

IN THE SUPREME COURT OF GEORGIA

CASE NOS. S11G1681, S11G1683

JAMES MATTHEW HOOVER

Appellant,

v.

MAXUM INDEMNITY COMPANY

Appellee.

**BRIEF OF *AMICUS CURIAE* GEORGIA DEFENSE LAWYERS
ASSOCIATION IN SUPPORT OF MOTION FOR RECONSIDERATION**

Lynn M. Roberson, President

Robert R. Gunn, II and Jeffrey S. Ward, *Amicus* Committee

David M. Leonard, Author
Georgia Bar No. 446625
Christopher B. Freeman, Author
Georgia Bar No. 140867
CARLTON FIELDS, P.A.
One Atlantic Center, Suite 3000
1201 West Peachtree Street NE
Atlanta, Georgia 30309-3455
Telephone: 404.815.3400
Facsimile: 404.815.3415

STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (“GDLA”) consists of approximately 675 attorneys, including sole practitioners and members of law firms of all sizes throughout the State, who engage in litigation primarily for defendants in civil cases, as well as workers’ compensation claims. In part, GDLA and its members work to improve the adversary system of jurisprudence in our courts, the elimination of court congestion and delay in litigation, and to promote improvements in the administration of justice.

The Court’s recent opinion in Hoover contains an unprecedented pronouncement regarding the inability of an insurer to reserve its rights to assert additional contract defenses in the context of a denial of coverage. A corollary that follows is that all defenses not raised in the initial disclaimer are waived, a ruling that represents a wholesale change in the law of this State and is contrary to industry practice in this and other states. The ruling also presents a dilemma for defense counsel advising insurers. The practical implication of the Court’s broad pronouncements in Hoover will be an increase in unnecessary coverage litigation, as insurers are forced to engage counsel and look to the courts to preserve their rights under the insurance contracts. This cannot have been the Court’s intent, yet it will almost certainly be the result.

While this Court will have the opportunity to hear from the Appellee and, perhaps, Appellant, GDLA submits this brief in support of Appellee Maxum Indemnity Company's ("Maxum") Motion for Reconsideration from the perspective of Georgia defense lawyers, specifically regarding sections 1 and 2 of the Court's Opinion.¹

INTRODUCTION

In reversing the Court of Appeals' affirmance of the trial court's grant of summary judgment to Maxum on the issue of timely notice, this Court went far beyond holding that Maxum's late notice defense had been waived under the specific factual circumstances presented. Citing only dicta from a single Georgia case – one that relied solely on foreign jurisprudence – this Court broadly announced a new rule in Georgia in part 1 of its opinion: "An insurer cannot both deny a claim outright and attempt to reserve the right to assert a different defense in the future." (Opinion at 6.) The majority holding in this case effectively finds waiver or estoppel whenever policy defenses are omitted as grounds for the disclaimer, regardless of whether the insurer has expressly indicated its intent not to waive any additional defenses.

¹ Part 3 of the Court's Opinion involves an analysis of the underlying facts of the case, which is beyond the scope of what can be addressed by the GDLA as *amicus curiae* in the short time available. The decision to address sections 1 and 2 only should not be interpreted as indicating GDLA's agreement with the Court's decision regarding Part 3.

By limiting this fundamental contract concept of non-waiver, or reserving rights as to other contract defenses, the Court is on uncharted ground. By limiting the ability of a contracting party to reserve its rights solely to circumstances where the contracting party agrees to perform under the contract (in this context by the insurer defending the insured) despite its good faith belief that the contract does not apply, the Court is mandating performance beyond the terms of the contract. This raises state and federal constitutional issues.

Moreover, as a practical matter, the new rule announced by the majority in Hoover could be interpreted to require any insurer – including one that believes reasonably and in good faith that no coverage is afforded by the insurance contract for at least one reason – to commence the Richmond² procedure of defending its insured under a reservation of rights while filing a separate declaratory judgment action. In addition to presenting a dilemma to lawyers involved both in the defense of insureds and insurers, the ruling encourages unnecessary litigation to prevent waiver of additional policy defenses. This new rule is not only inconsistent with industry practice, but also is contrary to the well-settled law of this State concerning waiver and estoppel and the right to contract. It places Georgia far out of line with the jurisprudence of its sister states.

