



## Client Alert



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### **An Insurer Cannot Both Deny A Claim And Reserve Its Rights**

So held the Supreme Court of Georgia in *Hoover v. Maxum Indemnity Company*, 2012 Ga. LEXIS 570 (Ga. June 18, 2012). In that case, an employee was injured while working for his employer, which held a commercial liability policy with Maxum. When the employee brought a personal injury action, Maxum denied coverage for the claim and refused to provide a defense to the employer based on the policy's employer liability exclusion. In its letter disclaiming coverage, Maxum also reserved the right to assert other coverage defenses, including late notice, and specifically stated that it was not waiving any other potential defenses.

Nevertheless, the Court determined that Maxum had waived its right to assert a defense based on untimely notice because it did not properly alert its insured that lack of timely notice would potentially bar coverage for the claim. In doing so, the Court stated that an insurer cannot both deny a claim and reserve the right to assert a different defense in the future. Rather, a reservation of rights is only available to an insurer who undertakes a defense of the insured pending resolution of any coverage issues. Because Maxum denied the employer's claim, and refused to provide a defense, on the basis of the employer liability exclusion, it could not reserve the right to assert other defenses, including lack of timely notice.

The Court also found that Maxum's reservation of rights was defective because it did not unambiguously inform the employer of its intent to pursue a late notice defense. Finally, the court held that the employer liability exclusion did not apply, as the employee was not performing duties related to the conduct of the insured's business at the time of the accident. Accordingly, Maxum had breached its duty to defend its insured.

Justice Melton, in a concurring and dissenting opinion, pointed out that the majority had created new Georgia law in deciding that an insurer could not both deny coverage and reserve its rights – which had been a common practice. Based on the majority's holding, an insurer must now specifically assert all of its coverage defenses if it intends to disclaim coverage, or it must defend under a reservation of rights and seek a declaratory judgment as to coverage.

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