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Florida Appellate Court Finds that an Additional Insured is Entitled to the Appointment of Separate and Independent Defense Counsel

University of Miami v. Great American Assurance Company, et al.
No. 3D09-2010 - Third District Court of Appeal - State of Florida

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On February 20, 2013, in a matter of first impression in the state of Florida, the Third District Court of Appeal ruled 2-1 that an additional insured was entitled to the appointment of separate and independent defense counsel in a liability matter involving multiple insureds with "conflicting legal positions." The majority opinion, written by Judge Suarez with Chief Judge Wells concurring, determined that the retention of separate defense counsel was necessary, simply because: 1) the complaint alleged each insured was independently negligent; and 2) each insured sought contribution and indemnification from the other. Judge Suarez found that these allegations were enough to create a "legal dilemma" for defense counsel in advancing the defense interests of one insured to the potential detriment of the other. In an 11-page dissent, however, Judge Shepherd expressly rejected the majority's holding, characterizing the insureds' mutual defense interests as nothing more than a "paper conflict" that fails to justify the retention of separate counsel.

The underlying liability matter involved a personal injury lawsuit commenced by the parents of a four-year-old child who suffered extensive injuries after being pulled unresponsive from a pool on the campus of the University of Miami (UM). The child was enrolled as a camper at MagiCamp, which ran a summer swim camp on the campus of UM. Both UM and MagiCamp were named defendants in the child's lawsuit, which advanced allegations of negligent supervision against both UM and MagiCamp, as well as vicarious liability against UM for the negligence of MagiCamp.

UM was an additional insured under a Great American commercial general liability policy insuring MagiCamp. Great American retained one law firm to represent both UM and MagiCamp under the liability policy. Defense counsel filed an answer with affirmative defenses on behalf of both UM and MagiCamp, which asserted standard claims for "indemnity and/or contribution" from "persons or entities other than Defendants" who caused the child's injuries. There was no question as to coverage under the liability policy and no possibility of an excess judgment against UM or MagiCamp.

Once the answer was filed, UM retained separate counsel who advised Great American, by way of letter, that, in his view, there was a conflict of interest in the single representation of both UM and MagiCamp. Counsel demanded UM be appointed independent defense counsel of UM's choice. The letter further argued that MagiCamp, and not UM, was the culpable party in the underlying litigation. Great American denied UM's request for independent counsel, maintaining that no actual conflict of interest existed as between the interests of UM and MagiCamp.

UM thereafter retained its own defense counsel to protect its defense interests and, after the underlying case was settled by Great American, filed a declaratory judgment action against Great American seeking a determination that Great American breached its contractual duty to UM by refusing to provide it separate and independent counsel. UM sought reimbursement of attorney's fees and costs expended in the underlying action. The parties cross-moved for summary judgment. The Circuit Court for Miami-Dade County granted summary judgment in favor of Great American. UM appealed.

On appeal, the Third District Court of Appeal reversed. Pointing to the allegations of independent negligence advanced against UM and MagiCamp in the underlying action, coupled with UM and MagiCamp's mutual claims for contribution and indemnity, the Court of Appeal determined these allegations were enough to create a "legal dilemma" for defense counsel in advancing the defense interests of one insured to the potential detriment of the other. Because UM and MagiCamp were the only defendants in the underlying action, the Court of Appeal construed the contribution and indemnity claims as claims made by UM against MagiCamp, and vice versa. Consequently, the question presented, in the words of the court, was:

> [W]hether, in *this factual scenario*, where both the insured and the additional insured have been sued, and the allegations claim that each is directly negligent for the injuries sustained, a conflict between the insured and the additional insured exists that would require the insurer to provide separate and independent counsel for each. (emphasis added).

The court said yes, and concluded that "Great American's counsel *would have had to* argue conflicting legal positions, that each of its clients was not at fault, and the other was, even to the extent of claiming indemnification and contribution for the other's fault." (emphasis added). The court further concluded that "[i]n doing so, legal counsel *would have had to* necessarily imply blame to one co-defendant to the detriment of the other." (emphasis added). The court's decision thus rested on what the court viewed as necessary arguments to be made by counsel, as dictated by the specific facts presented in the underlying litigation and the manner in which the parties pled. Arguably, therefore, the holding is limited to the specific facts of this case – an argument supported by the very words of the court, which limited legal analysis of the question presented to "this factual scenario."

Judge Shepherd's dissent further criticizes the majority's opinion that a conflict of interest existed between the defense interests of UM and MagiCamp. While the majority viewed the conflict as actual and real, Judge Shepherd characterized it as nothing more than a "paper conflict," arising by virtue of the generic claims for indemnity and contribution advanced by UM and MagiCamp. Espousing a more practical approach to the issue, Judge Shepherd noted that neither UM nor MagiCamp were required to prove the other's liability in the underlying litigation. That burden rests solely with the plaintiff. Consequently, despite the claims for indemnity and contribution advanced by UM and MagiCamp, there was never a "substantial risk" that one would place blame on the other – "[t]hus, there was no real conflict and no need for self-appointed counsel."

While the majority's holding is arguably limited to the facts of this decision, it remains to be seen whether it will have more far-reaching application. At the very least, the majority's opinion cautions against generic pleading and the assertion of blanket claims for indemnity and contribution among co-defendants who are also co-insureds. This issue becomes more prevalent in negligence claims involving general contractors and subcontractors, manufacturers and suppliers, or companies with contracts that incorporate indemnity and/or hold harmless agreements.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Kellyn J. W. Muller at 856.910.5063 or kmuller@cozen.com.