² Richmond v. Georgia Farm Bureau Mut. Ins. Co., 140 Ga. App. 215, 231 S.E.2d 245 (1976).

ARGUMENT AND CITATION OF AUTHORITY

A. The Majority Opinion Violates Parties' Fundamental Freedom of Contract.

The Court's holding in Hoover expands the scope of an insurance contract beyond that for which the parties bargained. Such expansion violates the parties' fundamental freedom to contract. See GEOR. CONST., art. I, sec. I, par. 10 ("No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed."); NEC Technologies, Inc. v. Nelson, 267 Ga. 390, 396, 478 S.E.2d 769 (1996) ("Georgia law also recognizes and protects the freedom of the parties to contract."); Jefferson Pilot Life Ins. Co. v. Clark, 202 Ga. App. 385, 389, 414 S.E.2d 521 (1991) (upholding the validity of an insurance policy exclusion and noting that "[i]t is the paramount public policy of this state that courts will not lightly interfere with the freedom of the parties to contract").

The parties to an insurance contract are entitled to the same constitutional protection of their freedom to contract as are parties to any other type of contract. See GEOR. CONST., art. I, sec. I, par. 10. Under Georgia law, "insurance contracts are governed by the rules of construction applicable to other contracts, and words in the policy must be given their usual and common signification and customary meaning." Clayton v. S. Gen. Ins. Co., 306 Ga. App. 394, 396, 702 S.E.2d 446, 448-49 (2010). "When the language of an insurance policy defining the extent of

the insurer's liability is unambiguous and capable of but one reasonable construction, the courts must expound the contract as made by the parties." Id. at 396, 702 S.E.2d at 449.

Rather than adhering to this basic principle of contract and insurance law, the Court effectively has empowered courts to modify or eliminate certain provisions in insurance contracts by holding that "[a]n insurer cannot both deny a claim outright and attempt to reserve the right to assert a different defense in the future".³ There is no basis in Georgia law for allowing courts to ignore contract provisions, without having first undergoing the appropriate analysis for doing so. As demonstrated in Section B below, it is well-settled that an insurer's failure to raise a particular policy provision as a coverage defense in an initial denial letter constitutes neither a waiver of nor an estoppel from later relying on that policy provision. This certainly is the case where, as here, an insurer includes language in its denial expressly asserting the non-waiver of additional policy defenses.

³ As noted by the Hoover dissent, the case cited by the majority in support of the quoted proposition, Browder v. Aetna Life Ins. Co., 126 Ga. App. 140, 190 S.E.2d 110 (1972), is inapposite to that point. In any event, the dicta in Browder relates only to the waiver of a forfeiture of coverage based on policy conditions. It does not support a finding that the denial of liability on one ground constitutes a waiver of defenses based on the scope of coverage afforded by the insurance contract (i.e., the insuring agreement and policy exclusions).

B. Failure to Raise a Coverage Defense In An Initial Denial Letter Does Not Constitute Waiver Under Georgia Law.

“Waiver is a voluntary relinquishment of some known right, benefit, or advantage, which, except for such waiver, the party otherwise would have enjoyed.” Jordan v. Flynt, 240 Ga. 359, 366, 240 S.E.2d 858 (1977). As a general rule under Georgia law, neither waiver nor estoppel can be used to create liability that does not otherwise exist under the insurance contract and, thus, is not assumed by the insurer. Andrews v. Ga. Farm Bureau Mut. Ins. Co., 226 Ga. App. 316, 317, 487 S.E.2d 3 (1997).⁴

Accordingly, numerous courts have held that an insurer does not impliedly waive those defenses of which it had knowledge at the time it denied coverage, but failed to mention in its coverage declination letter. See, e.g., Shahan v. Shahan, 988 S.W.2d 529 (Mo. 1999) (filing by insurer of complaint that does not raise particular coverage defense does not constitute a waiver of that defense); Walker v.

