SHIRKING THE DUTY TO DEFEND IN FLORIDA: IS ASSIGNMENT THE EXCEPTION TO ARGONAUT?

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by

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**INTRODUCTION**

A lawsuit is filed by a plaintiff and the defendant is served. The defendant has a drawer full of liability insurance policies and, therefore, the insured defendant sends a copy of the served complaint to any and all insurance carriers that may provide coverage for the claim. The insured defendant then receives a few coverage denials for reasons such as the event at issue did not occur within a certain policy period or that the insured’s private automobile policy does not provide coverage for a commercial general liability claim. In any event, the denials appear to be valid - so the insured looks to the remaining carriers.

Finally, the insured gets a letter from one carrier setting forth that an attorney has been retained to defend the insured and that insurance defense counsel will soon be in touch. The letter also requests that the insured provide the defending carrier with all other coverage information. So, the insured informs the defending carrier of all of the other insurance carriers and their respective responses to submission of the complaint.

The adjuster for the defending carrier then discovers that one carrier has not yet responded. A closer examination of the complaint and the policies indicates that the unresponsive carrier may provide primary coverage for the claim at issue. Hopeful that the defending carrier may provide only excess coverage, that is over and above the coverage of the unresponsive carrier, the “other insurance” clauses contained within both policies are quickly, but thoroughly, examined. This examination reveals only that both insurance carriers are primary and, therefore, both carriers must provide primary, pro-rata indemnity to the insured defendant.
The adjuster for the defending carrier then calls the adjuster for the currently unresponsive carrier to inquire as to that carrier’s position on the issues of defense and indemnity of the mutual insured. In response, the adjuster for the unresponsive carrier informs the adjuster for the defending carrier that the unresponsive carrier has already had the matter reviewed by its coverage counsel and, based on that review, the two carriers should indemnify the insured defendant on a primary, pro-rata basis - should the facts warrant an indemnity offer or if the plaintiff is ultimately successful in obtaining a judgment against the insured defendant.

Hearing that the two carriers seem to be in agreement on the coverage issues, the adjuster for the defending carrier informs the adjuster for the unresponsive carrier that insurance defense counsel has already been retained and asks if such counsel is acceptable. The adjuster for the unresponsive carrier relays that the chosen insurance defense counsel is also a lawyer utilized by that carrier and, therefore, the defense counsel is more than acceptable. However, the adjuster for the unresponsive carrier does not offer to share the cost of the defense. Being a reasonable person, the adjuster for the defending carrier then requests that the unresponsive carrier pay half of the defense costs - to which the adjuster for the unresponsive carrier politely declines. What? A primary carrier cannot do that! It has a duty to defend! However, the current state of the law in Florida on this issue can be summed-up with one question and answer: What can the defending carrier do? Not much.

This article specifically addresses the state of the law barring a defending primary carrier from seeking contribution or subrogation from a non-defending co-primary carrier.
for the expenses of defending a mutual insured. One of the key inequities addressed in this article is the fact that Florida law actually allows a primary carrier, with a clear duty to defend, to sit back and let another co-primary carrier pickup the entire tab for defending a common insured. While contribution and subrogation may not be currently condoned legal vehicles for a primary insurer to recoup defense costs in Florida, this article next discusses the possibility, under just the right set of circumstances, of using the legal theory of assignment in order for a defending primary carrier to recover defense costs from a non-defending co-primary carrier. Finally, a recommendation is made that the timing appears to be right for the courts or the legislature to revisit and reweigh the public policy issues that have supported the current state of the law on this issue for over thirty years.

I. THE INDEPENDENT DUTY TO DEFEND

“[T]he duty to defend has no roots in the common law. It is purely a statutory or contractual duty.”

1 This article directly addresses the relationship between a defending primary carrier and a non-defending co-primary carrier. It should be noted that the relationship between co-primary insurance carriers is different from the relationship between a non-defending primary carrier and a defending excess carrier. The right of a defending excess carrier to recover defense costs from a non-defending primary carrier is beyond the scope of this article. But see, e.g., Galen Health Care, Inc. v. American Cas. Co. of Reading Pennsylvania, 913 F. Supp. 1525, 1531 (M.D. Fla. 1996) (“Florida law recognizes a cause of action for equitable subrogation between primary and excess insurers arising from the payment of a claim by the excess insurer”); American and Foreign Ins. Co. v. Avis Rent-A-Car System, Inc., 401 So. 2d 855, 857 (Fla. 1st DCA 1981) (“Expenses incurred by a secondarily liable carrier in the defense of its insured, have been universally awarded when that company sues a primary insurer of the same insured, which should have undertaken that defense”). Moreover, the primary-excess dichotomy between carriers where one insured has agreed to insure and/or indemnify another insured is also beyond the scope of this article, and is distinguishable from the direct topic of this article of when two co-primary carriers are involved in a claim where the insured parties do not have a separate indemnity agreement between themselves. But see, e.g., Continental Cas. Co. v. City of South Daytona, 807 So. 2d 91, 92-93 (Fla. 5th DCA 2002) (Indemnity agreement between insureds shifted liability exposure from the indemnitee’s carrier to the indemnitor’s carrier); see also Allstate Ins. Co. v. Fowler, 480 So. 2d 1287, 1290 (Fla. 1985) (“other insurance” clause in a liability insurance policy may be disregarded where indemnity agreements lie between different insureds).

