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Client Alert

Insurance Coverage & Recovery Practice Group

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Eleventh Circuit Dials Back The Specificity Required In An Insurer's Reservation of Rights—Will Georgia Courts Agree?

The U.S. Court of Appeals for the Eleventh Circuit recently held under Georgia law that an insurance company does not waive a coverage defense by defending the policyholder in an underlying case without reserving its rights to later deny coverage based on that specific defense, as long as the insurance company makes clear to the policyholder that it is reserving its rights to deny coverage in general. This unpublished decision, *Wellons, Inc. v. Lexington Ins. Co.*, No. 13-11512, 2014 U.S. App. LEXIS 9091 (11th Cir. May 23, 2014), turns on an interpretation of recent Georgia Supreme Court cases that may or may not be in line with how the Georgia Supreme Court would view its own precedents and creates uncertainty about exactly how specific an insurance company must be when reserving rights in Georgia.

In *Wellons*, the insured manufacturing company argued that Lexington's general oral reservation of rights and its references to prior reservations of rights on related matters failed to preserve the grounds upon which Lexington ultimately denied coverage. The Eleventh Circuit disagreed and upheld the coverage denial.

At the heart of the Eleventh Circuit's analysis is the court's application of the Georgia Supreme Court's decision in *World Harvest Church v. GuideOne Mut. Ins. Co.*, 695 S.E.2d 6 (Ga. 2010). In *World Harvest Church*, the Georgia Supreme Court held that, "[a]t minimum, the reservation of rights must fairly inform the insured that, notwithstanding the insurer's defense of the action, it disclaims liability and does not waive the defenses available to it against the insured." *World Harvest Church*, 695 S.E.2d at 10 (internal punctuation and quotation marks omitted). And, in the next sentence of *World Harvest Church*, the Georgia Supreme Court further held that "[t]he reservation of rights should also inform the insured of the specific basis for the insurer's reservations about coverage." *Id.* (internal punctuation and quotation marks omitted). Rather than certify a question to the Georgia Supreme Court regarding exactly what specificity is required in a reservation of rights, the Eleventh Circuit determined that the distinction between "must" and "should" in *World Harvest Church* means that a general reservation of rights is sufficient if it informs the policyholder that its insurance company is defending under a reservation of rights generally, and it is only *recommended* that the insurance company inform the policyholder of the specific basis for its reservation. *Wellons*, 2014 U.S. LEXIS 9091 at *23-24.

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The Eleventh Circuit in *Wellons* also turned aside the policyholder's argument that *Hoover v. Maxum Indemnity Co.*, 730 S.E.2d 413 (Ga. 2012), required it to hold that the insurance company waived its coverage defense by not timely raising it in a reservation of rights. In *Hoover*, the Georgia Supreme Court held that an insurer cannot both deny a claim outright and also attempt to reserve its rights to assert other unspecified coverage defenses in the future. The Eleventh Circuit distinguished *Hoover* on the basis that, in its view, that case bars an insurance company from raising an un-reserved coverage defense only where the insurance company has denied coverage outright without reserving rights as to the particular defense, and does not apply where the insurance company initially accepts the defense under a general reservation of rights as in *Wellons*. *Wellons*, 2014 U.S. LEXIS 9091 at *34.

After the *World Harvest Church* and *Hoover* decisions, it was widely expected that insurers, when accepting a defense obligation to a policyholder in Georgia, would have stronger incentives to issue clearly-worded reservation of rights letters to place their policyholders on notice of any and all potential coverage defenses that they might raise at a later date. In the wake of the *Wellons* decision, however, insurers may be more likely to issue the type of vague reservation of rights letters that the Georgia Supreme Court has criticized. Therefore, until the Georgia Supreme Court weighs in again on the specificity requirement for reservation of rights letters, prudence dictates that policyholders in Georgia should always be wary when they receive vague, generalized reservation of rights letters that do not specify the coverage defenses that the insurer might rely upon to deny coverage. Moreover, after receiving vague reservation of rights letters, policyholders should protect themselves by consulting coverage counsel and insisting that their insurers identify each and every potential basis upon which the insurer may contest coverage in the future.

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