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THE DUTY TO DEFEND IN FLORIDA

Under Florida law, when two primary insurers are potentially responsible for indemnifying an insured defendant, there is no penalty if one of those primary insurers does not participate in the defense. Irrespective of the duty to defend, Florida law bars a defending primary carrier from seeking contribution or subrogation from a non-defending co-primary carrier for the expenses of defending a mutually insured defendant. However, under the right set of circumstances, a defending primary carrier may be able to recover defense costs from a non-defending co-primary carrier by using the legal theory of assignment.

In the seminal case of ***Argonaut Ins. Co. v. Maryland Casualty Co.,*** 372 So. 2d 960 (Fla 3d DCA 1979), Argonaut filed suit against Maryland Casualty attempting to assert a subrogation right to recover a fair share of the costs spent defending a mutually insured client where Maryland Casualty was a co-primary insurance carrier, but did not contribute anything to the defense of the insured.

Unfortunately, the 3d DCA upheld the dismissal of ***Argonaut***'s cause of action for subrogation because the 3d DCA

felt that Argonaut had done nothing more than defend its insured pursuant to the terms of its own insurance policy and that it was irrelevant that the insured may have had other co-primary insurance. In short, the 3d DCA held that "the duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer."

The reasoning of the 3d DCA was that each carrier had an independent, contractual duty to defend its insured and one carrier cannot get a partial refund on its independent duty to defend simply because the insured had another insurance contract with another carrier. The 3d DCA further explained that each insurer has a duty to defend regardless of what the other insurer is doing and that while both insurers may join together in the services and share expenses, there is no requirement that they do so.

Nearly 15 years later, the 5th DCA set forth why, in the court's view, Florida law should not allow contribution or subrogation rights between co-primary insurance carriers. In ***Continental Casualty Co. v. United Pacific Ins. Co.,*** 637 So. 2d 270 (Fla 5th DCA) **(en banc) rev. den.**, 645 So. 2d 45 (Fla 1994), the 5th DCA agreed with ***Argonaut*** and discussed the public policy assertions for and against contribution and subrogation rights for defense costs between co-insurers.

One argument for allowing the right of defense cost recovery is that carriers should not be rewarded for avoiding their contractual defense obligation if another co-primary insurance carrier is first to defend a mutually insured client. One argument for not allowing defense costs recovery is that if contribution for costs were allowed between insurance companies, there would be multiple coverage disputes in every case and the insurance companies would have no incentive to settle since another lawsuit would be forthcoming to resolve the coverage dispute between the two insurers.

Furthermore, the 5th DCA found that defense cost contribution and subrogation was not necessary because "the risk of an insured filing suit for breach of contract and bad faith, or the possibility of extra-contractual liability, was enough of a deterrent so that carriers would not shirk their duty to

defend." This argument is flawed because the reality of the situation is that an insured is being fully defended and indemnified by at least one carrier. Therefore, that insured has no real damages that it can calculate or that it must withdraw from its bank account.

These circumstances make it highly unlikely than an insured will actually take the time or make the initial expenditure to sue the non-defending carrier because the insured will be fully indemnified for any ultimate final judgment. Although the insured is the proper person to bring suit against the non-defending primary carrier for the failure to defend, one must acknowledge that there is little incentive for the insured to do so.

Argonaut and ***Continental Casualty*** dealt only with the legal theories of contribution and subrogation, but in 2010, an assignment theory was finally raised in ***Pennsylvania Lumbermens Mutual Ins. Co. (PLM) v. Indiana Lumbermens Mutual Ins. Co. (ILM),*** 43 So. 3d 182 (Fla 4th DCA 2010). In this case, PLM and ILM were both co-primary liability insurance carriers with Causeway Lumber Company as their mutual insured.

A complaint was submitted for a construction defect against Causeway Lumber Company and was pled in a way where both insurers had a duty to defend due to potential coverage. ILM defended the insured, while PLM did not. However, the defense provided by ILM was provided under a reservation of rights whereby Causeway Lumber Company agreed to reimburse ILM for its defense costs if it was ultimately determined that the ILM policy did not provide coverage. ILM later sued PLM alleging that ultimately there was no coverage under the ILM policy because there was no occurrence during the ILM policy period.

The twist in this case was that ILM settled the underlying lawsuit against Causeway Lumber Company in exchange for the insured's assignment of first party rights against PLM for breaching the duty to defend and indemnify. Essentially, ILM had purchased the insured's first-party breach of contract claim against PLM and therefore, did not have to rely on overcoming the ***Argonaut*** and ***Continental Casualty*** cases which had been based on theories of contribution and subrogation.

ILM's argument was that the law regarding the lack of contribution and subrogation rights between co-primary carriers with a mutual insured was irrelevant to its claims for recovery of fees and costs against PLM because ILM's legal theory was one of assignment for first-party breach of contract. ILM argued that unlike an insurer that has no damages because it is ultimately indemnified by at least one carrier, Causeway Lumber was damaged in the amount of ILM's defense expenses because of the reimbursement agreement contained in the reservation of rights.

Regardless of ILM's unique theory of liability for reimbursement of defense costs, it was rejected by the 4th DCA based upon the facts of the case, but not on the theory of assignment. The 4th DCA stated that ILM's theory must fail because Causeway Lumber was never obligated to reimburse ILM for defense costs and therefore, Causeway Lumber never had any actual damages to assign. The 4th DCA explained that an insurance company which defends clearly uncovered claims and claims where a duty to defend never existed may recover reimbursement of its defense costs from the insured if such terms are set forth in a reservation of rights.

However, in this case, the complaint against Causeway Lumber was broad enough that it did trigger at least an initial duty to defend for both ILM and PLM. The discovery regarding the true date of the occurrence only negated ILM's continued duty to defend and indemnify, but did not have any bearing on its initial duty to defend under the broad allegations of the complaint.

While ILM may have lost the case on the issue of recovering defense costs, ***Pennsylvania Lumbermens Mutual*** sets forth the road map for a set of facts and circumstances able to drive around the holdings of ***Argonaut*** and **Continental *Casualty***. For instance, if a court holds that a defending co-primary carrier never had a duty to defend, then if that defending carrier has a valid reimbursement agreement in its reservation of rights, the result is that it might be able to recover defense costs from the non-defending co-primary carrier.

With a new track now demonstrated, insurance carriers and their lawyers can now frame the facts to develop a future assignment theory unlike the ***Pennsylvania Lumbermens*** case. While it may be years before the law evolves on this issue, the road map has been drawn and perhaps the ***Pennsylvania Lumbermens*** case will serve as a signal to the Florida legislature that it is time to adjust the public policy arguments stated in ***Argonaut***.

JLH/GRS/lcr

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