Third District Court of Appeal

State of Florida, January Term, A.D. 2013

Opinion filed February 20, 2013.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-2010
Lower Tribunal No. 01-13468

University of Miami,
Appellant,

vs.

Great American Assurance Company, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mark King Leban, Judge.

Isicoff Ragatz & Koenigsberg, and Eric Isicoff and Teresa Ragatz, for appellant.

Anania Bandklayder Baumgarten & Torricella, and Francis A. Anania and Maurice J. Baumgarten, for appellee.

Before WELLS, C.J., and SHEPHERD and SUAREZ, JJ.

SUAREZ, J.

The University of Miami ("UM") appeals an order granting final summary judgment in favor of Great American Assurance Company ("Great American") in a declaratory action for indemnification of attorney's fees and costs based on breach of a policy of insurance and bad faith. We reverse the final summary judgment in favor of Great American and, based on the facts of the UM claim, find that UM is entitled to be indemnified for attorney's fees and costs incurred in this action.

UM was an additional named insured on a Great American commercial general liability policy insuring MagiCamp, which ran a summer swim camp for kids using the pool on the campus of UM. On July 18, 2000, Daniel Segurola, a four-year-old child, was enrolled as a camper at MagiCamp. He was pulled, unresponsive, from the bottom of the pool and was hospitalized with extensive injuries. His parents sued both MagiCamp and UM claiming the injuries were due to lack of supervision of the campers at the UM pool and that both, MagiCamp and UM, were each directly negligent, and UM also vicariously negligent, for the lack of supervision. Great American retained the services of one law firm to represent both MagiCamp and UM. MagiCamp filed an answer and affirmative defenses alleging that there was an intervening or superseding act, not under the control of MagiCamp, which caused the injuries, and that the resulting damages were caused, in whole or in part, by the fault of persons or entities other than MagiCamp. It is

important to note that the only other entity being sued was UM. MagiCamp requested apportionment of damages based on the percentage of fault of the respective defendants and claimed it was entitled to indemnification and contribution from UM for the damages.[1] The commercial general liability policy included a condition that the rights or duties applicable to the first named insured, MagiCamp, applied as if each named insured were the only named insured and applied separately to each insured against whom a claim was made.[2]

---

[1] MagiCamp's Answer and Affirmative Defenses asserted claims for indemnification and contribution from UM as follows:

> If Plaintiff was injured or damaged as alleged, however, such injuries and damages were caused in whole or in part by the fault, neglect and/or want of care of persons or entities other than Defendants, and therefore Defendants are entitled to indemnity and/or contribution from such persons or entities in direct proportion to their respective fault.

[2] **SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS**

* * *

7. Separation of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the First Named insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

On February 12, 2001, the same day that MagiCamp filed its answer and affirmative defenses, UM advised Great American, by way of letter, that there was a conflict of interest in the single representation of both MagiCamp and UM, and UM demanded independent counsel of UM's choice. The letter stated that any negligence which occurred was due to the negligence of MagiCamp and not UM. The insurer took the position that there was no conflict of interest in providing single counsel in the representation of both MagiCamp, as a named insured, and UM, as an additional insured. The insurer refused to provide separate independent counsel for UM. UM retained its own counsel to protect its interest and, after the case was settled, brought this indemnification declaratory action requesting declaration by the trial court that Great American had breached its contractual duty to UM by refusing to provide separate and independent counsel. The declaratory action sought indemnification for the costs of UM's defense, including attorney's fees. In its answer and affirmative defenses, Great American asserted that it had no contractual, legal or professional obligation to provide separate and independent counsel to UM. Both sides moved for summary judgment.[3] After significant litigation, and following mediation, cross motions for summary

---

> b. Separately to each insured against whom claim is made or "suit" is brought.

[3] The trial judge ruled that the motions were premature, denying them without prejudice to reinstituting them at the close of litigation.

judgment were renewed. Great American took the position that, because MagiCamp was contractually bound to indemnify and hold harmless UM for any liability arising out of the use of its facilities by MagiCamp, there could be no conflict of interest in its single representation by counsel. The trial court granted Great American's motion for final summary judgment and denied UM's request for indemnification of attorney's fees and costs.

