OA 6-2-97

IN THE SUPREME COURT, STATE OF FLORIDA

SUPREME COURT CASE NO. 89,124

THIRD DISTRICT COURT OF APPEAL CASE NO. 96-842

ILLINOIS INSURANCE EXCHANGE, an Illinois Corporation and BRITAMCO UNDERWRITERS, INC., and Illinois Corporation,

Petitioners,

vs.

SCOTTSDALE INSURANCE COMPANY a/s/o GAMEL PROPERTIES INC., d/b/a CARILLON RESORT and TIFFANY'S and CARYLANN HOTEL PROPERTIES, INC. d/b/a CARILLON RESORT and TIFFANY'S,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

Petitioners, ILLINOIS INSURANCE EXCHANGE and BRITAMCO UNDERWRITERS, INC., will be referred to as ILLINOIS in this brief. Respondent, SCOTTSDALE INSURANCE COMPANY, will be referred to as SCOTTSDALE. The insured CARILLON RESORT and TIFFANY'S will be referred to collectively as TIFFANY'S.

All references to the record will appear as follows:

(R.____)

STATEMENT OF THE CASE AND FACTS

Plaintiff/Respondent SCOTTSDALE sued Defendant/Petitioner ILLINOIS for declaratory relief seeking reimbursement of moneys expended in defending and indemnifying the parties' mutual insured TIFFANY'S lounge. (R.44, pp. 1-41) According to SCOTTSDALE'S Complaint, four individuals, Francisco Francis, Mathew Goltzman, James Aranaez and Daniel Trujillo (hereinafter **"claimants"**) were injured outside the premises of the lounge on August 8, 1987 after they had attended a fraternity party on the premises. (R.44, pp. 4-5) SCOTTSDALE defended the bar and settled the claims brought by the Plaintiffs and then sought to recover those sums expended from **ILLINOIS. (R.44, pp. 7-8)**

On the day of the incident, TIFFANY'S had in force a general premises liability policy with SCOTTSDALE and a liquor liability policy with ILLINOIS. (R.44, pp. 2-3) SCOTTSDALE'S policy provided, in pertinent part, that:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury, or (b) property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim for judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgment or settlements.
>
> . . .

This insurance does not apply:

. . .

(h) to bodily injury or property damage for which the insured or his indemnity may be held liable

(1) as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages or

(2) if not *so* engaged, as an owner or lessor of premises used for such purposes, if such liability is imposed

(i) by, or because of the violation of, any statute, ordinance or regulation pertaining to the sale, gift, distribution or use of any alcoholic beverage, **or**

(ii) by reason of the selling, serving or giving of any alcoholic beverages to a minor or to a person under the influence of alcohol or which causes or contributes to the intoxication of any person: but part (ii) of this exclusion does not apply with respect to liability of the insured or his indemnity as an owner or lessor described in (2) above.

(R.44, p. 18) ILLINOIS' policy provided, in pertinent part, that:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as compensatory damages (excluding punitive damages) because of injury to which this insurance applies, sustained by any person if such liability is imposed upon the insured by reason of: (1) causing or contributing to the intoxication of any person; **(2)** the furnishing of alcohol beverages to a person under the legal drinking age or under the influence of alcohol; or **(3)** any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages, provided the activities described in (1), **(2)** and (3) above occur at **the** insured premises and provided the injury occurs after the retroactive date shown on the policy declarations and the claim is first made during the policy period and that written notice of **the** claim is reported to the company during the policy period. The company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the

> suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit it deems expedient, but the company shall not be obligated to pay any claim or judgement [sic] or to defend any suit after the applicable limit of the company's liability has been exhausted by payment or judgements [sic] or settlements.

(R.44, p. 55)

The claimants testified that they were all underage and had been served alcohol on the **TIFFANYS'** premises on the evening in question. **(R.44,** p. **49)** The claimants also testified that they were not intoxicated after leaving the bar. (R.44, **p. 49) SCOTTSDALE** submitted no evidence to the contrary at the hearing on the Motions for Summary Judgment. **(R.44, pp. 142-174)**

According to the claimants, after they **left TIFFANY'S** and **were** walking to their car, a group of unknown individuals attacked them without provocation, resulting in a melee in which several individuals, including one of the assailants, were stabbed. **(R.44, pp.** 103, **120, 134)** None of the claimants knew any of the assailants, nor did any of the claimants recall seeing any of the assailants **in TIFFANY'S.** (R.44, pp. **104-105,** 122, 125, **134, 136)**

The claimants' Complaint alleged, in pertinent part, that **TIFFANY'S owed** a duty to the claimants to exercise reasonable care **to** maintain its premises in a reasonably safe manner, including policing the premises to protect its patrons from assaults by other patrons. **(R.44, pp.** 25-26) **The** Complaint further alleged that TIFFANY'S had an obligation and **a** duty to refrain from willfully and unlawfully selling or furnishing alcohol to underage patrons. **(R.44, p.** 26) According to the claimants, **TIFFANY'S** breached these duties by:

a) failing to have adequate security;

b) having improper and inadequate crowd control;

c) having improper and inadequate crowd security;

d) having improper and inadequate crowd control policies;

e) selling or furnishing alcohol to minors.

