

# ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,124

3rd DCA 96-842

ILLINOIS INSURANCE EXCHANGE  
and BRITAMCO UNDERWRITERS,

Petitioners,

vs .

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

Respondents.

---

FILED

STO J. WHITE

NOV 7 1996

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

---

RESPONDENT'S BRIEF ON JURISDICTION

---

RILEY & KNOERR, P.A.  
700 S.E. Third Avenue  
Suite 401.  
Fort Lauderdale, FL 33316  
(954) 524-1888

By:

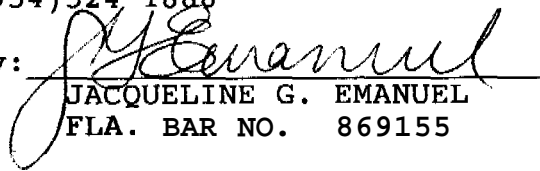
  
JACQUELINE G. EMANUEL  
FLA. BAR NO. 869155

TABLE OF CONTENTS

	<u>Pages</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I. STATEMENT OF THE CASE AND FACTS	1
11. POINT ON APPEAL	2
<u>THE THIRD DISTRICT COURT OF APPEALS' DECISION IN THIS CASE DOES NOT CONFLICT, EXPRESSLY OR DIRECTLY, WITH THE FIFTH DISTRICT COURT OF APPEALS' DECISION IN CONTINENTAL CASUALTY COMPANY V. UNITED PACIFIC INSURANCE COMPANY, 637 So.2d 270 (Fla. 5th DCA 1994), WHEREBY, THE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT CANNOT BE INVOKED.</u>	
III. SUMMARY OF ARGUMENT	3-4
IV. ARGUMENT	5-7
V. CONCLUSION	a
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

	<u>Pages</u>
<u>Arqonaut Insurance Company v.</u> <u>Maryland Casualty Company,</u> 372 So.2d 960 (Fla. 3rd DCA 1979)	5
<u>Continental Casualty Company v.</u> <u>United Pacific Insurance Company,</u> 637 So.2d 270 (Fla. 5th DCA 1994)	3,4,5,7
<u>Florida Power &amp; Light Company v. Bell,</u> 113 So.2d 697 (Fla. 1959)	7
<u>Phoenix Insurance Company v.</u> <u>Florida Farm Bureau Mutual Insurance Company,</u> 558 So.2d 1048 (Fla. 2nd DCA 1990)	8

I. STATEMENT OF THE CASE AND FACTS

**The** Respondents, SCOTTSDALE INSURANCE COMPANY, TIFFANY'S and CARYLANN HOTEL PROPERTIES, INC., essentially agree with the Statement of the Case and Facts recited by Petitioners, with some exceptions.

In the trial court, the Honorable Thomas S. Wilson granted Respondents' Motion for Summary Judgment finding that Petitioners owed Respondents reimbursement for a **50%** share of the defense and indemnification costs, not a proportionate share. (A-1).

Petitioners filed a Motion for Clarification, Rehearing and Rehearing En Banc, which was denied by the Third District Court of Appeal on September 11, 1996. (A-2). A corrected opinion was filed September 11, 1996 by the Third District Court of Appeal. **The** minor changes contained in the corrected opinion were not substantive and the court's ruling was not altered, changed or modified.

11. POINT ON APPEAL

THE THIRD DISTRICT COURT OF APPEALS\* DECISION  
IN THIS CASE DOES NOT CONFLICT, EXPRESSLY OR  
DIRECTLY WITH THE FIFTH DISTRICT COURT OF  
APPEALS\* DECISION IN CONTINENTAL CASUALTY  
COMPANY V. UNITED PACIFIC INSURANCE COMPANY,  
637 So.2d 270 (Fla. 5th DCA 1994), WHEREBY,  
THE DISCRETIONARY JURISDICTION OF THE FLORIDA  
SUPREME COURT CANNOT BE INVOKED

### 111. SUMMARY OF ARGUMENT

A review of the Third District Court of Appeals' opinion which was filed September 11, 1996 as a corrected opinion, does not conflict with the Fifth District Court of Appeals' decision in Continental Casualty Company v. United Pacific Insurance Company, 637 So.2d 270 (Fla. 5th DCA 1994), whereby the discretionary jurisdiction of the Supreme Court of the State of Florida cannot be invoked herein. A review of the Fifth District Court of Appeals' decision in Continental Casualty Company, supra, and the Third District Court of Appeals' opinion in the case at bar, clearly show that the cases are distinguished on their facts and the rulings are not in conflict, either expressly or directly.

