IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,124

ILLINOIS INSURANCE EXCHANGE
and BRITAMCO UNDERWRITERS, INC.,

Petitioners,

vs.

SCOTTSDALE INSURANCE COMPANY,
TIFFANY'S and CARYLANN HOTEL
PROPERTIES, INC.,

Respondents.

JURISDICTIONAL BRIEF ON PETITION FOR DISCRETIONARY REVIEW

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STATEMENT OF THE CASE AND FACTS

Plaintiff/Respondent SCOTTSDALE INSURANCECOMPANY (SCOTTSDALE) sued Defendant/Petitioner ILLINOIS INSURANCE EXCHANGE and BRITAMCO UNDERWRITERS, INC. (collectively ILLINOIS) for declaratory relief seeking reimbursement of moneys expended in defending and indemnifying the parties' mutual insured TIFFANY'S lounge. (A.3) According to SCOTTSDALE'S Complaint, four individuals, Francisco Francis, Mathew Goltzman, James Aranaez and Daniel Trujillo (hereinafter "claimants") were assaulted by unknown individuals outside the premises of the lounge on August 8, 1987 after they had attended a fraternity party on the premises. (A.2, 7-15) SCOTTSDALE had defended the bas and settled the claims brought by the claimants and then sought to recover those sums expended from ILLINOIS. (A.2-3)

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. (A.2, 4) It is undisputed that the coverage provided by these policies were mutually exclusive of one another. (A.2, n. 1)

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. (A.4, 17) 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. (A.4, 17) 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.

(A.17) According to SCOTTSDALE, as a result of "one or more" of these breaches, the claimants suffered injury. (A.12)

SCOTTSDALE defended TIFFANY'S under a reservation of rights and settled the claimants' claims. (A.3) Because SCOTTSDALE concluded that the underlying Complaint by claimant Frances contained allegations of both premises and liquor liability, SCOTTSDALE notified ILLINOIS about the claim. (A.2-3) According to SCOTTSDALE'S Complaint, ILLINOIS breached its duty to defend TIFFANY'S. (A.3)

After settling the claims with all four claimants, SCOTTSDALE brought the 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. (A.3)[1] Both parties moved for summary judgment. (A.3)

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. (A.3) ILLINOIS appealed the non-final order determining liability in favor of SCOTTSDALE and against ILLINOIS. (A.3) The Third District Court of Appeal rendered its original opinion

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[1] SCOTTSDALE'S original Complaint contained claims for Breach of Contract, Indemnification and Subrogation. That Complaint was dismissed and SCOTTSDALE'S amended Complaint contained only a single claim for declaratory relief.

on the case on August 14, 1996 and after ILLINOIS filed Motions for Clarification, Rehearing and Rehearing En Banc, the Court issued a "Corrected Opinion" on September 11, 1996. (A. 1-5) ILLINOIS filed its Notice to Invoke Discretionary Jurisdiction on October 9, 1996 on the basis that the Third District's opinion expressly and directly conflicts with the Fifth District Court of Appeal en banc decision in Continental Casualty Co v. United Pacific Ins. Co., 637 So. 2d 270 (Fla. 5th DCA 1994)(en banc).

POINT ON APPEAL

The Third District Court of Appeals' Decision in this case expressly and directly conflicts with the Fifth District Court of Appeals' decision in Continental Casualty Co. v. United Pacific Ins. Co., 637 So. 2d 270 (Fla. 5th DCA 1994)(en banc)

SUMMARY OF ARGUMENT

The Third District Court of Appeals' decision in this case is in express and direct conflict with the Fifth District Court of Appeals' decision in Continental Casualty Co. v. United Pacific Ins. Co., 637 So. 2d 270 (Fla. 5th DCA 1994)(en banc). The panel incorrectly concluded that the carriers in this case had a primary/excess relationship such that the expense of the defense of the mutual insured by the "excess" carrier SCOTTSDALE entitled SCOTTSDALE to recover a portion of those defense costs in subrogation. In fact, and as is evident on the face of the opinion itself, SCOTTSDALE and ILLINOIS had completely different coverages and only their duties to defend their mutual insured overlapped; neither was an "excess" carrier.

These facts are indistinguishable from those presented to the Fifth District Court of Appeals in Continental and compel the application of that body of law that provides that where two carriers have independent primary duties to defend a mutual insured, the carrier that provides the defense has no right of reimbursement from a carrier that does not. In applying the law applicable to cases factually distinguishable from this case and ignoring that body of law applying to cases that are factually indistinguishable, the panel's decision creates an irreconcilable conflict that must be resolved by this Court.

ARGUMENT

In the decision at bar, the Third District Court of Appeal held that although the policies at issue had mutually exclusive coverage, both insurers owed their mutual insured concurrent duties to defend the Complaint in light of the allegations in the complaint. (A.3) The Court found that:

> The claimants' complaint alleged facts sufficient to create potential coverage under both policies. Scottsdale had a duty to defend Tiffany's because the complaint alleged a claim of premises liability. Illinois had a duty to defend because the complaint alleged that Tiffany's had served alcohol to underaged persons, causing their intoxication.

