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Third DCA Ruling Requires Insurers to Provide Extra Counsel

by Walter Andrews, Michael S. Levine and Anna Lazarus

In a ruling that places additional burdens on insurance companies, a state appeals court has ruled insurance companies must provide separate counsel for policyholders and an another insured when both are sued for negligence.

The case, *University of Miami v. Great American Assurance*, No. 3D09-2010, 2013 WL 616156 (Fla. 3d DCA Feb. 20, 2013), stemmed from the near drowning of a 4-year-old at a summer swim camp run by MagiCamp at the university.

Great American Assurance Co. insured MagiCamp and the university as an additional insured under the same policy. After the camper nearly drowned — he was pulled unresponsive from the bottom of the pool and hospitalized with extensive injuries — his parents sued both MagiCamp and UM, claiming the injuries were caused by a lack of supervision at the school's pool and that MagiCamp and UM were both responsible. They also claimed UM was responsible since the camp operated on school property.

Great American retained one law firm to represent both UM and MagiCamp. In defense of the suit, MagiCamp claimed the child's injuries were caused by someone other than a MagiCamp worker. Since the only other entity being sued was UM, MagiCamp requested apportionment of damages based on the percentage of fault of each defendant and also claimed it was entitled to indemnification and contribution from UM for the damages.

In a letter to the insurer, UM stated that the single representation of the university and MagiCamp created a conflict of interest and demanded independent counsel of its choice. The university also said 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 that lawsuit settled, UM brought a separate lawsuit asserting Great American breached its contractual duty to UM by refusing to provide separate counsel. Great American argued that because MagiCamp was contractually bound to indemnify and protect the school against 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 ruled in Great American's favor.

Upon appeal, a three-judge panel of the Third District Court of Appeal reversed the trial court and concluded that where both insureds have been sued, and the complaint alleges that

each is directly negligent for the injuries, there is a conflict between the two, and the insurer must provide separate and independent counsel for each.

The court reasoned that because of MagiCamp's claim the camper's injury was not its fault but that of someone else, and UM's claim that the injury was MagiCamp's fault, the two entities held inherently adverse positions.

In the ruling, Judge Richard J. Suarez wrote, "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.

Chief Judge Linda Ann Wells concurred.

THE DISSENT

Judge Frank A. Shepherd dissented, saying the decision only serves to provide more work for lawyers. Shepherd emphasized the difference between an actual conflict and a potential conflict and noted that MagiCamp had agreed to fully indemnify UM. He wrote 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."

Shepherd recognized that Florida law requires separate counsel where there is an actual conflict, but concluded that this case did not present such a conflict. He 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."

THE 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 covered parties. 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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