2 Allstate Ins. Co. v. RIT Enterprises, Inc., 692 So. 2d 142, 144 (Fla. 1997).

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defend, there is no such duty.”  But if two carriers are both primary, and both have a contractual duty to defend, should not both carriers equally contribute to the defense of a mutual insured? Common sense would so indicate. Even good business sense would so indicate. However, Florida law does not always match common or business sense. In the everyday adjustment of claims where co-primary carriers exist, as one Florida court explained:

Sometimes carriers will agree to select an attorney who is on the ‘approved’ list for each carrier and will split defense costs. Sometimes both carriers will hire counsel and provide legal representation, but with the understanding that the attorney hired by the carrier with the highest exposure will be lead counsel, assisted by the other. Sometimes, the defense functions are simply divided to save expenses and duplication of effort. There may be some instances where one carrier takes the ‘lag behind’ strategy . . .

If a defending primary carrier could sue a lagging, non-defending co-primary carrier for contribution or subrogation in the equitable recovery of defense costs, then there would no longer be a reason for any carrier to employ the “lag behind” strategy. However, such is not the case in the state of Florida.

A. Contribution and Subrogation

In the seminal Florida case of Argonaut Ins. Co. v. Maryland Casualty Co., Argonaut filed suit against Maryland Casualty in an attempt to assert a subrogation right to recover a fair share of the defense costs spent on a mutual insured for which Maryland Casualty was a co-primary carrier that did not contribute to the defense. However, the Third District Court of Appeal held that Argonaut’s complaint did not even set forth a

3 Id.
5 See id.
6 372 So. 2d 960 (Fla. 3d DCA 1979).
7 Id. at 961-62.
valid cause of action for subrogation or recovery of defense costs because Argonaut did nothing more than defend its insured pursuant to the terms of its own insurance policy, which had nothing to do with the fact that the insured may have had other co-primary insurance. While the insured, which was defended by Argonaut, had a contractual relationship with both Maryland Casualty and Argonaut, the court was quick to point-out that neither insurance carrier had a contractual relationship with the other.

The court went on to hold that “[t]he duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer.” Contribution is not allowed between insurers for expenses incurred in defense of a mutual insured. The reasoning of the court was that each carrier had an independent, contractual duty to defend its insured and one carrier cannot get a partial refund on its independent duty to defend simply because the insured had another insurance contract with another carrier.

The court set forth:

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 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 co-insurer than co-surety. As

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8 Id. at 963.
9 Id.
12 Argonaut Ins. Co., 373 So. 2d at 963.
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.13

Since the insured was defended by Argonaut, the insured had not incurred any defense expenses.14 Therefore, even if Argonaut did step into the shoes of the insured, it still could not recover defense costs from Maryland Casualty, under a subrogation theory, because the insured did not incur any defense costs.15 The court held that it would be inequitable for Argonaut to be provided with a remedy to recover defense expenses when it merely acted pursuant to its contractual relationship with its insured.16 In sum, the court did not find that it was inequitable for Argonaut to pay all of the defense costs while Maryland Casualty paid none.17 Rather, the court held it was inequitable for Argonaut to be provided with a method of recovery for an obligation it undertook with its insured, regardless of any other carrier’s like duty.18

Nearly fifteen years later, the court in Continental Cas. Co. v. United Pacific Ins. Co.19 not only agreed with the Argonaut decision, but it further set forth why, in the court’s view, Florida law should not allow contribution or subrogation rights between co-primary carriers with a mutual insured.20 The Fifth District Court of Appeal held that “Argonaut was correct that traditional principles of subrogation will not support a

