Lawyer Insights

Until the Last Gavel Falls

Whether an insurer has a duty to defend arises in almost every liability insurance claim. A less common question is when the duty ends. Judge Sarah…

By Rachel Hudgins and Larry Bracken
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Whether an insurer has a duty to defend arises in almost every liability insurance claim. A less common question is when the duty ends. Judge Sarah E. Geraghty of the U.S. District Court for the Northern District of Georgia addressed this issue in a recent summary judgment decision, finding Maxum Indemnity Company's obligation to defend its insured, Colliers International, continued until Maxum won a declaratory judgment determining that it was not required to cover Colliers' liability.

Out Like a Light

Mattress Firm Inc. filed the underlying suit against Colliers and a Colliers' employee, alleging they had operated a multi-year, multistate fraud scheme in which Colliers steered Mattress Firm towards more expensive real estate deals in exchange for kickbacks from developers.

Colliers reported the suit to Maxum, its professional liability insurer. Maxum accepted Colliers' defense under a reservation of rights, then filed a declaratory judgment action against Colliers in Georgia federal court. Maxum argued that it did not owe Colliers coverage under its claims-made-and-reported policy because Colliers reported the claim after the policy's reporting window closed. The trial court agreed with Maxum. Because Colliers did not report the claim during the policy period, it was not entitled to coverage. (Maxum Indem. Co. v. Colliers Int'l – Atlanta, LLC, 2020 U.S. Dist. LEXIS 256077 (N.D. Ga. 2020)). The Eleventh Circuit later vacated the trial court's determination that Maxum also did not owe the Colliers' employee a defense. (Maxum Indem. Co. v. Colliers Int'l – Atlanta, LLC, 861 F. App'x 279 (11th Cir. 2021)). Maxum had argued that Collier's late notice voided coverage for both of them. But the Eleventh Circuit found that the policy's Innocent Insured Provision salvaged the employee's coverage. That provision "applies to instances where an innocent insured would lose coverage due to another insured's failure to comply with the requirements surrounding the transfer of information about a claim, including the reporting requirements. "Id. at 282.

The Bounce Back

Then Colliers sued Maxum. Colliers argued that Maxum owed defense costs incurred before the no-coverage determination. That time span ran from (1) the date Colliers gave Maxum notice of the claim until (2) the date the district court found the claim was not covered. Maxum paid Colliers only part of the defense costs Colliers incurred between those dates. In this second suit, Colliers sought the unpaid

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defense costs and bad faith damages under O.C.G.A. §33-4-6. Among other things, Maxum argued that it never had a duty to defend, so there was no duty to breach.

Credit: Larry Bracken and Rachel Hudgins.

The parties agreed on two things. First, "an insurer that agrees to defend under a reservation of rights must actually defend the insured." (Op. at 27.) And second, in the first declaratory judgment action, "the Court, in finding that the Mattress Firm Claim against Colliers was not covered by the Policy, determined that Maxum owed no duty to indemnify Colliers against any judgment, and no longer owed a duty to defend Colliers going forward." (Id.) The parties disagreed about whether the no-coverage finding "retroactively eliminate[d] the pre-declaration duty to defend," such that Maxum did not owe Colliers any defense costs. (Id.)

The court framed the issue—one of first impression in Georgia—like this: "whether the Court's. Declaration of Non-Coverage retroactively relieved Maxum of its duty to defend such that it is not liable for any portion of Colliers' pre-declaration defense costs." (Op. at 23.) The court found that it had not.

The court's analysis was based on four bedrock principles of Georgia insurance law:

1. The duty to defend is separate from and broader than the duty to indemnify. (Op. at 24.)
2. The duty to defend arises if the facts alleged in the complaint even arguably fall within the policy's coverage. (Op. at 24-25.)
3. An insurer has three options when a lawsuit is filed against its insured. First, the insurer can defend the claim without a reservation of rights and waive its policy defenses. Second, the insurer can deny coverage and refuse to defend. Third, the insurer can offer a defense subject to a reservation of rights that "preserve[s] the option to later litigate and ultimately deny coverage." (Op. at 25.)
4. An insurer "cannot simultaneously reserve rights and fail to defend." () That is, it cannot choose the second and third options at the same time.

Allowing a declaration of non-coverage to retroactively eliminate the duty to defend would violate these principles in these ways. First, it would narrow the duty to defend and collapse it into the duty to indemnify, because the insurer could delay (or never pay) defense costs while awaiting an expected declaration of no coverage. (Op. at 29-30.) This violates the first and second principles. Second, retroactive elimination of the duty to defend would allow the insurer to reserve rights while functionally

failing to defend by delaying defense payments. This is not an option available under the third principle and violates the fourth. But that's what Maxum tried to do.

Maxum's approach ignored the options provided in the third principle and ran smack into the fourth. It tried to reap the benefit of providing a defense under a reservation of rights—a shield against a breach of contract or bad faith claim if it was wrong in its coverage determination—without paying for that benefit by providing the defense it said it would. By failing to fulfill its promise, Maxum lost its shield. The court allowed Colliers' breach of contract and bad faith claims to survive Maxum's motion for summary judgment. The claims will move forward to a jury, which could reasonably "conclude that Maxum slow-walked its coverage decision and then underpaid Colliers for its defense costs in anticipation of a forthcoming declaration of non-coverage." (Op. at 39-40.)

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