Policyholder Playbook Episode 35: Attack Insurer Defenses Raised Late in the Game Using the Waiver Doctrine

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Quick Overview of the Play – The best policyholder advocates know that, in some instances, an insurer can legally waive a coverage defense if they fail to disclose it promptly. In such instances, the insurer's defense cannot be used to bar or reduce the coverage owed to the policyholder.

Imagine a policyholder tenders a claim to an insurer, who in turn calls attention to a defense—call it "Defense A"—as a potential barrier or limitation to coverage. Now imagine that, after significant time passes, the insurer suddenly has an epiphany that "Defense B" may also apply to exclude or limit coverage. Should the insurer be able to change, or add to, its arsenal of coverage defenses or limitations? In some jurisdictions and in some circumstances, the answer may be "no."

Consider a recent decision issued by a federal court in Georgia in the case *First Solar Electric LLC v. Zurich American Insurance Co*.[1] In *First Solar*, the insurer raised two coverage defenses or limitations that the policyholder contended were waived.

First, the insurer asserted that a 12-month suit limitation clause applied, but the policyholder argued the insurer lulled it into a belief that the limitation was waived, as evidenced by the insurer's partial payment of the claim and continued representations—past the suit limitations period—that it was continuing to investigate the claim.[2] The court ultimately held that whether the insurer waived the clause was an issue of fact, noting that the insurer's "initial payment and continued representations of investigation up to and past the suit limitation period are affirmative actions from which a jury could find that [the insurer] waived the right to enforce the suit limitation clause."[3]

Second, the insurer argued the policyholder's claim was subject to a $2.5 million flood deductible—rather than a $100,000 deductible for water damage—but the policyholder argued the insurer waived that argument by making three advanced payments subject to the lower deductible.[4] The insurer contended the deductible was a "nonwaivable coverage defense" and that "waiver or estoppel may not be used to enlarge the coverage contained in a policy of insurance."[5] The court held that the "'critical question' is whether the insured is seeking to employ the theory of implied waiver to cover a loss not within the coverage of the policy and, thus, assert a nonwaivable coverage defense."[6] The court then noted that since both parties agreed the claim was covered—the insurer just argued the claim was subject to *less* coverage because of the flood deductible—the deductible was a waivable coverage defense.[7] The court then concluded that the insurer waived its deductible argument, as a matter of law, by making a series of payments subject to the lower deductible.[8]

What's the bottom line? If an insurer fails to timely disclose a coverage defense or argument, assess whether the insurer may have waived that defense or argument.

[1] No. 5:21-cv-00408 (M.D. Ga. June 24, 2024) (ECF No. 116).
[2] *Id.* at *18–19.
[3] *Id.* at *23.
[4] *Id.* at *39–44.
[5] *Id.* at *40.
[6] *Id.* at *41.
[7] *Id.* at *41–42.
[8] *Id.* at *42–44.