(A.4) Despite having found that the coverages under both policies did not overlap, the appellate court held that:

> 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 defendingthe insured.' United States Auto. Ass'n v. Hartford Ins. Co., 468 So. 2d 545, 548 (Fla. 5th DCA), rev. denied, 476 So. 2d 676 (Fla. 1985); see also, Associated Elect. & Gas Ins. Servs, Ltd. v. Ranuer Ins. Co., 560 So. 2d 242 (Fla. 3d DCA 1990). Accordingly, Scottsdale is entitled to half of the attorney's fees and costs that it incurred which defending Tiffany's.

(A.4) The appellate court mistakenly treated the subject case as one involving primary and excess insurers when the opinion itself recognized that the coverages were mutually exclusive. The court compounded the error by relying on decisions involving primary and excess carriers which are clearly factually inapposite to the case at

bar, in order to come to the conclusion that ILLINOIS was liable for half of the defense costs.

Until this opinion was issued, the law in Florida was that where two carriers have primary duties to defend on the same Complaint, the carrier who defends the claim has no right of subrogation or contribution from the non-defending carrier. Continental Casualtv Co v. United Pacific Ins. Co., 637 So. 2d 270 (Fla. 5th DCA 1994)(en banc); Argonaut Ins. Co. v. Maryland Casualty Co., 372 So. 2d 960 (Fla. 3d DCA 1979). The courts' reasoning has always been that each carrier owes the insured a separate independent duty to defend and that duty runs only to the insured; not to another carrier.

This body of law contrasts decisively with those cases cited by the appellate court herein in that, in primary/excess cases, if the excess carrier who does not have the primary duty to defend the insured assumes that duty after the primary carrier declines to meet its obligations, the excess carrier steps into the shoes of the insured and is then owed reimbursement for its defense costs as if that carrier were the insured to whom the non-defendins carrier owed the duty to defend. Phoenix Ins. Co. v. Florida Farm Bureau Mutual Ins. Co., 558 So. 2d 1048 (Fla. 2d DCA 1990). This conclusion is consistent with general principles of subrogation, contribution and indemnification, which all require that the party claiming reimbursement for defense costs have paid more than its fair share. Where, as in this case, both carriers have a primary duty to defend, the defending carrier has done nothing more than perform its obligation. See, Argonaut, 372 So. 2d 960 (where two insurers had concurrent duty to defend mutual insured,

defending carrier had no claim in subrogation or contribution as its defense merely fulfilled its contractual duty).

The appellate court herein very obviously mixed apples and oranges in acknowledging, on the one hand, that the carriers were not in the position of primary/excess and, on the other hand, applying the primary/excess dichotomy to these facts. In doing so, the court's opinion expressly and directly conflicts with continental Casualty Co v. United Pacific Ins. Co., **637** So. **2d 270** (Fla. 5th DCA 1994)(en banc).

In Continental, the Fifth District Court of Appeal held, in no uncertain terms, that an insurer is not entitled to seek equitable subrogation or contribution from another insurer for the purpose of recovering defense costs expended in defense of their mutual insured as each insurer had an independent duty to defend the insured, which duty is personal and does not inure to the benefit of another insurer. Id.[2] Here, as in Continental, both insurers had primary duties to defend their mutual insured and only one carrier fulfilled that duty. Here, unlike the cases cited by the appellate court, neither carrier's coverage was **"excess"** over the other's coverage. There is literally no factual distinction between this case and Continental and there is every factual distinction between this case and those cited by the

[2] This decision, ironically, was based solely upon the Third District Court of Appeals' decision in Aruonaut Ins. Co. v. Marvland Casualty Co., 372 So. 2d 960 (Fla. 3d DCA **1979).** Undersigned counsel moved for rehearing and rehearing en banc urging the appellate court to, at the very least, explain why Argonaut was inapplicable to this case but the Court declined that invitation.

appellate court. Put another way, the legal principles espoused in the opinion were misapplied to the facts in this case while the applicable legal principles were not even addressed, thereby creating a conflict of decisional law that is genuinely irreconcilable. See Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981)(it is not necessary that an appellate court explicitly identify conflicting district court decision in its opinion as long as its discussion of legal principles fairly creates conflict). Such a blatant conflict cries out for Supreme Court intervention as this Court's primary function with respect to such conflicts "is to stabilize the law by a review of decisions which farm patently irreconcilable precedents." Florida Power & Light Co. v. Bell, 113 So. 2d 697, 699 (Fla. 1959).

Finally, public policy requires that this conflict be reconciled by the Court. Many individuals and business have more than one policy that, while not providing overlapping coverage per se, provides overlapping defense obligations. Because the Third District's opinion in this case provides a parallel body of law to that established in both that District and the Fifth District, this opinion will undoubtedly have the effect of fostering patently incansistent results without rhyme or reason. It is therefore respectfully requested that this Court accept jurisdiction to review and resolve this conflict because any future appellate decision on these facts will necessarily result in yet another conflict.

CONCLUSION

For the foregoing reasons, the Petitioners ILLINOIS INSURANCE EXCHANGE and BRITAMCO UNDERWRITERS, INC., respectfully request that this Court accept jurisdiction to resolve the inter-district conflict of decisions.

Respectfully submitted,

HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/~~hand-delivered~~ this 17th day of October, 1996, to: Jacqueline Emanuel, Esq., Riley & Knoerr, P.A., 700 Southeast Third Avenue, Suite 401, Ft. Lauderdale, Fla. 33316.

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