



Alerts

Florida District Court of Appeal Holds that Additional Insured Is Entitled to Separate, Independent Counsel in "Paper Conflict" With Co-Insured

May 9, 2013

Insurance Coverage Alert

On July 18, 2000, a young child nearly drowned while at a summer swim camp held on a university's campus. The child's parents sued both the camp and the university for negligent supervision. The lawsuit also included allegations that the university was vicariously liable for the camp's negligence.

The university was an additional insured under a commercial general liability policy issued to the camp. The policy contained a separation of insureds provision.

In response to the lawsuit, the insurer retained the same defense counsel to represent both the university and the camp. Shortly after suit was filed, the university advised the insurer that there was a conflict of interest in the single representation of itself and the camp, and demanded independent counsel of its own choice. The insurer refused, and the university retained counsel at its own expense.

After the negligence case settled, the university filed a declaratory judgment action against the insurer, arguing that the insurer breached the policy by failing to provide it with separate counsel from the camp. The university sought reimbursement of its defense costs and attorneys' fees.

The insurer moved for summary judgment, arguing that there could be no conflict of interest in its representation by a single counsel because the camp was contractually bound to indemnify and hold harmless the university for any liability arising out of the camp's use of its facilities. The trial court agreed and held that the insurer had no obligation to reimburse the university for its fees and costs.

In a case of first impression, *Univ. of Miami v. Great Am. Ins. Co.*, Case No. 3D09-2010 (Fla. 3d DCA Feb. 20, 2013), Florida's Third District Court of Appeal reversed the trial court's holding. On appeal, the university argued that there was an obvious conflict of interest with the camp, as evidenced by the pleadings which contained direct allegations of negligence on the part of both defendants as well as vicarious liability. The defendants also each alleged that they were relieved of liability based on the negligence of the other in their answers to the complaint.

The court agreed with the university, concluding that it was entitled to its own independent counsel based on the allegations and record evidence which established "inherently adverse" legal defenses between the university and camp. To defend both co-defendants, the court observed that "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 so doing, legal counsel would have had to necessarily imply blame to one co-defendant to the detriment of the other." According to the court, "[o]n these facts, we believe this legal dilemma clearly created a conflict of interest between the legal defenses of the common insureds sufficient to qualify for indemnification for attorney's fees and costs for independent counsel."

While the holding of this case is noteworthy, the dissent is also significant. In a lengthy and well-reasoned dissent, Judge Frank A. Shepherd noted that there was no actual conflict of interest or even a "substantial risk" of conflict between the



insureds. Judge Shepherd observed that the majority's decision to afford the university and camp separate counsel on the basis of mere finger pointing created by their own pleadings was nothing more than a "paper conflict." According to the dissent, the majority would afford insureds "separate counsel any time an insured articulates a conflict in a pleading, whether or not real."

Judge Shepherd further noted that the "flaw in the majority opinion is that it confuses and conflates insurer obligations in three unrelated circumstances: (1) the duty to defend; (2) conflicts between an insured and insurer; and (3) conflicts between insureds." In a statement based on the majority's citation of cases from all three circumstances, Judge Shepherd observed that this case involved only the third circumstance and that "the majority makes no effort to distinguish among them in its resolution of this case."

Practice Note

This case expands an insured's right to independent defense counsel where there is a perceived conflict of interest with a co-insured. Although the dissent argued that this case expands the requirement to provide separate defense counsel to insureds anytime an insured "articulates a conflict in a pleading," the majority also relied upon "record evidence" submitted on summary judgment. From a practical standpoint for insurers, where an insured seeks separate, independent counsel from a co-insured and there are allegations of a conflict of interest between them, separate counsel may need to be provided.

For further information, please contact your regular [Hinshaw attorney](#).