(R.44, pp. 26-27) According to the claimants, as a result of "one or more" Of these breaches, the claimants suffered injury. (R.44, p. 26)

SCOTTSDALE defended TIFFANY'S under a reservation of rights and settled the claimants' claims. (R.44, p. 7) Because SCOTTSDALE concluded that the underlying Complaint by claimant Frances contained allegations of both premises and liquor liability, SCOTTSDALE notified ILLINOIS about the claim. (R.44, p. 30) According to SCOTTSDALE'S Complaint, ILLINOIS breached its duty to defend TIFFANY'S and further breached its duty to investigate the claim. (R.44, p. 6)

After settling the claims with all four claimants, SCOTTSDALE broughtthe instant suit against ILLINOIS seeking a declaration that it was entitled to reimbursement of sums expended in defending and settling liquor liability claims on behalf of TIFFANY'S. (R.44, pp. 1-41)[1] Both parties moved far summary judgment. (R.44, pp. 47-51, 65-83) SCOTTSDALE submitted the underlying Complaint, insurance policies, discovery and correspondence between the two insurers in support of its Motion. (R.44, pp. 84-141) SCOTTSDALE argued that since the Complaint alleged facts falling within both insurers' coverage, ILLINOIS had a

[1] SCOTTSDALE'S original Complaint contained claims far Breach Of Contract, Indemnification and Subrogation. That Complaint was dismissed and SCOTTSDALE'S amended Complaint contained only a single claim for declaratory relief. (R.44, pp. 1-41)

duty to defend and a duty to indemnify their mutual insured. (R.44, pp. 67-69) Since ILLINOIS had declined to do so when requested by SCOTTSDALE, ILLINOIS had, according to SCOTTSDALE, no defense to this declaratory action, (R.44, pp. 71-72) Finally, SCOTTSDALE argued that once ILLINOIS declined to defend or indemnify its insured, it lost the ability to demonstrate that the actual facts surrounding the subject incident fell outside its coverage. (R.44, p. 73)

ILLINOIS posited that even assuming that it had a duty to defend the mutual insured simply because the claimants had been served alcohol at TIFFANY'S, there was no evidence that alcohol played any factor in the incidents such that it would have had a duty to indemnify the insured. (R.44, p. 50) Furthermore, ILLINOIS argued, under the Third District Court of Appeals' decision in Argonaut Ins. Co. v. Maryland Casualty Co., 372 So. 2d 960 (Fla. 3d DCA 1979), since both insurers indisputably had separate, independent duties to defend the insured in this case, SCOTTSDALE could not recover any percentage of its defense costs from ILLINOIS as under general subrogation principles, it had incurred liability over and above what it independently owed to its insured. (R.44, p. 169)

After a hearing, Judge Thomas S. Wilson granted SCOTTSDALE'S Motion for Summary Judgment, finding that ILLINOIS owed SCOTTSDALE reimbursement for its proportionate share of the defense and indemnification costs. (R.44, pp. 142-177) A timely Notice of Appeal was filed from this non-final order determining liability in favor of SCOTTSDALE and against ILLINOIS. (R.44, pp. 175-177)

The Third District Court of Appeal issued its decision on August 14, 1996. (R.105-110) The appellate court determined that ILLINOIS owed SCOTTSDALE 50% of **SCOTTSDALE'S** defense costs but remanded the case to the trial court, finding that there were genuine issues of material fact precluding summary judgment on the issue of whether ILLINOIS actually had coverage for the underlying claim, (R.105-110) The decision made no mention of the appellate court's own Argonaut decision. (R.105-110)

After ILLINOIS moved for Rehearing and/or Clarification and Rehearing En Banc, the Third District issued a Corrected Opinion on September 11, 1996, which made only minor changes to the facts contained in the opinion. (R.111-118, 119-138, 149, 150-155) Thereafter, ILLINOIS filed its Notice of Invoke this Court's Discretionary Jurisdiction and the parties filed Jurisdictional Briefs on the issue of whether the appellate court's decision was in conflict with the Fifth District Court of Appeal's en banc decision in Continental Casualty Co. v. United Pacific Ins. co., 637 So. 2d 270 (Fla. 5th DCA 1994), in which that court adopted the rationale of Argonaut as its own. (R.157-158) This Court accepted conflict jurisdiction over this case on February 18, 1997. (R.159)

POINTS ON APPEAL

The Trial and Appellate courts erred in contrmining that ILLINOIS was obliged to ribute to SCOTTSDALE'S defense costs given that SCOTTSDALE had a separate, independent duty to defend the mutual insured and was therefore not entitled to recover any portion of its defense costs under general subrogation principles as espoused in Continental Casualty Co. v. United Pacific Ins. Co.

