King & Spalding
Client Alert

Trial and Global Disputes

DECEMBER 15, 2020

For more information, contact:

Anthony P. Tatum
+1 404 572 3519
ttatum@kslaw.com

Shelby S. Guilbert, Jr.
+1 404 572 4697
sguilbert@kslaw.com

Joseph M. Englert
+1 404 572 3536
jenglert@kslaw.com

Melanie C. Papadopoulos
+1 404 572 4651
mpapadopoulos@kslaw.com

Morgan Bridgman
+1 404 572 5127
mbridgman@kslaw.com

King & Spalding

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600

Recent Court Ruling Illustrates The Perils Insurers Face When Sending Boilerplate Coverage Letters To Georgia Policyholders

Federal Court in Georgia Applies *Hoover* Rule Finding that Insurers Who Sent Denial Letters Waived Right to Assert Other Coverage Defenses Later.

Eight years ago in *Hoover v. Maxum Indemnity Co.*, 730 S.E.2d 413 (Ga. 2012), Georgia's Supreme Court cautioned insurers against the common practice of denying coverage on one ground at the outset of a claim's investigation, and later amending or supplementing that coverage denial to assert new coverage defenses if the initial reasons for denying coverage fail. Under *Hoover*, when an insurer responds to a Georgia policyholder's claim notification, it has three options: (1) confirm coverage for the claim; (2) defend the claim under a reservation of rights to deny coverage later after a claim investigation; or (3) deny the claim outright. *Hoover v. Maxum Indemnity Co.*, 730 S.E.2d 413, 416 (Ga. 2012). When an insurer chooses option (3), the insurer must identify the specific grounds for denying coverage in its denial letter, *id*. at 417, and defenses that are not identified in the initial coverage denial letter are waived. *Id*. at 418. In *Hoover*, this meant that the insurer waived its right to assert a late notice defense following its claim investigation because it failed to mention that defense as a potential ground for denying coverage in its initial coverage letter. *Id*. That defense was waived because the insurer "did not properly alert [its policyholder] that the lack of timely notice would be a potential bar to coverage." *Id*. at 415.

Over the last eight years, *Hoover* has been followed by numerous federal courts in Georgia. *See, e.g.*, *Latex v. Const. Co. v. Everest Nat. Ins. Co.*, 11 F. Supp. 3d 1193, 1201 (N.D. Ga. 2014); *Moon v. Cincinnati Ins. Co.*, 920 F. Supp. 2d 1301, 1305 (N.D. Ga. 2013) ("[Defendant insurer], like the insurer in *Hoover*, failed to properly reserve its rights to assert additional defenses when it denied the insured's claims on specific grounds and refused to undertake a defense."); *G.M. Sign., Inc., v. St.*

Paul Fire & Marine Ins. Co., 677 F.App'x 639, 643 (11th Cir. 2016) (affirming the reasoning of *Hoover*, and holding that "[u]nder Georgia law, [an insurer's] denial of coverage–for reasons unrelated to the policies' notice requirements–waive[s] the notice requirement.").

Several weeks ago, in *SavaSeniorcare LLC, v. Starr Indemnity & Liability Co*., No. 1:18-CV-01991-SDG, 2020 WL 5820643 (N.D. Ga. Sept. 29, 2020), the Court in the Northern District of Georgia reaffirmed the *Hoover* waiver rule once again. The Court held that two insurers who failed to raise a possible late notice defense in their first coverage denial letter waived the right to assert that defense later, including in subsequent coverage litigation. *Id.* at *6. In doing so, the Court in *Sava* confirmed that the *Hoover* waiver rule is not limited to duty to defend policies, and also applies to excess insurers who rely on letters sent by underlying insurers.

***SavaSeniorCare, LLC v. Starr Indemnity and Liability Co*., demonstrates that the *Hoover* waiver rule applies broadly and remains an important tool for Georgia policyholders facing untimely coverage defenses.**

SavaSeniorCare, LLC v. Starr Indemnity arose out of a disputed insurance claim under a blended program liability policy between SavaSeniorCare, LLC ("Sava") and its insurers, Starr Indemnity & Liability Company ("Starr") and Aspen American Insurance Company ("Aspen"). Sava sought coverage for defense costs it incurred defending against claims that Sava owed damages for alleged False Claims Act violations. After Sava notified Starr and Aspen of the claim, each insurer denied any coverage above a $1 million sublimit in the Starr policy, based solely on their interpretation of an exclusion to the definition of "Loss" (the "Return of Funds Exclusion") that they contend applies to False Claims Act claims. Starr and Aspen did not raise any other coverage defenses in their initial or later denial coverage letters other than a boilerplate disclaimer that they reserved the right to raise additional defenses in the future. Over the next two years, they sent five letters reaffirming this position.

Sava never accepted the Insurers' position that the Return of Funds Exclusion limited coverage to only $1 million, and Starr later reneged on its promise to pay the $1 million it had agreed to pay in its initial coverage letter.

In May 2018, Sava sued Starr for its failure to indemnify Sava for defense costs it had incurred in defending the claim since the date it provided notice to Starr, and sought a declaration that the Return of Funds Exclusion did not apply. In response, Starr filed an answer and counterclaim asserting a litany of new coverage defenses, including a late notice defense, none of which had been referenced in Starr's coverage letters. Sava later joined Aspen in the coverage litigation, and Aspen adopted Starr's coverage defenses as its own.