⁴ A narrow exception to this general rule, not applicable to the facts here, is where the insurer has assumed the defense of the insured without adequately reserving its rights, and under circumstances where the insured is not sophisticated or otherwise able to recognize the limitations on the defense without prejudice. See Prescott’s Altama Datsun, Inc. v. Monarch Ins. Co. of Ohio, 253 Ga. 317, 318, 319 S.E.2d 445 (1984) (stating that “risks not covered by the terms of an insurance policy, or risks excluded therefrom, while normally not subject to the doctrine of waiver and estoppel, ... may be subject to the doctrine where the insurer, without reserving its rights, assumes the defense of an action or continues such defense with knowledge, actual or constructive, of noncoverage....”). However, the Prescott court ultimately found that the insurer’s retention of additional defense counsel several months before making its coverage decision was not a waiver under the facts of that case.

Truck Ins. Exchange, Inc., 900 P.2d 619 (Cal. 1995) (applying California law) (noting that “of the 33 sister states to consider the issue, 32 agree” with the rule that “[a]n insurer does not impliedly waive coverage defenses it fails to mention when it denies the claim”); Guberman v. William Penn Life Ins. Co. of New York, 146 A.D.2d 8, 12, 538 N.Y.S.2d 571, 573 (1989) (“While it is true that an insurer’s specification of one of several available grounds for disclaimer may be taken by the insured as an indication that the other grounds have been overlooked, as a basic matter of fairness we see no reason why this circumstance should operate to bar the later assertion of the other grounds for disclaimer where the insured cannot claim to have suffered any degree of prejudice.”); Ladd Const. Co. v. Insurance Co. of North America, 73 Ill. App. 3d 43, 391 N.E.2d 568, 573 (3d Dist. 1979) (“An insurance company is not required to raise all possible defenses in its [declination of coverage] letter to the insured. Failure to raise all defenses does not result in a per se waiver of the same.”); Consolidated Rail Corp. v. Hartford Acc. and Indem. Co., 676 F. Supp. 82, 85 (E.D. Pa. 1987) (insurer not precluded from raising defenses not mentioned in declination of coverage letter because “waiver cannot operate to expand coverage under an insurance policy”; as a result, “the initial assertion of one policy defense does not waive the right to rely upon other portions of the policy”); State of Miss. ex rel King v. Richardson, 634 F. Supp. 133, 136 (S.D. Miss. 1986) (insurer did not, by denying coverage based on a policy

exclusion, waive its right to deny coverage because of tardy notice); City of Pigeon Forge, Tenn. v. Midland Ins. Co., 788 F.2d 368, 371 (6th Cir. 1986) (Tennessee law) (defense of lack of timely notice not waived simply because it was not mentioned in the insurer's declination of coverage letter); Taylor v. Commercial Union Ins. Co., 614 F.2d 160, 163 (8th Cir. 1982) (Missouri law) (insurer did not, by denying coverage based on a policy exclusion, waive its right later to deny coverage on ground that claimant was not an insured).

The rationale for this rule is clear and flows from the principle that a finding of waiver requires the voluntary, intentional relinquishment of a known right:

Clearly, by denying coverage on what it believes to be proper and adequate grounds, the insurer does not intend to forgo any other policy defenses that may be available to it in the event that the grounds stated prove to be erroneous. To hold, therefore, that the insurer has waived its rights as to such other grounds is to afford the insured insurance not purchased, and for no legitimate reason. As a result, absent an applicable statute, an insurance company should not be deemed to have waived those defenses that it had knowledge of at the time it denied coverage, but which it failed to mention in its declination of coverage letter.

Allan D. Windt, 1 Insurance Claims & Disputes § 2:25 (5th ed. 2007).

Although some courts have held to the contrary, the cases that hold that an insurer waives the right to disclaim coverage for reasons other than those specifically identified in the original disclaimer cannot be reconciled with the concept of waiver as the voluntary and intentional relinquishment of a known right.

See Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes § 2.05[b] (15th ed. 2010); Windt, 1 Insurance Claims & Disputes § 2:25 (“Nevertheless, to find a waiver under those circumstances is necessarily to ignore the fundamental principles on which the doctrine of waiver is premised—that a waiver is the intentional relinquishment of a known right.”) (citations omitted).