II. Even if the lower courts did not err in concluding that SCOTTSDALE was entitled to recover a portion of its defense costs exaended on behalf of the mutual insured. the courts erred in presuming that SCOTTSDALE was entitled to recover 50% of those costs in light of the fact that SCOTTSDALE 'S pro rata share of those costs exceeded ILLINOIS' and in light of the fact that of the five (5) co- contained in the Complaint. only one (1) of those counts was arauably covered under ILLINOIS' policy.

III, The Third District Court of Anneal erred in remandinu the case to the trial court on the issue of whether SC E was entitled to summary judgment in its favor on coveracre; the Record reflects that there is no evidence supporting SCOTTSDALE'S contention that ILLINOIS lly had coverage for the insured's claim and both parties admitted that further discovery was unlikely to unearth anv further evidence n support of SCOTTSDALE'S claim.

SUMMARY OF ARGUMENT

The lower tribunals erred in determining that ILLINOIS was obligated to contribute to SCOTTSDALE'S defense costs since SCOTTSDALE had its own independent duty to defend the mutual insured TIFFANY'S and therefore, was not providing a benefit to TIFFANY'S which it was not already contractually bound to provide, The appellate court's attempt to analogize this case to those in which an excess carrier provides a primary defense to the insured when the insured's primary carrier wrongfully refuses to do so, must fail as in those cases, the excess carrier does not have the initial duty to defend and therefore, it is rendering a service to the insured over and above what is required by its contract. Therefore, under general subrogation principles, SCOTTSDALE had no claim for equitable subrogation and summary judgment should have been rendered in ILLINOIS' favor.

The lower courts also erred in determining, without explanation, that ILLINOIS owed SCOTTSDALE 50% of its defense costs. ILLINOIS' policy contains a "pro rata" "other insurance" clause while SCOTTSDALE'S policy contains no "other insurance" clause. If ILLINOIS is bound to contribute to the mutual insured's defense costs, it should only be required to do so on a "pro rata", rather than equal, basis.

Finally, the appellate court erred in remanding the case, on the grounds that there remain genuine issues of material fact with respect to ILLINOIS' duty to contribute to SCOTTSDALE'S settlement. As the appellate court recognized, SCOTTSDALE had no evidence to Sustain its contention that the loss in question arose out of a covered loss under ILLINOIS policy. In light of the fact that the incident occurred

almost ten (10) years ago and in light of SCOTTSDALE'S own explicit admission that there were no genuine issues of material fact remaining to be litigated and its tacit admission, in response to ILLINOIS' Motion for Rehearing, that there were no material facts remaining to be discovered, the appellate court should have simply reversed the trial court's summary judgment compelling ILLINOIS' contribution to the settlement, rather than remanding that issue for further proceedings.

ARGUMENT

I. The Trial and Appellate courts erred in determining that ILLINOIS was obliged to contribute to SCOTTSDALE'S defense costs given that SCOTTSDALE had a separate, independent duty to defend the mutual insured and was therefore not entitled to recover any portion of its defense costs under general subrogation principles as espoused in Continental Casualty Co. v. United Pacific Ins. co,

This case poses the question of whether, where two insurance policies arguably cover the same claim and only one insurer defends the mutual insured, the defending insurer is entitled to recover a portion of its defense costs from the non-defending insurer under the principle of equitable subrogation. The Third District Court of Appeals' decision in this case, holding that the defending insurer may so recover, inexplicably failed to address the only two (2) Florida cases directly on point, Continental Casualty Co. v. United Pacific 637 So 2d 270 (Fla. 5th DCA 1994)(en banc) and Argonaut Ins. Co. v. Maryland Casualty Co., 372 So. 2d 960 (Fla. 3d DCA 1979), both of which have held to the contrary. ILLINOIS moved for Rehearing En Banc in an effort to have the appellate court articulate why it felt that neither case governed the issue, but the Court declined to do so, thereby necessitating Supreme Court review.

SCOTTSDALE'S policy provided primary coverage to TIFFANY'S for premises liability claims. ILLINOIS' policy provided primary coverage to TIFFANY'S for liquor liability claims. The underlying Complaint alleged, in pertinent part, that TIFFANY'S owed a duty to the claimants to exercise reasonable care to maintain its premises in a reasonably

safe manner, including policing the premises to protect its patrons from assaults by other patrons. (R.44, pp. 25-26) The Complaint further alleged that TIFFANY'S had an obligation and a duty to refrain from willfully and unlawfully selling or furnishing alcohol to underage patrons. (R.44, p. 26) According to the claimants, TIFFANY'S breached these duties by:

a) failing to have adequate security;

b) having improper and inadequate crowd control:

c) having improper and inadequate crowd security;

d) having improper and inadequate crowd control policies:

e) selling or furnishing alcohol to minors.