In the within case, it is admitted by Petitioners that Illinois Insurance Exchange issued a liquor liability policy to Tiffany's, its insured and that Scottsdale issued a general premises liability policy to Tiffany's, its insured. It is further undisputed by Petitioner that the coverage provided by these policies were mutually exclusive of one another. (Petitioners' Statement of the Case and Facts).

In Continental Casualty Company v. United Pacific Insurance Company, supra, both Continental Casualty Company and United Pacific Insurance Company issued liability insurance policies which insured Allen Morris. The policies were not mutually exclusive but rather, both provided primary liability coverage for the underlying claim. The facts in the Fifth District Court of Appeal case of Continental Casualty Company v. United Pacific Insurance Company.

supra, are clearly distinguishable from the facts in the case at bar. Therefore, the decision by the Fifth District Court of Appeal in Continental Casualty Company, does not conflict with the Third District Court of Appeals' decision in the within matter.

#### IV. ARGUMENT

The Respondents' claim for subrogation was in equity and the Third District Court of Appeal properly concluded that Respondents stood in an excess position to Petitioners with regard to the liquor liability claims which were insured only by Petitioners.

Florida case law supports the finding of the Third District Court of Appeal in the within case whereby the law recognizes equitable subrogation which arises by operation of law and is determined by weighing the equities between the parties.

Continental Casualty is not a conflicting case "on all fours" factually in all material respects to the case at bar whereby this Honorable Supreme Court of the State of Florida does not have jurisdiction to review the Appellate Court's decision.

As in their appeal before the Third District Court of Appeal, Petitioners incorrectly rely upon Argonaut Insurance Company v. Maryland Casualty Company, 372 So.2d 960 (Fla. 3rd DCA 1979) in their position that they should not be responsible to reimburse Respondent for defense costs expended by Respondent in the defense of the underlying claim. As in Continental Casualty Company v. United Pacific Insurance Company, supra, the facts in Argonaut Insurance Company v. Maryland Casualty Company, supra, involve two insurance companies that insured a mutual insured for the same type of insurance; liability insurance.

The Third District Court of Appeal in the within matter was correct in its conclusion that Petitioner **and** Respondent stood in a primary/excess relationship with regard to the defense of the



liquor liability claim against the mutual insured, which was not insured by Respondent but which was primarily insured against by Petitioner.

In Phoenix Insurance Company v. Florida Farm Bureau Mutual Insurance Company, **558** So.2d 1048 (Fla. 2nd DCA 1990), the Second District Court of Appeal determined the exact issue which was before the Third District Court of Appeal in the within case. In Phoenix Insurance Company, supra, the insured had in force two insurance policies, one with the Phoenix Insurance Company for homeowners insurance and the second with Florida Farm Bureau for commercial farm insurance. The Second District Court of Appeal addressed subrogation as a cause of action in equity which is designed to afford relief to one who is required to pay a legal obligation of another. Legal or equitable subrogation arises by operation of law and is determined by weighing the equities between the parties. The Second District Court of Appeal in Phoenix held that equitable subrogation was an appropriate form of relief in a dispute between a primary and **excess** insurer arising from the payment of a claim by the excess insurer.

As in the Phoenix Insurance case, the **case** at bar involved equitable subrogation wherein petitioner was primary and respondent excess with regard to defense of the liquor liability claim, which was excluded from respondent's policy.

The Third District Court of Appeal in the within matter properly concluded that Petitioner was the primary insurer and Scottsdale the excess and that accordingly, Scottsdale was entitled

to half of the attorney's fees and costs that it incurred while defending Tiffany's.

Where there is no conflicting case "on all fours", factually in all material respects, the jurisdiction of the Supreme Court is not invoked. Florida Power & Light Company v. Bell, 113 So.2d 697 (fla. 1959). The rulings in Continental Casualty Company v. United Pacific Insurance Company and Illinois Insurance Exchange v. Scottsdale Insurance Company are not irreconcilable, are not in express conflict or direct conflict with each other whereby this Honorable Court's intervention is inappropriate. The Third District Court of Appeals' opinion in the within case is consistent with other cases which are factually similar. Petitioners have not presented a case to invoke the discretionary jurisdiction of the Florida Supreme Court and has not established that the decision of the Third District Court of Appeal in the within matter is in collision with any other decision and specifically, with

---

whereby there is no conflict of authority on the point.

