instead, the company first provided notice to the insurer two years later, when the employee filed a personal injury action. The insurer denied coverage, refusing to defend, based on the "Employer's Liability Exclusion" in the policy. The disclaimer letter from the insurer also noted that "coverage for [the] matter may be barred or limited to the extent the insured has not complied with the notice provisions under the policy." Those provisions provide that the insured "must see to it that [the insurer is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." The letter further indicated that the insurer "continues to reserve the right to raise any other coverage defenses, including the right to disclaim coverage on any other basis that may become apparent as the matter progresses and as [the insurer] obtains additional information."

The insurer brought suit against the insured for a declaration of no coverage based solely on the Employer's Liability Exclusion. That action was dismissed, however, because, under Georgia law, "[an] insurer cannot deny a claim and then seek declaratory judgment to determine the propriety of the denial; declaratory judgment is only available where the insurer undertakes a defense but is uncertain how to handle the claim." Following the entry of judgment against the

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insured in the underlying action, the injured employee filed suit against the insurer pursuant to an assignment of claims from the insured.

On appeal from an order granting summary judgment to the insurer based on untimely notice, the high court set forth three options for an insurer faced with a suit against its insured: (1) defend the claim, thereby waiving its policy defenses and claims for coverage; (2) deny coverage and refuse to defend, leaving the policy defenses open for future litigation; or (3) defend under a reservation of rights. According to the court, "[a]n insurer cannot both deny a claim outright and attempt to reserve the right to assert a different defense in the future." In this regard, the court held that the insurer's reservation of any rights was ineffective because the insurer had denied coverage based on the Employer's Liability Exclusion and refused to defend the claim. The court therefore concluded that the insurer waived its late-notice defense to coverage. The court also found that, even if the defense could have been preserved notwithstanding the denial of coverage on other grounds, the boilerplate language in the insurer's letter did not suffice, because it failed to "unambiguously inform [the insured] that [the insurer] intended to pursue a defense based on untimely notice of the claim."

The opinion is available [here](#).