(R.44, pp. 26-27) According to the claimants, as a result of "one or more" of these breaches, the claimants suffered injury. (R.44, p. 26) ILLINOIS denied coverage on the grounds that the Complaint did not state claim for liquor liability and accordingly, ILLINOIS refused SCOTTSDALE'S requests to contribute to its defense and indemnification costs. After settling the claims against the mutual insured, SCOTTSDALE brought this suit for equitable subrogation against ILLINOIS, seeking reimbursement for an unspecified portion of its defense and indemnification expenditures.

At the time of the trial court's summary judgment in SCOTTSDALE'S favor, the law in Florida was well settled that where two carriers have primary duties to defend on the same claim, the carrier who defends the claim has no right of subrogation from the non-defending insurer. Continental Casualty, 637 So. 2d 270; Argonaut, 372 so. 2d 960. The underlying rationale of both cases is that each

carrier owed the insured a separate, independent duty to defend and that duty runs only to the insured; not to another carrier, who is a stranger to the contract.

In an apparent effort to avoid these cases, the Third District opined:

> Since Scottsdale's policy excluded liquor liability claims, and since Illinois' policy specifically covered liquor liability claims, Illinois was the primary insurer on the negligence claim and Scottsdale was the excess insurer. 'The fact that a carrier which is secondarily liable also had a duty to defend the insured does not deprive the carrier of its right to be indemnified for the cost of defending the insured.' United States Auto, Ass'n v Hartford Ins. Co,, 468 So. 2d 545 (Fla. 5th DCA), rev. denied, 476 So. 2d 676 (Fla. 1985); see also. Associated Elect.& Gas Ins. Servs., Ltd. v. Ranger Ins Co. 560 So 2d 242 (Fla. 3d DCA 1990). Accordingly, Scbttsdale'is entitled to half of the attorney's fees and costs that it incurred while defending Tiffany's.

(R.153) Thus, in an effort to distinguish this case from Continental and Argonaut, the appellate court mistakenly treated this case as one involving primary and excess insurers while the opinion itself revealed that both carriers provided primary coverage to the mutual insured and that their coverages were mutually exclusive of one another. As a result, the cases relied upon by the Court in reaching its decision that ILLINOIS owed SCOTTSDALE reimbursement for a portion of its defense costs are all distinguishable and this opinion is in direct conflict with the Fifth District's en banc decision in Continental Casualty, which was based upon the Third District's own decision in Argonaut.

In Continental, the Fifth District Court of Appeal issued an en banc decision holding that an insurer is not entitled, pursuant to equitable subrogation or contribution, to recover from another insurer the costs of defending their mutual insured because the duty to defend an insured is personal and does not inure to the benefit of another insurer. Id., 637 So. 2d 270. As in the present case, both carriers, Continental Casualty Company and United Pacific Insurance Company, provided primary coverage to their mutual insured, but only Continental provided a defense to a claim covered under both policies. Id. United Pacific ultimately contributed equally to the settlement of the claim, but refused to contribute to Continental's defense costs. Id, United obtained a summary judgment in its favor on Continental's claim for equitable subrogation. Id.

The Fifth District affirmed that summary judgment, adopting as its own the rationale of the Third District in Argonaut. The Argonaut court, in turn, relied upon a 1955 California case as the basis for its decision:

> While the fact that here both companies in their policies agree to defend the assured bears some analogy to the situation where both companies have agreed to indemnify the assured against a total loss, nevertheless the agreement to defend is not only completely independent of and severable from the indemnity provision of the policy, but is completely different. Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services. The insurer must investigate, and conduct defense, and may if it deems it expedient, negotiate and make a settlement of the suit. These matters each insurer is required to do regardless of what the other insurer is doing. While both may join together in the services and share expenses, there is no requirement that they do so. Conceivably, one might disagree with the other

> as to the strategy of the investigation and defense. It could act independently of the other. Thus the relationship is more that of coinsurer than cosurety. As to the assured, neither one is excused to any extent from its full duty to defend, no matter what the other does, The duty to defend is personal to the particular insurer. It is not entitled to divide that duty with or require contribution from the other.

Araonaut, 372 So. 2d at 963, quoting Financial Indemnitv Co. v. Colonial Ins. Co., 281 P. 2d 883 (Cal. App. 1955).[2] With respect to Continental's argument that such a policy would encourage insurer's to "shirk" their duty to defend, the Continental panel once again looked to the reasoning of Argonaut by quoting:

> If an insurance company refuses to defend or provide contractual coverage to its insured, then it may expose its policy limits to a third party and faces a breach of contract suit with other statutory remedies (e.g., Section 627.421(1) Florida Statutes) bv the insured An insured is adequately protected when its insurer breaches its contact. Further, third parties are protected for required liability coverage by public policy pursuant to established law. All necessary remedies and protection to the proper parties are available to enforce all necessary rights.
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> . . .
>
> The Legislature has not seen fit to allow contribution for costs or attorney's fees between insurance companies. If contribution for costs were allowed between insurance companies, there would be multiple claims and law suits. The insurance companies would have no incentive to settle and protect the interest of the insured, since another