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14 Argonaut Ins. Co., 373 So. 2d at 964.
15 Id. at 965.
16 Id.
17 Id. at 964-65.
18 Id.
19 637 So. 2d 270 (Fla. 5th DCA 1994) (en banc), rev. den., 645 So. 2d 451 (Fla. 1994).
20 Id. at 271-76.
reimbursement of defense costs in favor of someone who has the independent contractual
duty to pay all such expenses.”21

The arguments for and against allowing contribution and subrogation rights for a
defending primary carrier to recover defense costs from a non-defending co-primary
carrier are mostly based on public policy assertions.22 One argument for allowing the
right of defense cost recovery is that carriers should not be allowed to shirk their
contractual defense obligation by actually being rewarded if another co-primary carrier is
first to defend a mutual insured.23 One argument for not allowing defense cost recovery
was set forth by the Argonaut court, and then restated by the Continental Cas. Co., court
as follows:

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 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.24

The Argonaut and Continental Cas. Co. courts also found that defense cost
contribution and subrogation between co-primary carriers was not necessary because the
risk of an insured filing suit for breach of contract and bad faith, or the possibility of
extra-contractual liability, was enough of a deterrent so that carriers would not shirk their
duty to defend.25 However, if that is the best argument against having co-primary carriers
equitably share in the defense costs of a common insured, perhaps it is time for the public
policy balance-test to be recalibrated. An insurance carrier should not need to be

21 Id. at 272.
22 Id. at 272-73.
23 Id.
24 Id. at 272 (quoting Argonaut Ins. Co., 372 So. 2d at 964).
25 Argonaut Ins. Co., 372 So. 2d at 964; Continental Cas. Co., 637 So. 2d at 273.
motivated to honor the terms of its own insurance contract. There will always be reasons why a carrier should honor its duty to defend; and, there will always be deterrents for not doing so. However, the bottom-line is that it is facially inequitable for one primary carrier to defend while another co-primary carrier does not. The fact that an insurance company may file suit to enforce a legally provided right is not a violation of any public policy. That is almost like saying that if people can sue for motor vehicle accidents, “there would be multiple claims and law suits.”

Yes, and so what? Is that not the purpose of the judicial branch of government? It is also a very broad and over-characterizing statement to set forth that no insurer will protect its insured if there are any coverage issues to be litigated. Coverage issues are litigated all the time - often at the same time the carrier is defending the insured in a separate tort action. While the goal of the judiciary may be to make sure the insured has been fully protected within the law for its purchase of an insurance contract, does that make it any less fair or equitable that one primary carrier drove the entire defense while another co-primary carrier slept through the entire process?

As the law currently stands in Florida, not allowing a defending primary carrier to recover defense costs from a non-defending co-primary carrier, under the legal theories of contribution and subrogation, is entrenched with the courts of Florida. “[I]t is well settled Florida law that there is no right to contribution between [co-primary] insurance companies as to legal fees and costs.”

In the case of *American Cas. Co. of Reading Pennsylvania v. Health Care Indem., Inc.*, United States District Judge Virginia M.

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26 *Continental Cas. Co.*, 637 So. 2d at 272 (quoting *Argonaut Ins. Co.*, 372 So. 2d at 964).
28 613 F. Supp. 2d 1310 (M.D. Fla. 2009).

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Hernandez Covington agreed that the non-defending co-primary carrier should have honored its duty to defend but still, almost begrudgingly, applied the holdings of Argonaut and Continental Cas. Co. to deny the defending primary carrier’s claim for defense costs from the non-defending co-primary carrier under the theories of contribution and subrogation. Judge Covington noted: “This Court has painstakingly applied Florida law to come to this conclusion.” The court also set forth: “To the extent that ACC [the defending primary carrier] asks this Court for contribution and subrogation for fees and costs against HCI [the non-defending co-primary carrier], ACC is requesting this Court to create new law. This Court refuses to do so.”

B. Assignment

Argonaut and Continental Cas. Co. dealt only with the legal theories of contribution and subrogation in regard to the rights of a defending primary carrier against a non-defending co-primary carrier. So, what about an assignment theory? It took over thirty years since the 1979 Argonaut decision, but an assignment theory was finally raised in the 2010 case of Pennsylvania Lumbermens Mut. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co.

