

Client Alert

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Florida Intermediate Appellate Court Opinion May Result In Increased Obligation For Insurers To Provide Independent Counsel For Additional Insured

On February 20, 2013, Florida's Third District Court of Appeal held as a matter of first impression in *University of Miami v. Great American Assurance Company*, No. 3D09-2010, 2013 WL 616156 (Fla. 3d DCA Feb. 20, 2013), that an insurer was obligated to provide separate counsel for its insured and an additional insured under its policy where both were sued for negligence. Judge Shepherd, in dissent, argued the decision "opens a new frontier in insurance litigation of benefit only to the legal profession."

Background

The case stemmed from the near drowning of a four-year-old at a summer swim camp run by MagiCamp at the University of Miami ("UM"). Great American Assurance Company had issued a commercial general liability policy insuring MagiCamp. UM was an additional named insured under the same policy. When the camper suffered extensive injuries after nearly drowning, his parents sued both MagiCamp and UM, claiming the injuries were due to lack of supervision of the campers at the UM pool and that both MagiCamp and UM were each directly negligent (and UM also vicariously liable) for the lack of supervision.

Great American retained one law firm to represent both defendants. In MagiCamp's answer, it asserted as an affirmative defense that an intervening or superseding act, not under its control, caused the injuries, and the resulting damages were caused, in whole or in part, by persons or entities other than MagiCamp. The only other entity being sued was UM. MagiCamp requested apportionment of damages based on the percentage of fault of the respective defendants and also claimed it was entitled to indemnification and contribution from UM for the damages. UM, for its part, sent a letter to the insurer, stating that there was a conflict of interest in the single representation of UM and MagiCamp. UM demanded independent counsel of its choice. The letter further stated that any negligence was attributable to MagiCamp, not UM. Great American took the position that there was no conflict of interest in providing single counsel and refused to provide separate independent counsel for UM.

After the underlying case settled, UM brought a declaratory judgment action, asserting that Great American had breached its contractual duty to UM by refusing to provide separate counsel. Great American argued that because MagiCamp was contractually bound to indemnify and hold harmless UM for any liability arising out of the use of its facilities by MagiCamp, there could be no conflict of interest in its single representation. The trial court granted summary judgment in Great American's favor.

Holding

Upon review, the Third District Court of Appeal reversed the trial court and held that where both the insured and the additional insured have been sued, and the complaint alleges that each is directly negligent for the injuries sustained, there is a conflict between the two, which requires the insurer to provide separate and independent counsel for each. The court reasoned that because of MagiCamp's assertion in its answer that the camper's injury was not its fault but was the fault of another entity, and

UM's assertion in a letter that the injury was MagiCamp's fault, the two entities held inherently adverse positions. "There exists no factual dispute, as evidenced by the record, that, in defense of both co-defendants, 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." In a footnote, the court stated, "We reject Great American's position that the hold harmless agreement between MagiCamp and UM negates a conflict of interest between the two defendants which would necessitate appointment of separate co-counsel." The court did not elaborate on its rejection of Great American's argument.

Dissent

In dissent, Judge Shepherd emphasized the difference between an actual conflict and a potential conflict and noted that MagiCamp had agreed to fully indemnify UM. He stated that "[i]n this case, there was neither an actual conflict nor a 'substantial risk' of conflict. The parties were united in the defense against the plaintiff from the moment the [independent counsel] appeared in the litigation through settlement. Neither party filed a claim against the other." The dissent recognized that Florida law, and that of other states, would require separate counsel in the case of an actual conflict, but concluded that the facts of this case did not present such a conflict. The dissent described the conflict as "a paper conflict" only, and characterized the majority's holding as requiring separate counsel "any time an insured articulates a conflict in a pleading, whether or not real."

Implications

The Third District's opinion is noteworthy for policyholders entitled to a defense as an additional insured and for insurers providing a defense to multiple insureds. In light of the court's holding, insurers could face increased obligations to provide independent counsel, even where one insured is obligated to indemnify the other. At a minimum, policyholders and insurers should carefully consider the potential basis for separate independent counsel, taking the court's holding into account and evaluating the standards for conflicts of interest.

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