[2] Financial Indemnity was overruled in Continental Casualty Co. v. Zurich Ins. Co., 366 P. 2d 455 (Cal. 1961)(in Bank), but that did not preclude the Argonaut or Continental panels from adopting its reasoning as it was not cited as binding precedent. See, Parker v. Florida First Nat. Bank of Jacksonville, 419 So. 2d 730 (Fla. 1st DCA 1982)(District Court of Appeal was not bound by holdings in cases from foreign jurisdictions).

> law suit would be forthcoming to resolve the coverage dispute between the insurance companies. This is contrary to public policy, particularly since the insured has been afforded legal protection and has not had to personally pay any attorney's fees.

Argonaut, 372 So. 2d at 964 (emphasis supplied). Thus, the Fifth District concluded that "Argonaut was correct that traditional principles of subrogation will not support a reimbursement of defense costs in favor of someone who has the independent contractual duty to pay all such expenses." Id.

Because the Third District Court of Appeal declined to address Continent& or Argonaut in the decision on review, we are not privy to what the appellate court below would have concluded had it squarely addressed the issue.[3] We can only presume that the Court's decision reflects an unarticulated desire on the part of the panel to permit recovery in subrogation for defense costs in cases in which a single insurer provides the defense in cases in which multiple carriers provide coverage. Aside from the fact that this desire is contrary to existing Florida law, there is no overwhelming public policy to be served by turning subrogation principles inside out to create an equitable "right" to defense costs in favor of one who has no concomitant "right" to a defense.

The only basis for SCOTTSDALE'S claim against ILLINOIS was in equitable subrogation. "'Equitable' subrogation is a creature of

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[3] Of course, in order reach the conclusion that ILLINOIS owed SCOTTSDALE a proportionate share of the defense costs, the Court would have had to address the issue en banc since Argonaut bound the panel to hold to the contrary.

equity which was developed to afford relief 'when one person has satisfied the obligations of another and equity compels that the person discharging the debt stand in the shoes of the person whose claim has been discharged, thereby succeeding to the rights and priorities of the original creditor.'" Kala Investments, Inc. v. Sklar, 538 So. 2d 909, 917 (Fla. 3d DCA 1989)(citing, Eastern National Bank v. Glendale Federal Savings and Loan Association, 508 So. 2d 1323, 1324 (Fla. 3d DCA 1987). In defending its insured, SCOTTSDALE satisfied its own obligation under its insuring agreement, not the obligation of ILLINOIS. There is no evidence in the Record that ILLINOIS' obligation to defend its insured was any greater or broader than that contained in SCOTTSDALE'S policy, nor is there any evidence that the insured sought a defense from ILLINOIS first or to the exclusion of SCOTTSDALE. The insured's defense was tendered to SCOTTSDALE and SCOTTSDALE discharged its obligation as it was legally bound to do under its policy." Since it did no more than it was required to do, SCOTTSDALE can not logically assert that it is entitled to recompense for alleviating ILLINOIS' obligation to do the same and its own obligations are fatal to its

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' It was SCOTTSDALE, and not the insured, who provided notice of the claim to ILLINOIS.

subrogation claim.[5] In Argonaut, the Third District addressed this deficiency in the defending carriers claim:

> The appellant has no right of subrogation, as the subrogation clause in its policy only allows the appellant rights to recover payment made by appellant on behalf of the insured.
>
> . . .
>
> No obligation was incurred by the appellant in the prior litigation to make any payment on behalf of its insured (Watsco) to any other party for attorney's fees and costs. Equity should not provide a subrogation remedy to appellant in the absence of any other rights of recovery The appellant merely acted pursuant to its contractual relationship to Watsco. Appellant's duty, pursuant to that relationship would defeat equitable subrogation in this cause . . .
>
> This case fails to compel the application of subrogation on a contractual, quasi-contractual, or equitable basis. Appellant has not paid a loss on behalf of Watsco; it has merely incurred attorneys' fees and costs in fulfilling its contractual duty.

Id. at 965 (citations omitted: emphasis added).