In the Pennsylvania Lumbermens Mut. Ins. Co. case, Indiana Lumbermens Mutual (ILM) and Pennsylvania Lumbermens Mutual (PLM) were both co-primary general liability insurance carriers, with Causeway Lumber Company as their mutual insured. A construction defect lawsuit was filed against Causeway Lumber Company, which

29 Id. at 1322-24.
30 Id. at 1323.
31 Id.
32 43 So. 3d 182 (Fla. 4th DCA 2010).
33 Id. at 183.
submitted the lawsuit to both PLM and ILM.\textsuperscript{34} PLM and ILM both insured Causeway Lumber Company, but for different policy periods.\textsuperscript{35} The complaint asserted against Causeway Lumber Company was pled in a way where a duty to defend, due to potential coverage, was triggered under both policies.\textsuperscript{36} ILM defended the insured, while PLM did not.\textsuperscript{37} However, the defense provided by ILM was provided under a reservation of rights whereas Causeway Lumber Company agreed to reimburse ILM for its defense costs if it was ultimately determined that the ILM policy did not provide coverage for the claim.\textsuperscript{38}

After resolving the claim for its insured, ILM sued PLM in an attempt to recover defense costs and indemnity payment.\textsuperscript{39} ILM’s complaint against PLM claimed that, ultimately, there was no coverage under the ILM policy, because there was no occurrence during the ILM policy period, and that there was coverage under the PLM policy.\textsuperscript{40} ILM also alleged that PLM had breached its contract of insurance by failing to defend and indemnify Causeway Lumber Company for a claim covered under the PLM policy.\textsuperscript{41}

However, the twist in this case was that ILM settled the underlying lawsuit against Causeway Lumber Company in exchange for the insured’s assignment of first-party rights against PLM for breaching the duty to defend and indemnify.\textsuperscript{42} As further consideration for the assignment, ILM released Causeway Lumber Company from the

\textsuperscript{34} Id. at 184.
\textsuperscript{35} Id. at 183-84.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 184.
\textsuperscript{38} Id.; see also, generally, Jim Black & Associates, Inc. v. Transcontinental Ins. Co., 932 So. 2d 516 (Fla. 2d DCA 2006); Colony Ins. Co. v. G & E Tires & Service, Inc., 777 So. 2d 1034 (Fla. 1st DCA 2000); cf. Wendy’s of N.E. Florida, Inc. v. Vandergriff, 865 So. 2d 520 (Fla. 1st DCA 2003).
\textsuperscript{39} Pennsylvania Lumbermens Mut. Ins. Co., 43 So. 3d at 184.
\textsuperscript{40} Id. at 184-85.
\textsuperscript{41} Id. at 184.
\textsuperscript{42} Id.
reimbursement provision contained within the reservation of rights. Because of the assignment, ILM had essentially purchased the insured’s first-party breach of contract claim against PLM and, therefore, did not have to rely on overcoming the Argonaut and Continental Cas. Co. cases for the theories of contribution and subrogation.

ILM’s argument was that the law regarding the lack of contribution or subrogation rights between co-primary carriers with a mutual insured was “utterly irrelevant” to its claim for recovery of fees and costs against PLM because ILM’s legal theory was one of assignment for first-party breach of contract. ILM’s assertion was that, unlike an insured that has no damages because it was ultimately defended and indemnified by at least one carrier, Causeway Lumber Company was damaged in the amount of ILM’s defense expenses because of the reimbursement agreement contained in the reservation of rights.

However, regardless of the originality of the argument, ILM’s theory of liability for reimbursement of defense costs was shot down by the Fourth District Court of Appeal on the facts of the case - but not on the theory of assignment. The Fourth District Court of Appeal held that ILM’s theory must fail because Causeway Lumber Company was never obligated to reimburse ILM for defense costs and, therefore, Causeway Lumber Company never had any damages to assign. The court held that an insurance company that defends clearly uncovered claims and claims where a duty to defend never existed

45 Id. at 187.
48 Id.
may recover reimbursement of its defense costs from the insured if such terms are set forth in a reservation of rights to the insured and the insured accepts the defense on those terms. However, the complaint against Causeway Lumber Company was broad enough that it did trigger at least an initial duty to defend for both ILM and PLM. The discovery as to the true date of the occurrence, outside of its policy limits, only negated ILM’s continued duty to defend and indemnify - but did not have any bearing on its initial duty to defend the insured under the broad allegations of the complaint. With ILM’s assignment claim for defense costs having been gutted, the court held that “ILM was not entitled to reimbursement of defense costs from PLM because it had an independent contractual duty to defend . . . .” In making its own public policy statement, the court also set forth:

If [the law] . . . recognized that an insurer could seek reimbursement for defense costs, even when a duty to defend existed, as long as the insured signed a reservation of rights agreement, then insurance companies could avoid their contractual obligations to provide a defense by simply having the insured sign a reservation of rights. This is contrary to case law and public policy.

While ILM may have lost the case on the issue of recovering defense costs from a non-defending co-primary carrier, the Pennsylvania Lumbermens Mut. Ins. Co. case sets forth the roadmap for a set of facts and circumstances able to drive around the holdings of Argonaut and Continental Cas. Co. If a claim arises where the insured has two co-primary insurance carriers, and no separate contractual indemnity agreements, where a court holds that the defending primary carrier never had a duty defend, while the non-

51 Id.
52 Id. at 188.
53 Id.
defending carrier did have a duty to defend, and the defending carrier has a valid
reimbursement agreement in its reservation of rights with the insured that the insured
assigns to the defending carrier to be used against the non-defending carrier - then a
primary insurance carrier may just yet be able to recover defense costs from another
primary carrier. It may take another thirty years, but the roadmap has now been drawn.
Insurance carriers, and their lawyers, can now frame the facts to take a future assignment
theory where the Pennsylvania Lumbermens Mut. Ins. Co. case could not.

CONCLUSION

The Argonaut and Continental Cas. Co. courts found it to be unnecessary to allow
defense cost contribution and subrogation claims because the risk of an insured filing suit
for breach of contract and bad faith was enough of a deterrent to insurance carriers so that
they will not shirk their duty to defend. But, is it? Is it really enough of a deterrent that
the non-defending co-primary carrier would have retained a better defense team? Is it
really enough of a deterrent that the non-defending carrier does not have as much say or
control with the defending carrier’s defense counsel? Is it really enough of a deterrent
that the non-defending carrier may have the insured agree to a consent judgment to be
enforced only against the non-defending carrier? The answer is: Probably not!

If an insured is being fully defended and indemnified by at least one carrier, then
that insured has no real damages that it can calculate or that it must withdraw from its
bank account. Therefore, it is highly unlikely that an insured will actually take the time,
or make the initial expenditure, to sue the non-defending carrier. The odds are slim that
an insured would want to make a deal with the devil by entering into a consent judgment
with a claimant, to be enforced against the non-defending carrier, when another carrier is

54 Argonaut Ins. Co., 372 So. 2d at 964; Continental Cas. Co., 637 So. 2d at 273.

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fully defending the insured and the insured will be fully indemnified for any ultimate final judgment. Judge Covington, in *American Cas. Co. of Reading Pennsylvania*, hit the nail squarely on the head by setting forth, “[w]hile . . . [the insured] is the proper person to bring a suit against . . . [the non-defending primary carrier] for failure to defend, . . . this Court acknowledges that there is little incentive . . . to do so.”55

In the *Continental Cas. Co.* case, in 1994, the Fifth District Court of Appeal noted “it significant that in the fifteen years since *Argonaut* was decided in the Third District, there has been virtually no activity on this issue out of the other districts. Nor has any fact pattern arisen that would cause the courts that have decided this issue to reconsider.”56 Well, that has now changed. Since the *Argonaut* decision in 1979, there has been “activity on this issue” at least nine times, and as recently as September 15, 2010.57 Since *Argonaut*, there has been “activity on this issue” in at least four out of Florida’s five appellate districts and at least two out of Florida’s three federal districts.58

With a track record now demonstrated, which the *Continental Cas. Co.* court requested, perhaps now is the time for the courts to reweigh the public policy arguments. As the *Argonaut* court noted: “The Legislature has not seen fit to allow contribution for costs or attorney’s fees between insurance companies.”59 While the issue of more government and laws versus less government and laws is an unwinnable debate, for such

55 *American Cas. Co. of Reading Pennsylvania*, 613 F. Supp. 2d at 1323.
56 *Continental Cas. Co.*, 637 So. 2d at 273.
58 *Id.*
59 *Argonaut Ins. Co.*, 372 So. 2d at 964.
a well-established principle of 1979 law to still be challenged and questioned in so many Florida courts, as recently as September 15, 2010, is, perhaps, a signal that now is the time for the Florida Legislature to decide what is in the best interest of Florida insureds, and their insurance carriers, on the issue of equitable recovery of defense costs between co-primary carriers. This article is an open invitation to the courts and the legislature to act equitably on the issue.

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60 See Pennsylvania Lumbermens Mut. Ins. Co., 43 So. 3d at 186; American Cas. Co. of Reading Pennsylvania, 613 F. Supp. 2d at 1322; Miami Battery Mfg. Co., 1999 WL 34583205 at *15; Shelby Mut. Ins. Co., 744 So. 2d at 1254; Continental Cas. Co., 637 So. 2d at 271; MacLeod, 490 So. 2d at 231; Marriott Corp., 473 So. 2d at 285; Lumbermens Mut. Cas. Co., 425 So. 2d at 1159; Chicago Ins. Co., 422 So. 2d at 364.