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Insurer Not Entitled to Reimbursement of Defense Expenses Despite Reservation of Rights on the Issue

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Insurance Coverage Alert

A Florida appellate court recently addressed an insurer's right to seek reimbursement of its defense fees and indemnity from a co-primary carrier that refused to participate in the defense and settlement. *Pennsylvania Lumbermens Mut. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co.,* 43 So. 3d 182 (Fla. 4th DCA 2010). The action arose from a lawsuit filed by homeowners against a developer for property damage. The developer brought a third-party action against Causeway Lumber Company (Causeway), which was insured by Indiana Lumbermen's (ILM) and Pennsylvania Lumbermen's (PLM), but for different time periods.

Causeway tendered the suit to both carriers. PLM did not provide a defense and was not involved with the settlement. ILM defended under a reservation of rights, including one to seek reimbursement of defense expenses from Causeway or its other insurers if it was later determined that ILM provided no coverage for the claims against Causeway under the policy.

ILM settled the claims for $40,000. Causeway assigned to ILM its rights to pursue an action against PLM for breaching its defense and indemnity obligations, in exchange for ILM's release of its reimbursement claims against Causeway. Subsequently, ILM sued PLM for recovery of the $40,000 paid for indemnity costs, as well as for recovery of its defense expenses.

ILM admitted that it had a duty to defend Causeway based on the allegations in th complaint, but asserted that the facts ultimately developed in discovery demonstrated that its policy did not apply to the loss. Florida courts have refused to allow a carrier to seek contribution from a defense-defaulting co-insurer because this would encourage carriers to fight amongst themselves instead of protecting the interests of the insured. The courts have also rejected the counter-argument that denying a right of contribution encourages carriers to shirk their duty to defend, ruling instead that insureds have sufficient remedies in that situation.

ILM argued, however, that it was entitled to recover its defense expenditures by standing in the shoes of Causeway — to whom PLM owed a duty to defend — by virtue of its assignment from the insured. The court held that such an arrangement would allow a carrier to circumvent the Florida rule against contribution as the insurer can always obtain such an assignment.

Florida only allows insurers to obtain reimbursement of defense costs where the insurer *never had a duty to defend* from the beginning of the case, the court stated. *Colony Ins. Co. v. G&E Tires & Serv., Inc.,* 777 So. 2d 1034 (Fla. 1st DCA 2000); *Jim Black & Assoc., Inc. v. Transcontinental Ins. Co.,* 932 So. 2d 516 (Fla. 2d DCA 2006). The court reasoned that ILM did have a duty to defend based on the allegations of the complaint, and so could not seek reimbursement. ILM could, however, obtain reimbursement of the settlement payment because PLM was the only carrier on the risk at the time of the property damage.

Practice Note
The court's opinion serves as a reminder to carriers that, under Florida law, if an insurer intends to seek reimbursement of its defense fees and costs: (1) it must reserve its rights to seek such reimbursement for uncovered claims from other

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carriers; and (2) there must be a finding that the insurer never had a duty to defend the insured.

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