An appellate court reviews a summary judgment de novo to determine whether, after viewing every inference in favor of the non-moving party, there is any genuine issue of material fact; if not, the appellate court must determine whether the moving party is entitled to judgment as a matter of law. Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000); Building Educ. Corp. v. Ocean Bank, 982 So. 2d 37 (Fla. 3d DCA 2008).

UM argued below and contends on appeal that there was a conflict of interest between MagiCamp and UM, as evidenced by the allegations in the pleadings, whereby the plaintiffs claimed both MagiCamp and UM were directly negligent and, whereby each defendant alleged that it was relieved of its separate responsibility for damages due to the negligence of the other defendant.

The precise question presented by this appeal and these facts has not been answered directly in Florida. Simply stated, the question presented is whether in this factual scenario, where both the insured and the additional insured have been

sued, and the allegations claim that each is directly negligent for the injuries sustained, a conflict between the insured and the additional named insured exists that would require the insurer to provide separate and independent counsel for each. We answer the question affirmatively.

The duty of an insurance company to participate in an action and defend is determined by the allegations in the complaint. New Amsterdam Cas. Co. v. Knowles, 95 So. 2d 413 (Fla. 1957); Fed. Ins. Co. v. Applestein, 377 So. 2d 229 (Fla. 3d DCA 1979). An insurer's conflict of interest in the duty to defend is determined properly on summary judgment. See All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160 (N.D. Ind. 1971).

UM relies on the following authorities, contending that Great American breached its duty under the policy to provide independent and separate counsel where there exists a conflict of interest between the insureds: See, e.g., Williams v. Am. Country Ins. Co., 833 N.E. 2d 971, 980 (Ill. Ct. App. 2005) (holding that a policy exclusion for intentional acts of an agent under the doctrine of respondeat superior creates a conflict of interest with co-defendants requiring separate counsel where "it would be in [one co-defendant's] best interest to present a defense that he was an agent of [the other co-defendant], while it would be in [the other co-defendant's] best interest to establish the exact opposite"); Wolpaw v. Gen. Accident Ins. Co. v. Parker, McCay & Criscuolo, 639 A.2d 338, 340 (N.J. Ct. App.

1994) (holding that liability insurer violates its contractual duty and must retain separate and independent counsel for insured's co-defendant where interests conflict in "maximizing the percentage of the other insured's fault and minimizing their own" and the risk of judgment exceeds the policy limit); Bituminous Ins. Cos. v. Pa. Mfrs.' Ass'n Ins. Co., 427 F. Supp. 539 (E.D. Pa. 1976) (holding that an insured is entitled to reimbursement from its insurer based on its duty to defend because of the insured's conflict with its co-defendant, reasoning that each defendant may attempt to absolve itself from liability by alleging the damage was caused solely by the negligence of the other). We agree with UM's position.[4] Although no question of coverage or excess policy limits, upon which to base a conflict of interest, exists in this case, since coverage has been agreed to by the parties, the pleadings and record evidence on summary judgment create a conflict, not on coverage, but on legal defenses based upon the record facts.

In the case before us, there exists a conflict in the co-defendants' legal defenses, based on the allegations of the complaint, that each defendant is directly liable, and the allegations in the answer and affirmative defenses set forth by MagiCamp and UM. MagiCamp answered and asserted the affirmative defense that, as alleged, through no fault of its own, but through the fault of another entity,

[4] We reject Great American's position that the hold harmless agreement between MagiCamp and UM negates a conflict of interest between the two defendants which would necessitate appointment of separate co-counsel.

UM, the minor camper was injured, for which it was entitled to indemnification and contribution; and conversely, UM presented its position by way of letter, that, through no fault of its own, but through the fault of MagiCamp, the camper was injured. These allegations create diverse legal positions that are inherently adverse. These conflicting legal positions presented in defense to individual active negligence claims against MagiCamp and UM exist separate and apart from issues of coverage or excess policy limits.[5] In this case, single defense counsel was provided by Great American to defend both MagiCamp and UM and to present adverse legal theories. There exists no factual dispute, as evidenced by the record, that, in defense of both co-defendants, Great American's counsel would have had to argue conflicting legal positions, that each of its clients was not at fault, and the other was, even to the extent of claiming indemnification and contribution for the other's fault. In so doing, legal counsel would have had to necessarily imply blame to one co-defendant to the detriment of the other. On these facts, we believe this legal dilemma clearly created a conflict of interest between the legal defenses of the common insureds sufficient to qualify for indemnification for attorney's fees