Moreover, courts have refused to find implied waiver in situations where, as here, a denial letter was combined with a general reservation of other potential defenses. See, e.g., Gary G. Day Constr. Co., Inc. v. Clarendon Am. Ins. Co., 459 F. Supp. 2d 1039, 1049-50 (D. Nev. 2006) (“The Court finds that Defendants have not waived any rights because its April 15, 2004 letter explicitly contained a reservation of rights. ... The addition of this language in its denial letter expressly negates any intentional relinquishment of rights by Defendants.”); Nat’l Fire Ins. Co. v. Entertainment Specialty Ins. Services, Inc., 485 F. Supp. 2d 737, 742 (N.D. Tex. 2007) (“The Court finds Defendants’ claim of waiver to be without merit for the additional reason that National’s August 28, 2003 letter did not purport to rely only on a particular defense against policy coverage. Rather, National’s letter included several paragraphs reserving other potential defenses. Such disclamatory language effectively reserved other defenses to coverage.”); Smith v. Shelby Ins. Co. of Shelby Ins. Group, 936 S.W.2d 261, 263 (Tenn. App. 1996) (reservation of right to assert additional grounds not mentioned in declination letter precluded

waiver); Lugo v. AIG Life Ins. Co., 852 F. Supp. 187, 192 (S.D. N.Y. 1994) (“it seems obvious” that the insurer did not waive an unmentioned coverage defense, since its declination letter contained a general reservation as to any other defenses that might exist). Cf. Progressive Ins. Co. v. Brown ex rel. Brown, 966 A.2d 666, 668 (Vt. 2008) (“if an insurer initially denies coverage on a specified basis and does not reserve the right to later raise other grounds, it waives any additional defenses.”). See also Windt, 1 Insurance Claims & Disputes § 2:25 (in connection with a denial of coverage, “[t]he inclusion of a general reservation negates the existence of an implied intent to waive an unmentioned defense.”).

The Court offers no support for its broad statement that “a reservation of rights is only available to an insurer who undertakes a defense while questions remain about the validity of the coverage.” (Opinion at 7.) As shown above, this is neither the majority rule, nor industry practice. The fact that much of Georgia jurisprudence relating to reservation of rights in the insurance context may involve the circumstance in which an insurer has undertaken a defense (typically under a duty to defend policy) does not foreclose the use of non-waiver language – whether termed a “reservation of rights” or otherwise – in other contexts, as the dissent correctly notes. (See Dissent at 5.) Nor does the law requiring an effective reservation of rights to be specific and unambiguous have any application where

coverage has been denied and no defense is being provided.⁵ Even a general reservation of rights should suffice to inform the insured that, although coverage is disclaimed on one basis, other bases may exist. (See discussion supra at 9-10.)

Thus, according to standard industry practice across a variety of jurisdictions, an insurer is not required to assert every possible ground for denial in its denial letter in order to avoid waiver. Further, the inclusion of a general “reservation of rights” or non-waiver language should, in all instances, negate the finding of an implied intent to waive an unmentioned policy defense. A contrary rule turns the law of waiver on its head, and would make the task of both the insurer and its counsel significantly more burdensome and uncertain by requiring that the insurer continue its factual investigation even after it believes it has grounds for disclaiming, and requiring its counsel to attempt to predict what other contract provisions might become relevant in the future.⁶

⁵ See World Harvest Church, Inc. v. GuideOne Mutual Insurance Co., 287 Ga. 149, 695 S.E.2d 6 (2010), which is premised on a presumption of prejudice that may arise when an insurer provides a defense to its insured without adequately informing the insured of the existence of questions as to coverage.

⁶ Although not at issue in the instant case, an insurer’s failure to raise a particular policy provision as a coverage defense in an initial denial letter similarly cannot work an estoppel of that provision under Georgia law. “[E]stoppel requires an act on the part of the one intended to influence the other, and detrimental reliance upon that act by the other.” Robinson v. Boyd, 277 Ga. 53, 58, 701 S.E.2d 165 (2010). It is difficult to imagine a circumstance in which an insured could have reasonably relied to its detriment on a denial asserted on one basis, where other grounds for denial are later found to exist as well. In either event, coverage was denied, so the

To hold not only that unmentioned policy defenses are waived as a matter of law, but also that such waiver occurs even where an insurer has expressly indicated its intent not to waive, is without precedent under any state's law. Whether intended or not, such an extreme and unsupported position cannot stand.

C. The Practical Effect of the Court's Holding Will Be An Increase In Needless Coverage Litigation To The Detriment Of Both The Insureds and Insurers.