Respondents respectfully request that this Honorable Court decline jurisdiction to review this matter as there is no conflict presented.

CONCLUSION

For the foregoing reasons, the Respondents, SCOTTSDALE INSURANCE COMPANY, TIFFANY'S and CARYLANN HOTEL PROPERTIES, INC., respectfully request that this Honorable Court deny jurisdiction as there is no conflict between the District Courts of Appeal presented by Petitioners.

Respectfully submitted,

RILEY & KNOERR, P.A.  
700 S.E. Third Avenue  
Suite 401  
Fort Lauderdale, FL 33316  
(954) 524-1888

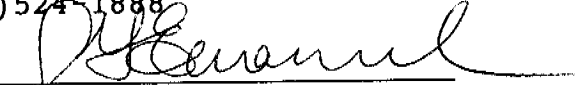
By:   
JACQUELINE G. EMANUEL  
FLA. BAR NO. 869155

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above  
has been furnished this 6<sup>th</sup> day of November, 1996 to: HINDA  
KLEIN, ESQ., Venture Corporate Center I, Second Floor, 3440  
Hollywood Boulevard, Hollywood, FL 33021.

RILEY & KNOERR, P.A.  
700 S.E. Third Avenue  
Suite 401  
Fort Lauderdale, FL 33316  
(954) 524-1888

By: \_\_\_\_\_



JACQUELINE G. EMANUEL  
FLA. BAR NO. 869155

# ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,124

3rd DCA 96-842

ILLINOIS INSURANCE EXCHANGE  
and BRITAMCO UNDERWRITERS,

Petitioners,

vs.

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

Respondents.

---

FILED

NOV 7 1996

CLERK, SUPREME COURT  
By: *[Signature]*  
Clerk of Court

---

RESPONDENT'S APPENDIX TO BRIEF ON JURISDICTION

---

RILEY & KNOERR, P.A.  
700 S.E. Third Avenue  
Suite 401.  
Fort Lauderdale, FL 33316  
(954) 524-1888

By: *[Signature]*

JACQUELINE G. EMANUEL  
FLA. BAR NO. 869155

INDEX TO APPENDIX

Circuit Court Order of February 9, 1996

A-1

Third District Court of Appeal Denial  
on Motion for Rehearing

A-2

IN THE THIRTEENTH COURT OF THE  
11th JUDICIAL CIRCUIT,  
IN AND FOR DADS COUNTY, FLORIDA

**SCOTTSDALE INSURANCE COMPANY, et al,**  
Plaintiff

Case No: 34-6396 (CA 01 09)

DIVISION:

vs.

**ILLINOIS INSURANCE EXCHANGE,**  
et al

Defendants.

**ORDER**

(DESCRIBE TITLE OF ORDER)

**PLAINTIFF'S CROSS-MOTION FOR**

**Summary Judgment**

THIS CAUSE having come on to be heard on <sup>1/29/96</sup> ~~Plaintiff's~~ ~~Plaintiff's~~

~~SCOTTSDALE INSURANCE COMPANY, et al~~

Motion FOR SUMMARY JUDGMENT

and the Court having heard argument of counsel, and being otherwise advised  
in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

Granted. Scottsdale's motion for Summary  
Judgment is granted as to Settlement  
fund's and Defense fees + costs and  
Illinois Insurance Exchange's Cross Motion for Summary Judgment  
is denied

DONE AND ORDERED in Chambers, at Dade County, Florida.

this 9th day of February, 19 96.

  
Circuit Judge

THOMAS S. WILSON, Jr.

Copies furnished:

JACQUELINE G. BRANDEL, ESQ.  
ROBERT A. SELLIG, ESQ.

A-1

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

WEDNESDAY, SEPTEMBER 11, 1996

ILLINOIS INSURANCE  
EXCHANGE, et al.,

Appellants.

vs.

SCOTTSDALE INSURANCE  
co., et al.

Appellees.

\*\*

\*\*

\*\* CASE NO. 96-482

\*\* LOWER  
TRIBUNAL NO. 94-6396

\*\*

\*\*

Upon consideration, appellants' motion for rehearing and/or clarification is hereby denied. BARKDULL, JORGENSON and LEVY, JJ., concur. Appellants' motion for rehearing en banc is denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of  
Appeals Third District

By

cc:

/NB

Jacqueline G. Emanuel