[5] The dissent attempts to draw a distinction in cases where a conflict of interest was created by coverage or policy limit issues. Conflicts created by coverage or policy limit issues are not the issue in this appeal. The conflict in this case is created by the adverse legal positions one attorney must take in representing two different defendants.

and costs for independent counsel. Graci v. Denaro, 413 N.Y.S. 2d 607 (N.Y. Sup. Ct. 1979); 14 Couch on Ins. § 202.24 (3d ed. 2012).

Therefore, summary judgment in favor of Great American on the issue of indemnification of attorney's fees and costs for independent counsel is reversed.

Reversed and remanded.

WELLS, C.J., concurs.

SHEPHERD, J., dissenting.

The court today opens a new frontier in insurance litigation of benefit only to the legal profession.

The insurance contract in this case expressly states the insurer has "the right and the duty to defend the insured" against any suit to which the insurance applies. The insurer appointed the law firm of Hyman and Kaplan to defend both Magicamp and the University of Miami. Without providing Great American the courtesy of a phone call or demand, the Isicoff law firm declared conflict and appointed itself. The majority affords them fees for their trouble. The future of dual insured claims should not be hard to see.

Rule 4-1.7 of the Florida Rules of Professional Conduct states "a lawyer shall not represent a client if: (1) the representation of 1 client will be directly adverse to the other client; or (2) there is a substantial risk that representation of 1 or more clients will be materially limited by the lawyer's responsibility to another client." R. Regulating Fla. Bar 4-1.7. However, the rule is not slavishly applied. As the comment to the rule states, "A possible conflict does not itself preclude the representation." R. Regulating Fla. Bar 4-1.7 cmt. That is the applicable point in this case.

The complaint in the underlying case alleged that Magicamp was negligent in failing to properly monitor, supervise, and care for Daniel Segurola, a camper in its care, causing him to nearly drown. The University also was sued on the ground that its pool lifeguards failed to properly supervise the pool.

Magicamp had no defense to the lawsuit. A child entrusted to Magicamp nearly drowned in an area of the pool being used by it. The "Revocable Agreement for Use of University Facilities," pursuant to which Magicamp was licensed to use the pool, stated, in paragraph P, "User shall be solely responsible for the safety and welfare of its agents, employees, guests and the attending public." Magicamp also assumed "**full** financial responsibility for" (emphasis added), and agreed to "release, indemnify and hold harmless the University of Miami, its Trustees, officers, employees and agents from and against all losses, claims, demands, damages, actions or causes of action of whatsoever kind and nature, liability and expense, including attorney fees arising out of injury or death to persons or damage to property connected with or arising out of the use of [the] facility or activities of [the] User." After seven years of litigation—there were unusually lengthy periods of inactivity by plaintiff's counsel—the case settled. The University suffered no loss.

"A conflict of interest between jointly represented clients occurs whenever their common lawyer's representation is rendered less effective by reason of his

representation of the other." Spindle v. Chubb/Pacific Indem. Grp., 89 Cal. App. 3d 706, 713 (Cal. Ct. App. Second Dist., Div. 3 Cal. 1979). Furthermore, "the difference in the potential for liability [between] two insureds, standing alone, does not necessarily result in an actual conflict of interest between them so far as their joint defense is concerned." Id. at 713-14. In this case, there was neither an actual conflict nor a "substantial risk" of conflict. The parties were united in the defense against the plaintiff from the moment the Isicoff law firm appeared in the litigation through settlement. Neither party filed a claim against the other.

Although there was no actual conflict between the parties during the course of the underlying litigation, the University urges a determination of need for separate counsel should be treated just as the duty to defend. The analogy is flawed. The duty of a liability insurer to defend is contractual in nature and ordinarily is determined, in the first instance, by comparing the language of the insurance contract and allegations of the petition or complaint in the action brought by the person injured or damaged against the insured. Lincoln Ins. Co. v. Home Emergency Servs., Inc., 812 So. 2d 433, 435 (Fla. 3d DCA 2001). However, the question in this case is not one of duty to defend. The only question is who will do the defending.

The University's answer to this question resides in a paper conflict. Counsel for each party preserved the right to seek contribution or indemnity from the other

in its answer and affirmative defenses. However, as University counsel admitted at oral argument, neither the University nor Magicamp sought to prove liability of the other at any time during the course of the underlying litigation. As both knew, such a course almost certainly would have been fatal. See Oda v. Highway Ins. Co., 194 N.E.2d 489, 496 (Ill App. Ct. 1963) ("A traditional truism among lawyers is that nothing can be more ruinous to the defense of cases such as the personal injury cases here involved than for one defendant to seek to prove the liability of the other. On such occasions the plaintiff's lawyer sits by and watches the show as one defendant slaughters the other, while the court, observing the spectacle, meditates on the folly of the defendants in not having agreed on a policy of cooperation, even though it meant that each had to assume some degree of risk thereby."). Thus, there was no real conflict and no need for self-appointed counsel.[6]

The cases cited by the majority do not require a different result. For example, in Williams v. American Country Insurance Co., 833 N.E.2d 971 (Ill.

[6] The majority mistakenly suggests that at some point in the underlying litigation, not later than trial, insurer-appointed counsel "would have had to argue" the other was liable. That is not so. If the underlying case had been tried, the only necessary special jury interrogatories would be one, each asking whether each defendant was legally responsible for the accident. The statute of limitations does not begin to run on the apportionment claims in the case—contractual indemnity and contribution—until the conclusion of the underlying case either by settlement or judgment. See Kala Invs., Inc. v. Sklar, 538 So. 2d 909, 915-16 (Fla. 3d DCA 1989).

App. Ct. 2005), a police officer sued a taxi driver and his employer, Yellow Cab, for injuries sustained when the driver, exhibiting a pique of anger over a Chicago traffic jam, dragged the officer, who had leaned inside the cab, fifteen feet along a congested city street. Id. at 973. The policy expressly excluded "'bodily injury' . . . expected or intended from the standpoint of the 'insured.'" Id. at 974. In an earlier appeal, the Illinois First District Court of Appeal determined the taxi driver's conduct was intentional as a matter of law. Am. Country Ins. Co. v. Williams, 791 N.E.2d 1268, 1278 (Ill. App. Ct. 2003). However, under Illinois law, the driver would be entitled to coverage nevertheless if "his intentional, negligent or criminal acts were performed within the scope of employment." Am. Country, 833 N.E.2d at 976. American Country disputed that coverage existed under this alternative. The issue had to be resolved by a special verdict interrogatory during the course of the underlying liability trial. Unlike the case before us, the conflict in this case was not a paper conflict. It was an **actual** conflict. Id. at 980. See also Golotrade Shipping & Chartering, Inc. v. Travelers Indem. Co., 706 F. Supp. 214, 219 (S.D.N.Y. 1989) ("It is important to recognize that independent counsel is not necessary in all cases where multiple claims are made. It is only necessary where the "question of insurance coverage is . . . intertwined with the question of the insured's liability.") (quoting Pub. Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E. 2d 810, 815, n* (N.Y. App. Div. 1981)).

Bituminous Insurance Cos. v. Pennsylvania Manufacturers' Association Insurance Co., 427 F. Supp. 539 (E.D. Pa. 1976), cited by the majority, is similar. There, the insurer of a subcontractor, Pennsylvania Manufacturers', was ordered to provide a defense to a general contractor pursuant to an indemnity provision in a construction contract, including independent defense counsel if such became necessary to avoid a conflict of interest, where some, but not all, of the claims made against the general contractor were indemnified claims covered under the Pennsylvania Manufacturers' insurance policy. Id. at 542. As in Williams, the conflicts between insurer and insured were real and imminent. See also U.S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 941 (8th Cir. 1978) (conflict between insurer and insured over covered and non-covered claims required insurer to reimburse insured for services of independent counsel to protect insured's interest in maximizing coverage in underlying litigation); accord Travelers Indem. Co. of Ill. v. Royal Oak Enters. Inc., 344 F. Supp. 2d 1358, 1365-66 (M.D. Fla. 2004).[7] The case offers no solace to the majority.

Finally, Wolpaw v. General Accident Insurance Co., 639 A.2d 338 (N.J. Super. Ct. App. Div. 1994), likewise offers no assistance to the majority. There,

[7] In fact, in Royal Oak, the United States District Court for the Middle District of Florida opined that despite the fact Royal Oak is an **actual** conflict case—arising out of the addition of a non-covered intentional tort count and punitive damage claim to an existing wrongful death complaint—the Florida Supreme Court still would **not** require the appointment of insurer-paid independent counsel. Royal Oak, 344 F. Supp. at 1375.

defense counsel undertook the representation of three persons—a homeowner, sister, and eleven-year-old nephew of the homeowner—insured through a homeowner's policy of insurance issued by General Accident Insurance Company, in an accidental shooting case. Like our case, each defendant had an interest in minimizing the amount of the shooting victim's judgment and maximizing the percentage of fault attributable to the other defendants. Id. at 340. However, unlike our case, the Wolpaw case went to trial and apportionment of negligence was done by the jury. Id. at 339-40. It was obvious to the appellate court, as it would have been to us, that single defense counsel could not adequately represent all three insureds on the apportionment issue. Moreover, there was a significant exposure in the case for an excess judgment for which all three insureds might be found, and ultimately were found, responsible. Id. at 340. Wolpaw is another case of **actual** conflict.

In contrast, I find Spindle, 89 Cal. App. 3d at 706, cited in the briefs of both parties in this case, but overlooked by the majority, to be more informative. Spindle arises out of a medical malpractice action brought by a patient, Betty Burke, against two physicians, Dr. David K. Spindle and Dr. Chester C. McReynolds, both of whom carried malpractice insurance from the same insurer, Chubb/Pacific, albeit in different policy limits—one million dollars in the case of Dr. Spindle and $500,000 on Dr. McReynolds. Id. at 709. Like Magicamp in the

case before us, Dr. McReynolds had a much greater potential for liability than did Dr. Spindle. As in our case, Chubb/Pacific assigned the same defense counsel to defend both doctors. Id. at 714. After a jury trial, Ms. Burke obtained a joint and several judgment in the amount of $404,000 against both Dr. Spindle and Dr. McReynolds.

Dr. Spindle then sued Chubb/Pacific, alleging the company had committed fraud and bad faith by advising him soon after suit was filed that "there appeared to be no conflict of interest between the two doctors in the lawsuit and that it would be more economical for them to share the costs of their defense rather than to have each represented by separate counsel." Id. at 709. According to Spindle, this representation was false because Chubb/Pacific then knew (but Dr. Spindle did not) the interests of the two insureds conflicted in that (1) they had different maximum amounts of insurance protection; (2) defendant had reinsured them differently—for Dr. Spindle, everything above $25,000; for Dr. McReynolds, everything above $200,000; and (3) their respective potentials for liability differed. Id. at 710. According to Dr. Spindle, Plaintiff Burke would have settled the entire underlying case for $350,000 and, prior to trial, Dr. McReynolds had directed Chubb/Pacific to do so. Id. Spindle sought at least $2,043,000 specified compensatory damages (primarily emotional distress) because of Chubb/Pacific's improper joint defense of him in the underlying action. Id.

The California Second District Court of Appeal found no actionable impropriety in the joint representation. As to the fraud count, the court concluded, "What plaintiff [Dr. Spindle] has done is to confuse divergence of interest with conflict of interest." Id. at 713. The court explained:

> **Conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other. Nothing like this is alleged in the fraud count. The difference in the personal exposure of the two insureds resulting from the difference in their maximum coverage, by itself and without more, creates no actual conflict of interest between them in the matter of their joint representation.** The same may be said of the difference in their reinsurance situations since reinsurance is a matter ordinarily of concern only to the insurer. **Similarly the difference in the potential for liability of the two insureds, standing alone, does not necessarily result in an actual conflict of interest between them so far as their joint defense is concerned.**

Id. at 713-14 (emphasis added).

As to the bad faith claim, which was based on alleged breaches similar to those alleged in the fraud count,[8] the court concluded:

> **Plaintiff has not stated a cause of action for bad faith in any of these alleged breaches. We have already dealt with the absence of any actual conflicts of interest between the two doctors affecting**

[8] In his bad-faith claim, Dr. Spindle incorporated his fraud count and additionally alleged Chubb/Pacific breached its contractual obligation to him to act in good faith and deal fairly with him in (1) failing to advise him of the alleged conflicts of interest previously alleged in the fraud count; (2) not providing him with separate counsel; (3) controlling joint defense counsel in that case; and (4) refusing to settle the liabilities of both codefendants in that case for the sum of $350,000 from the McReynolds' policy alone. Id. at 714.