The appellate court in this case apparently failed to recognize that this scenario is in sharp contrast with that presented where an excess carrier steps into the breach and defends an insured who has been abandoned by its primary carrier. In that event, the excess carrier does not have the primary duty to defend, but does so in

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[5] ILLINOIS has consistently taken the position, as it does now, that it did not have a duty to defend the insured because the Complaint does not state a claim for liquor liability, but only alleges that the claimants were served alcohol by TIFFANY'S. Since the mere service of alcohol to minors, without a resulting injury does not constitute a legally cognizable claim under Florida law or'under ILLINOIS policy, the Complaint did not trigger ILLINOIS' duty to defend. The Third District Court of Appeal disagreed, but did not provide a basis for its conclusion.

an effort to protect the insured, and in the process, its own interests and coverage, and is entitled to recoup those expenditures from the insurer who had the sole obligation to defend the insured. See, Phoenix Ins. Co. v. Florida Farm Bureau Mutual Ins. Co., 558 So. 2d 1048 (Fla. 2d DCA 1990); Associated Elect. & Gas Ins. Servs., Ltd. v. Ranger Ins. Co., 560 So. 2d 242 (Fla. 3d DCA 1990); United States Auto. Ass'n v. Hartford Ins. Co., 468 So. 2d 545 (Fla. 5th DCA), rev. denied, 476 So. 2d 676 (Fla. 1985); Gen. Accident Fire and Life v. American Cas. Co., 390 So. 2d 761 (Fla. 3d DCA 1980), rev. denied, 399 So. 2d 1142 (Fla. 1981). In these cases, however, the defending insurer is rightfully entitled to recoup its defense costs because it discharged the non-defending insurer's sole duty to provide a primary defense to the claims at issue, an obligation different in kind and quality from that the defending insurer already owed to the insured.

We recognize that the underlying rationale of the Continental and Argonaut decisions has been criticized both in and outside Florida and has been characterized as the minority view.[6] Judge Sharp's dissent in Continental cited numerous cases from other jurisdictions

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[6] Florida is far from the only jurisdiction to have ascribed to this view. See, e.g., Josten's, Inc. v. Mission Ins., N.W.2d 161 (Minn. 1986); Barton & Ludwig, Inc. v. Fidelity & Deposit Co., 570 F. Supp. 1470 (N.D. Ga. 1983); Universal Underwriters Ins. Co. v. American Motorists Ins. Co., 541 F. Supp. 755 (N.D. Miss. 1982); Ferromontan Inc. v. Georgetown Steel Corp., 535 F. Supp. 1198 (D.S.C. 1982); Arizona Joint Underwriting Plan v. Glacier Gen. Assur. Co., 631 P. 2d 133 (Ariz. 1981); Associated Mut. Ins. Co. v. Fireman's Fund Ins. Co., 439 N.Y.S. 2d 706 aff'd, 436 N.E. 2d 1333 (1982); Sloan Constr. Co. v. Central Nat'l Ins. Co., 236 S.E. 2d 818 (S.C. 1977); Transamerica Ins. Group v. Empire Mut. Ins. Group, 327 A. 2d 734 (Conn. Supp. 1974); Fidelity & Cas. Co. v. Ohio Cas. Ins. Co., 482 P. 2d 924 (Okla. 1971); United States Fidelity & Guaranty Co. v. Tri-State Ins. Co., 285 F. 2d 579 (10th Cir. 1960).

permitting a defending primary insurer to recover its defense costs from another mutual insurer. Continental, 637 So. 2d at 277-279. Judge Sharp was concerned that the majority's decision would give license to insurers to "play chicken" with one another in an effort to exact a defense from a mutual insurer, thereby obtaining a windfall when its contractual duty is discharged. We can not represent with any authority that that scenario does not remain a possibility in isolated cases, but disagree that an opinion by this Court approving Continental and Argonaut would encourage such behavior on the part of Florida insurers.

As the Continental majority recognized, Florida insurers have significant incentives to comply with their contractual obligations by virtue of statutory and contractual remedies provided to the insured, the sole person or entity with the ability to compel compliance with the insurance contract. In addition, insurers also have the incentive to provide a defense, or coordinate with another insurer in providing a mutual defense, by virtue of the fact that their failure to do so would preclude them from having any control over the ultimate disposition of a covered claim, for which they are partially or fully responsible to provide indemnification regardless of whether the insurer provided a defense. These twin incentives have apparently held in check any alleged tendency on the part of mutual insurers to shirk their responsibilities vis-a-vis their insureds. Moreover, as the Supreme Court of South Carolina recognized in Sloan Construction Co., Inc. v. Central National Ins. Co. of Omaha, 236 S.E. 2d 818 (S.C. 1977), a case substantially similar to the case at bar, "[t]he

inequities, if any, of the results of two insurers owing equal obligations to defend and one bearing the entire cost can be obviated by rewriting the terms of insurance contracts or by the obligee actually incurring a legal obligation to pay and seeking recovery on a pro-rata basis if it so desires." Id. at 821.

As the Continental Court recognized, there was no evidence in that case, just as there is no evidence herein, to substantiate the defending insurer's claim that Florida insurers will be encouraged to deny their insureds a defense where another insurer also has primary coverage. Without such evidence, and in light of the dearth of case law demonstrating a trend toward this behavior, there is no overwhelming policy rationale supporting the propagation of equitable subrogation as a remedy for a defending insurer to recoup a portion of its defense costs, where that insurer has not so much as assumed the obligation of the non-defending insurer as it has complied with its own contractual obligations.