Sava then moved for partial summary judgment on the ground that the Insurers' new late notice defense was waived under *Hoover*. In response, Starr argued that (1) the holding of *Hoover* was limited to duty to defend policies, and did not apply to indemnity policies that reimburse defense costs; and (2) the insurers did not "deny" coverage when they stated that Sava's coverage was limited to $1 million in coverage. In an early ruling, before the completion of discovery in the case, the Court rejected both of these arguments and granted Sava's motion. *Id*. at *10.

First, the Court rejected the Insurers argument that different rules apply in Georgia when denying coverage under duty to indemnify vs. duty to defend policies. As the court reasoned: "The duty to pay defense costs under the Starr Policy is synonymous with the duty to defend discussed in *Hoover . . .* the Court does not believe that the Georgia Supreme Court intended *Hoover* to be so narrowly limited as to only cover an insurer's duty to defend." *Id*. at *8

The Court also found that Aspen, despite its status as an excess insurer, also waived its ability to raise a new late-notice defense. The court stated: "Aspen's position is ostensibly that it owes Sava nothing under the Aspen Excess Policy. That is an unambiguous denial of insurance coverage." *Id*. at *7. Thus, the Court affirmed that the *Hoover* waiver rule applies to primary and excess insurers alike.

Next, the Court squarely rejected the insurers' argument that invoking a sublimit in a coverage letter, as opposed to a policy exclusion, was somehow different from a denial of coverage. *Id*. at *7. As the court put it: "Given the principles embodied in *Hoover* and its progeny, the Court concludes that invoking a policy's sublimit of liability provision constitutes a 'denial' of all other coverages for purposes of determining whether any subsequently noticed defenses have been waived." *Id.*

Finally, the Court squarely rejected the insurers' contention that they lacked sufficient information to raise a late-notice defense in their initial coverage letters. Specifically, the Court noted that the insurers were not forced to deny coverage when Sava provided notice of its insurance claim, regardless of what information they possessed when Sava noticed the claim. The Court, citing *Hoover*, explained that:

"[W]hen Sava notified Starr and Aspen of the Qui Tam Actions and requested coverage, the Insurers had three options: (1) 'defend the claim, thereby waiving [their] policy defenses and claims of non-coverage'; (2) 'deny coverage and refuse to defend, leaving policy defenses open for future litigation'; and (3) 'defend under a reservation of rights.' The Insurers were not permitted to do what they did here—deny the lion-share of the policies' coverage limits on one ground, issue a boilerplate reservation of rights, and then 'continue to investigate to come up with additional reasons on which the denial could be based if challenged.' It is immaterial that Starr and Aspen believe they lacked the necessary facts to assert a late-notice defense at the time they sent Sava their coverage letters. ***They chose the wrong path."***

Id. at *9 (citing *Hoover*, 730 S.E.2d at 416-417) (emphasis added).

Despite the Court's clear affirmation of the rule in *Hoover*, the insurers promptly filed a motion for reconsideration, or in the alternative, a motion to certify questions for interlocutory appeal. In doing so, the insurers argued that despite numerous state and federal court decisions applying the waiver rule*, Hoover* somehow represented a "vexing and disputed" issue of law, and that the Court had erred in determining that the insurers' boilerplate reservation of rights were not sufficient to preserve their late-notice defense. The Court rejected both arguments outright, emphasizing that the holding of *Hoover* was, in fact, "binding, established precedent" in Georgia. *SavaSeniorCare, LLC*, v. *Starr Indemnity and Liability Company*, 2020 WL 6782049, at *13 (N.D. Ga. Nov. 18, 2020). The Court continued: "Boilerplate disclaimers are ineffective as a matter of law," and the insurers' disclaimers fell short when they failed to put Sava on notice of their apparent intention to deny coverage on the basis of late notice. *Id*. at 6.

Key Takeaways

Insurers frequently send lengthy and confusing letters containing boilerplate language and vague references to potential policy defenses when responding to claim notifications. The Court's holding in *SavaSeniorCare, LLC* demonstrates that the *Hoover* waiver rule is alive and well in Georgia, and insurers who send non-specific, boilerplate coverage letters do so at their own peril and risk waiving their coverage defenses. The *Hoover* rule is not an outlier and is similar to the law found in many jurisdictions around the country. *See, e.g.*, *Sauer v. Home Indem. Co.*, 841 P.2d 176, 183 (Alaska 1992) (holding when the "insurer does not communicate its decision to withdraw or explain the basis for its decision but simply denies coverage, it should be precluded from later arguing that coverage under the policy did not exist."); *See Britt v. Gen. Star Indem. Co.*, 494 F. App'x 151, 152–53 (2d Cir. 2012) ("Failure to provide a [disclaimer containing the basis for denying coverage] precludes denial of coverage based on a policy exclusion."); *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961, 993 (Conn. 2013) (holding that an insurer "after breaking the contract by its unqualified refusal to defend, should not thereafter be permitted to seek the protection of that contract in avoidance of its indemnity provisions") (citation omitted).

SavaSeniorCare reaffirms that policyholders should carefully review coverage letters with their coverage counsel, and push back when insurers attempt to withhold or delay payment based on new coverage defenses raised after an initial denial of coverage.

We work closely with our clients and their risk managers to help achieve best-in-class terms and conditions with U.S. and international insurers for clients' insurance programs, including fronting, captive and self-insured coverage, as well as advise clients on responding to insurer coverage letters and, when necessary, pursuing insurance recovery litigation.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

ABU DHABI	CHARLOTTE	GENEVA	MOSCOW	RIYADH	TOKYO
ATLANTA	CHICAGO	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
AUSTIN	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	
BRUSSELS	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE	