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Ga. High Court Steps Up Pressure On Insurers To Defend

By **Bibeka Shrestha**

Law360, New York (June 22, 2012, 8:03 PM ET) -- Insurance companies that deny a claim outright cannot reserve the right to later raise new coverage defenses, the Georgia Supreme Court recently held in a dispute over a serious on-the-job injury — a ruling attorneys say could prod more insurers into initially defending policyholders.

The high court handed down the ruling June 18 in a coverage dispute over a \$16.4 million award to James Hoover, a man who sustained a serious brain injury while working for Emergency Water Extraction Services LLC, which held a commercial liability policy with Maxum Indemnity Co.

Though three justices disagreed, a majority concluded that Georgia law provides a reservation of rights only to those insurance companies that defend underlying suits while investigating whether their policies actually provide coverage.

Philip Savrin, a Freeman Mathis & Gary LLP partner who represented Maxum, said the ruling could pressure insurers into defending underlying litigation just so they can reserve their rights to assert different defenses down the road.

"In a case of any significant value where there are coverage questions, it's almost going to require — [or at least] strongly urge — insurers to defend," Savrin said.

Megan Magruder, a policyholder attorney and co-leader of King & Spalding LLP's insurance coverage and recovery practice, also said the ruling might drive insurers to defend policyholders as they mull possible defenses to coverage.

"Certainly the insurance company that doesn't provide a defense is taking a great risk after this decision," Magruder said.

Lance Cooper, a partner at The Cooper Firm who represented Hoover, said he hoped the ruling would prompt insurers to be clearer about their reasons for denying claims, which will help their policyholders more adequately prepare to attack those coverage defenses in court.

Cooper added that the high court decision also provided certainty to both insurance companies and insureds about what had been a gray area in state law.

"It really wasn't clear in Georgia law until now if insurance companies flat-out denied the claim, whether they could come in after the fact and assert a defense that they hadn't asserted before," Cooper said. "From now on, both insureds and insurance companies will know what the rules are."

According to the ruling, Maxum had cited an employer liability exclusion when it refused to cover Hoover's injury lawsuit against EWES, but the insurer later tried to argue that coverage was barred because EWES hadn't promptly notified it about the claim.

The Georgia Supreme Court found Maxum had waived the timely notice defense because it hadn't asserted that argument when it first denied coverage.

Reversing an appeals court ruling in Maxum's favor, the majority of high court judges said that a reservation of rights exists to protect both insurers and policyholders. It allows an insurance company that is uncertain about its obligations to undertake a defense while reserving its right to ultimately deny coverage following an investigation, the opinion said.

"A reservation of rights does not exist so that an insurer who has denied coverage may continue to investigate to come up with additional reasons on which the denial could be based if challenged," the majority said.

But Justices Harold Menton, David Nahmias and Harris Hines said in a partial dissent that the majority's conclusion that insurers cannot both deny a claim outright and reserve the right to assert a different defense in the future was a pivotal statement of the law that was incorrect.

According to the three justices, the mere assertion of one defense cannot be considered the waiver of other defenses, unless there's a statement or conduct showing an intent to waive these defenses.

"Under the majority's reasoning, an insurance company could deny a claim based on one defense, discover during litigation that, but for the fraud of the insured, it could have raised another defense, and be unable to raise the new defense simply because it was not explicitly asserted the moment that the claim was denied," the dissenting justices said.

Hoover is represented by Lance Cooper of The Cooper Firm and Mathew Nasrallah of Robertson Bodoh & Nasrallah LLP.

Maxum is represented by Philip Savrin of Freeman Mathis & Gary LLP.

The cases are Hoover v. Maxum Indemnity Co., case numbers S11G1681 and S11G1683, in the Supreme Court of Georgia.

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