To the contrary, there are more serious public policy considerations supporting the Continental view that there is no such legal claim. As the majority recognized, such a cause of action would open a virtual Pandora's box of potential legal issues to be addressed in these cases, including the question of what proportion of the defense costs are recoverable by the defending insurer, see, infra, pp. 22-23; Twin City Fire Ins. Co. v. Home Indem. Co., 650 F. Supp. 785 (E.D. Pa. 1986)(where insuring agreements did not provide concurrent coverage, costs of defense are required to be divided equally); whether the tender of the defense to one of two insurers by the insured should

control as to whether there is an obligation to defend and if so, when that obligation to defend began to inure to the benefit of the already defending insurer, see, Institute of London Underwriters v. Hartford Fire Ins. Co., 599 N.E. 2d 1311 (Conn. 1992)(where insured elected which of its insurers was to defend and indemnify the claim by tendering its defense to one and not the other, insured foreclosed the settling insurer from obtaining contribution from the non-settling insurer): Scottsdale Ins. Co. v. American Empire Surplus Lines Ins. co., 791 F. Supp. 1079 (D. Md. 1992)(defending insurer has right to contribution, but no right to recover fees and expenses incurred before second insurer was put on notice of the claim); and whether the insured's failure to promptly disclose the existence of another insurer or failure to timely tender a defense to the non-defending insurer could preclude the defending insurer from obtaining subrogation from the non-defending insurer. See, Hartford Accident and Indem. Co. v. Gulf Ins. Co., 776 F. 2d 1380 (7th Cir. 1985), appeal after remand, 837 F. 2d 767 (7th Cir. 1988)(where sophisticated insured failed to properly tender its defense to both insurers, non-defending second insurer was not exposed to a claim for contribution by defending insurer). In addition, such a decision in this case could generate litigation between two insurers who have both honored their duties to defend, but may disagree on the strategy or amount of defense costs expended. See, Aetna Casualtv & Surety Co v. Mutual of Enumclaw Ins. Co., 826 P. 2d 1315 (Idaho 1992)(where both carriers defended but one carrier assumed the lion's share of the defense, contribution was not available to the actively defending insurer because the other had not

breached its duty to defend). The bottom line, as the majority recognized in Continental, is that:

> [T]he complications arising from the creation of this right of 'equitable contribution' or equitable subrogation' are at least as troublesome as the speculative ill sought to be remedied by the creation of this right in the first place. As the Argonaut court suggested in 1979, the place for this issue to be examined and remedied, if appropriate, is in the legislature.

Id. at 275.

It is respectfully submitted that, in light of the foregoing, this Court should approve the decisions of the Fifth District Court of Appeal in Continental and the Third District Court of Appeal in Argonaut and overrule the decision of the Third District Court of Appeal in this case, by determining that SCOTTSDALE had no cause of action for reimbursement of a portion of the defense costs expended in the defense of the mutual insured.

II. Even if the lower courts did not err in concluding that SCOTTSDALE was entitled to recover a portion of its defendants expended on behalf of the mutual insured, the courts erred in that SCOTTSDALE was entitled to recover 50% of those costs in light of the fact that SCOTTSDALE'S pro rata share of those costs exceeded ILLINOIS' and in light of the fact that of the five (5) counts contained in the Complaint, only one (1) of those counts was arguably covered under ILLINOIS' policy.

The appellate court concluded, without discussion, that SCOTTSDALE was entitled to recover 50% of the defense costs expended on behalf of the mutual insured. It is submitted that, should this Court determined that SCOTTSDALE is entitled to recover any portion of its defense costs from ILLINOIS, it should also determine that the appropriate measure of recovery is pro rata, rather than equal, as the

insurers had differing amounts of insurance covering the mutual insured and any right SCOTTSDALE may have to recover a portion of its indemnification expenses will be measured on a pro-rata basis.

Although the issue of what proportion of the defense costs was subject to recovery by SCOTTSDALE was never addressed by the trial court, SCOTTSDALE successfully argued before the Third District that it was entitled to recover 50% of expended costs, simply because that was what it requested in its Complaint. In response, ILLINOIS argued that SCOTTSDALE should not be entitled to recover more than its pro-rata share of the costs from it and that since SCOTTSDALE had proportionally more coverage than ILLINOIS, it was not entitled to recover half of its defense costs.[7]

Most Courts that have addressed this question have held that defense costs should be apportioned in the same manner as indemnity. Thus, where, as here, indemnity is to be allocated on a pro-rata basis, defense costs should likewise be apportioned in accordance with that formula.[8] See, Continental Ins. Co. v. Allstate, 821 F. Supp. 1084 (E.D. Pa. 1993); National Casualty Co. v. Great Southwest Fire Ins. Co., 833 P. 2d 741 (Colo. 1992)(en banc); Avondale Indus. v. Travelers Indem. C., 774 F. Supp. 1416 (S.D.N.Y. 1991); Air Prods & Chems. v.