The Court's pronouncement that "[a]n insurer cannot both deny a claim outright and attempt to reserve the right to assert a different defense in the future" will result in an increase in coverage litigation, at great expense to both insureds and insurers, further taxing an already strained judiciary. In setting forth the three options available to an insurer when faced with a claim, this Court states initially that an insurer can "deny coverage and refuse to defend, leaving policy defenses open for future litigation." (Opinion at 6.) However, the Court then holds, inconsistently, that having decided to deny a claim on at least one basis, the insurer nevertheless cannot preserve other potential defenses except in the context of providing a defense under a reservation of rights. The first option indicates that the insurer can disclaim coverage without citation to any policy provisions, requiring the insured (and, presumably, coverage counsel) to refer to the policy to determine the potential bases for the denial. This clearly is not helpful to the insured, but

insured could not have been lulled into the mistaken belief that the insurer intended to pay for everything.

under Hoover, this strategy would eliminate the risk of implied waiver or estoppel. Alternatively, the insurer can disclaim coverage, including citation to any and all possible policy provisions that might be applicable under any set of yet to be discovered facts, regardless of their relative merits or strengths. Again, this practice is much less helpful to the insured than current practice, and often would require an insured to retain coverage counsel to parse through each stated defense to determine its validity and applicability. Third, despite its reasonable belief of no coverage, an insurer can nevertheless tender a defense to its insured while reserving rights and thereafter file a declaratory judgment action under the Richmond procedure. This not only presents an unnecessarily expensive and wasteful procedure, but is totally unjustified under, for example, a policy that has no duty to defend in the first place but provides only indemnity for defense costs.

In all instances, coverage litigation is more likely to occur – the bulk of which may be unnecessary. Moreover, the risk of implied waiver places attorneys advising insurers in a precarious position. An insurer that reasonably believes no coverage is afforded under the insurance contract should not be required to undergo the expense of defending its insured and filing a declaratory lawsuit in order to eliminate the risk of waiver of alternative grounds not yet apparent or confirmed under the facts. Under Hoover, the insured will receive either less

information from its insurer than before, or too much conflicting information, or another lawsuit. That could not have been the Court's intention.

The current industry practice of promptly communicating with an insured regarding a denial of coverage with specific detail, and with reference to the most clearly applicable policy provisions, while expressly stating the non-waiver of other potential defenses under the contract, is preferable under every scenario to the result the majority's holding in Hoover will engender. An insurer's attempt to communicate with its insured in a timely manner and in good faith, but without initiating unnecessary litigation, should be encouraged. As presently stated, the majority's opinion in Hoover does just the opposite. Reconsideration of the scope of the Court's pronouncements is warranted.

On behalf of the Georgia Defense Lawyers Association as *amicus curiae* in this matter, the undersigned respectfully request that this Court grant the motion for reconsideration filed by Maxum in these cases, that the Court grant full rehearing with respect to all issues, and that the Court grant oral argument on not only the issues specific to the case, but on the larger issues to the industry and to the lawyers of this state as presented by *amicus curiae*.

Respectfully submitted this 29th day of June 2012.

**GEORGIA DEFENSE LAWYERS
ASSOCIATION**

Lynn M. Roberson
President

Robert R. Gunn, II
Jeffrey S. Ward
Co-chairs of *Amicus Curiae*
Committee

CARLTON FIELDS, P.A.

/s/ David M. Leonard
David M. Leonard
Georgia Bar No. 446625
Christopher B. Freeman
Georgia Bar No. 140867

One Atlantic Center, Suite 3000
1201 West Peachtree Street NE
Atlanta, Georgia 30309-3455
Telephone: 404.815.3400
Facsimile: 404.815.3415

Attorneys for Georgia Defense
Lawyers Association

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing document has been served via U.S. Mail upon the following attorneys of record:

Lance A. Cooper, Esq.
The Cooper Law Firm
701 Whitlock Avenue
Bldg. J, Suite 43
Marietta, GA 30064

Philip W. Savrin, Esq.
Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339-5948

Mathew G. Nasrallah, Esq.
Robertson, Bodoh & Nasrallah, LLP
990 Cobb Parkway North, Suite 205A
Marietta, GA 30062

This 29th day of June, 2012.

/s/ Christopher B. Freeman

Attorney