> **the effectiveness of their joint representation in the Burke case. It is a well known fact that under insurance policies generally the insurer controls the defense it provides its insured. We see nothing improper in this customary practice. It is true that** the trial memoranda between Kirtland & Packard and defendant, which plaintiff incorporated in this count, show that **Dr. McReynolds had a much greater potential for liability than plaintiff, but plaintiff has not alleged how this disparity in potential liability affected in any way the joint defense defendant provided him.**

Id. at 714-15 (emphasis added). Similarly in the case before us, the University of Miami has not alleged (or shown) how the disparity in potential liability between it and Magicamp affected in any way the joint defense provided it under the Great American policy.[9]

The flaw in the majority opinion is that it confuses and conflates insurer obligations in three unrelated circumstances: (1) the duty to defend; (2) conflicts between an insured and insurer; and (3) conflicts between insureds. The case before us involves the third circumstance. The majority makes no effort to distinguish among them in its resolution of this case. Instead, it begins its analysis

[9] Although not necessarily determinative, it at least is noteworthy that the Great American policy limit insuring both Magicamp and the University of Miami for this occurrence was $1,000,000, and the University of Miami had substantial coverage of its own in excess of the Magicamp limits. The underlying case settled within the Great American policy limit. Even where there might be inadequate limits, however, the usual defense strategy is to defer contribution or indemnity claims until the liability case is concluded. See Allan D. Windt, "Insurance Claims & Disputes: Representation of Insurance Companies & Insureds," 1 Insurance Claims and Disputes 5th, § 4:23 (2012); see also Wolpaw v. Gen. Accident Ins. Co., 639 A.2d 338 (N.J. Sup. Ct. App. Div. 1994) (discussing methods for resolving such claims after the liability case is concluded).

with the global pronouncement, "the rights or duties applicable to the first named insured, Magicamp, [must be] applied as if each named insured were the only named insured and applied separately to each insured against whom a claim was made."[10] Implicit in the statement is that each insured gets its own lawyer, almost no matter the circumstance. The premise presages the conclusion: "UM is entitled to be indemnified for attorney's fees and costs in the action." See supra Majority Op. p. 2.

The syllogism is a false one. The majority fails to appreciate that liability insurance involves the delicate merging of the duty to indemnify and the right to defend. See Kent D. Syverud, What Professional Responsibility Scholars Should Know About Insurance, 4 Conn. Ins. L.J. 17, 21 (1997). The majority opinion divides the two by affording dual insureds separate counsel any time an insured articulates a conflict in a pleading, whether or not real. However, unlike the duty to defend, allegations in a complaint or answer, such as the answer filed sua sponte by the Isicoff law firm, preserving the University's right to seek contribution or indemnity from Magicamp, are not controlling when actual facts demonstrate the existence or non-existence of an obligation to provide separate counsel. See Louis A. Roser Co., 585 F.2d at 936. In the case before us, the conflict was not real or

[10] The majority seeks to ground this statement in Section IV of the policy. See supra Majority Op. p. 3 & note 2. A casual perusal of Section IV reveals it merely begs the issue presented by this appeal.

actual. The Isicoff firm followed and supported counsel appointed by Great American throughout the underlying litigation.

Liability insurance is a relatively new product, not much older than the automobile. A liability insurer's contractual right to control the defense and indemnity features of its contract is indispensable to the protection of its financial interest in the litigation and thus the product itself. See Royal Oak, 344 F. Supp. 2d at 1374. This meaningful contractual right should not be penalized merely because there exists the potential for insurer-selected counsel to become impermissibly conflicted in its representation. Yet, that is what the majority does in the opinion this court issues today. See id. I am persuaded the rules governing the Florida Bar and the attendant threat of malpractice liability provide sufficient assurance that counsel appointed by an insurer will not continue to represent an insured in the event a conflict of interest interferes with counsel's ability to make independent professional judgments on behalf of the client. See id.

I would affirm the order under review.