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[7] SCOTTSDALE'S coverage was in the principal amount of $500,000 per occurrence, while ILLINOIS' coverage was in the amount of $300,000 per occurrence. (R.44, pp. 15, 54) SCOTTSDALE'S policy had no "other insurance" clause, but ILLINOIS' policy contains a "pro rata" "other insurance clause. (R.44, P- 58, ¶6(b))

[8] ILLINOIS' policy contains a pro-rata other insurance clause: SCOTTSDALE'S policy is silent as to apportionment with other insurers.

Hartford Accident & Indem. Co., 707 F. Supp. 762 (E.D. Pa. 1989); National Indemnity Co. v. St. Paul Ins. Companies, 724 P. 2d 578 (Ariz. Ct. App. 1985), affirmed in part, vacated in part, 724 P. 2d 544 (Ariz. 1985)(in bank); Sacharko v. Center Equities Ltd. Partnership, 479 A. 2d 1219 (Conn. 1984); Continental Casualty Co, v. Zurich Ins. Co., 366 P. 2d 455 (Cal. 1961)(in bank).

Should this Court determine that SCOTTSDALE is entitle to recover a portion of its defense costs in subrogation, it is respectfully requested that this Court should remand the case to the trial court for a pro-rata determination of the amount recoverable by SCOTTSDALE.

III. The Third District Court of Appeal erred in remanding the case to the trial court on the issue of whether SCOTTSDALE was entitled to summary judgment in its favor on coverage; the Record reflects that there is no evidence supporting SCOTTSDALE'S contention that ILLINOIS actually had coverage for the insured's claim and both parties admitted that further discovery was unlikely to unearth any further evidence in support of SCOTTSDALE'S claim.

The appellate court reversed the trial court's summary judgment in favor of SCOTTSDALE on the issue of whether that carrier was entitled to recover any portion of its indemnification costs from ILLINOIS but incorrectly remanded the case for further proceedings, based on its finding that "an issue of material fact existed concerning whether the service of alcohol had caused the claimants' injuries."

Both parties hereto moved for summary judgment: both parties agreed that there remained no genuine issue of material fact remaining to be discovered or litigated. The evidence establishes that the

claimants actually had no liquor liability claim against TIFFANY'S. ILLINOIS' liquor liability coverage covers a claim against an insured for liability arising out of injury caused by alcohol consumption. The evidence before the Court establishes that alcohol played no role whatsoever in the stabbing of the claimants in that none of the claimants were inebriated at the time of the stabbing and there is no evidence that the assailants had been in TIFFANY'S or had imbibed alcohol prior to the assault. In short, SCOTTSDALE established no nexus between alcohol and the injury and without that nexus, there is not only no liquor liability on the part of TIFFANY'S, but there is no liquor liability coverage on the part of ILLINOIS.[9]

At the trial and appellate levels, SCOTTSDALE'S only argument with respect to the issue of indemnification was that since ILLINOIS declined to defend the mutual insured and did not send the insured a reservation of rights letter, it was foreclosed from denying coverage. The Third District recognized the fallacy of this argument in its opinion by citing Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810 (Fla. 1st DCA 1985) and Keller Indus, Inc. v. Employers Mut. Liab, Ins. Co. of Wis., 429 So. 2d 779 (Fla. 3d DCA 1983) for the proposition that the failure to defend, even if unjustified, does not require the insurer to pay a settlement where no coverage exists.

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[9] Florida statute 768.125, which governs civil liquor liability, provides that "[a] person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age . . . may become liable for injury or damage caused by or resulting from the intoxication of such minor or person." (emphasis added)

The claim in this case arose almost ten (10) years ago and the likelihood of either party discovering any additional evidence supporting **SCOTTSDALE'S** contention that **ILLINOIS'** liquor liability policy covered any portion of this claim is slim. Tellingly, SCOTTSDALE did not dispute this fact when it was raised in ILLINOIS' Motion for Rehearing before the Third District, nor did SCOTTSDALE itself move for rehearing by arguing that the evidence in the Record supported its claim for to a portion of the settlement costs. In the absence of any evidence in the Record supporting SCOTTSDALE'S claim for a portion of its settlement costs and in light of SCOTTSDALE'S tacit admission that no further evidence would be forthcoming, the Third District Court of Appeal erred in remanding the case for further proceedings, when it should have remanded for entry of a summary judgment in favor of ILLINOIS.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court should reverse the decision of the Third District Court of Appeal, approve the Continental Casualty and Argonaut decisions and remand the case for entry of final summary judgment in favor of ILLINOIS.

Respectfully submitted,

Hinda Klein

HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of March, 1997, to: Jacqueline Emanuel, Esq., Riley & Knoerr, P.A., 700 Southeast Third Avenue, Suite 401, Ft. Lauderdale, Fla. 33316.

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