WILLIAM ACQUESTA and CRYSTAL ACQUESTA, husband and wife, et al.,

Petitioners/
Plaintiffs,

vs.

INDUSTRIAL FIRE and CASUALTY INSURANCE COMPANY,

Respondent/
Defendant

_____/

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 65,356

DCA CASE NO.: 82-2568
(4th DCA)

# PETITIONERS'/PLAINTIFFS' REPLY BRIEF

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Respondent's answer brief fails to answer the argument of expressio unius est exclusio alterius; to answer Respondent's failure to plead as an affirmative defense estoppel or apparent authority; to answer its knowledge of the conflict in the application of insurance; to answer it being put on inquiry due to the conflict, Stitles v. Gordon Land Co., 44 So.2d 417 (Fla. 1950); Tomkin Corp. v.Miller, 156 Fla. 388, 24 So.2d 48 (Fla. 1945); and to answer the lack of establishing a course of dealing, Bogue Electric Mfg. v. Coconut Grove Bank, 269 F.2d 1 (5th Cir. 1959). These issues are conceded by implication.

-A-

Respondent argues that it is better public policy to ignore the clear meaning and intent of the state legislature, which is to protect consumers against uninsured motorist, than to require Industrial Fire to follow the laws of this state -- laws it deals with each and every day -- by obtaining a proper notice of rejection of uninsured motorist coverage from William Acquesta, the named insured. In short, Respondent's position is that the public policy of this state should be ignored when it is expedient for Industrial Fire. Of course, this has been its position in the past, Industrial Fire & Casualty Ins. Co. v. Kwechin, So.2d (Fla. 1983); Daly v. Industrial Fire & Casualty Ins. Co., 422 So.2d 1218 (Fla. 4th DCA 1983).

In reality, consumers are unknowledegable [1] about the

[1] Industrial Fire can hardly be considered in the same position as a consumer since it deals with the issue of insurance every minute of its working day and has appellate decisions peppered throughout the Southern Reporter on issues of insurance.

intricacies of the insurance law and must rely on brokers and insurers to obtain insurance. This is a questionable reliance. Isn't this why the state legislature sought to protect the consumer by requiring that only the named insured can reject uninsured motorist coverage in writing?

Respondent relies on Aetna Casualty & Surety Co. v. Green, 327 So.2d 65 (Fla. 1st DCA 1976) to argue against the holding in Weathers v. Mission Insurance Company, 258 So.2d 277 (Fla. 3d DCA 1972), and in Protective National Insurance Company of Omaha v. McCall, 310 So.2d 324 (Fla. 3d DCA 1975). However, Green is clearly distinguishable. Unlike Weathers and McCall and the instant case, in Green the named insured dealt with the broker or insurer, personally rejected uninsured motorist coverage on company vehicles for an underlying policy, but was not offered uninsured motorist coverage on an excess policy. The court found that Green, the named insured, had uninsured motorist coverage because he was not offered nor did he reject this type of coverage. This decision is not inconsistent, as Respondent argues, with Weathers or McCall or the instant case. In short, Green holds that the named insured must be offered and reject uninsured motorist coverage for there to be an effective rejection. This is Petitioner's position. William Acquesta, the named insured,[2] never rejected uninsured motorist coverage.

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[2] It is interesting how Respondent chooses now to repudiate its stipulation before the trial court that William Acquesta was named insured (R. 223-224). Expediencey?

Empire Fire and Marine Insurance Co. v. Koven, 402 So.2d 1352 (Fla. 4th DCA 1981) and Auto Owners Insurance Co. v. Yates, 368 So.2d 379 (Fla. 4th DCA 1981) are argued to support Respondent's position. But these cases are not on point at all. For example, in Koven, an insurance broker signed Mr. Koven's name, the named insured, to the rejection of uninsured motorist coverage on Mr. Koven's application of insurance for his automobile. Koven relies on Yates, and finds that the insurer relied on the application form. There was no indication (conflict) that the application was not made out by Mr. Koven. The insurer believed Mr. Koven filled out and rejected uninsured motorist coverage. In short, based on the application, the insurer, not knowing the mechanics of how the application was filled out, felt uninsured motorist coverage was rejected.

In Yates, a broker filled out Ms. Yates' application for insurance, and signed Ms. Yates' name on the rejection of uninsured motorist coverage for her automobile. In reaching its decision, the court clearly distinguishes it from Weathers and McCall, supra, by stating those decisions would be inapplicable because:

> "in each of these cases the insurance company knew that the named insured had not signed the uninsured motorist coverage rejection" at 638.

In Yates, however, the court stated that the insurer was unaware that Yates, herself, did not sign the rejection.

This is an important distinction. In the instant case,

Industrial Fire knew that William Acquesta, the named insured, did not reject uninsured motorist coverage. Industrial Fire did not rely on nor accept the application as completed. The application listed William Acquesta as the named insured, yet he did not reject uninsured motorist coverage; his wife did. She signed her name to the rejection. Based on this conflict, Industrial Fire altered the application by crossing out William Acquesta's name and by writing in Crystal Acquesta's name as the named insured. How can this act be consistent with Koven or Yates? How can there by any reliance on the agency principals argued? What Industrial Fire desires is to rely on what is expendient for itself.

When Industrial Fire was presented with the conflict in the application, it should have provided uninsured motorist coverage by law or contact the Acquestas to find out what their true intentions were, instead of altering the application without any consent or authority.

Industrial Fire cannot argue reliance when it did not rely, agency when it did not accept the agency. Isn't an insurer ever going to be required to follow the letter of the law?

-B-

It is interesting to note Respondent's continuous attempts to alter its position and change established facts for expediency. By stipulation before the trial court, Industrial Fire acknowledged William Acquesta was the named insured (R. 223-224). Now Industrial Fire chooses to rewrite established, stipulated facts and state that Crystal Acquesta was the named insured rather

than William Acquesta. How can such an expedient argument even be contemplated? Industrial Fire asks the Court to ignore all established principals of law!

When all else fails, Industrial Fire then argues the alternative to the above position. Industrial Fire argues that it relied on the apparent authority of Crystal Acquesta, and sets forth three criteria "establishing" this reliance. However, a review of the facts indicate this not to be the case at all.

There is no question that Industrial Fire altered this application of insurance by crossing out William Acquesta's name as the named insured and by writing in Crystal's name (R. 33-34). In form, at least, Industrial Fire, in effect, made Crystal Acquesta the named insured. If this is the case, then how can Industrial Fire rely on the representation of William Acquesta that Crystal Acquesta was his agent when it rejected the application of insurance filled out by her and "its" agent? Clearly it could not have relied on an agent's acts that it rejected.

How can Industrial Fire claim that it relied on Crystal Acquesta's representation that William Acquesta was to be the named insured and that he desired to reject uninsured motorist coverage when it rejected her representation that he was to be the named insurer, and then issue a policy in her name? Can Industrial Fire pick and choose what it desires to rely on to meet its own ends?

How can Industrial Fire argue that it changed its position in reliance on the representation of Crystal Acquesta when it

rejected her representation that William Acquesta was to be the named insured? Isn't Industrial Fire's "detriment" caused by its own choosing, choosing to do what it wants regardless of any representation by anyone?

In short, when all else fails, Industrial Fire argues reliance without any reliance.

Industrial Fire further argues that William's conduct was a ratification of Crystal's acts. However, arguendo, viable this affirmative defense could have been, Industrial Fire never plead or raised it, and now asks this Court to speculate on matters not developed or rejected by discovery. Raising this affirmative defense now is improper. It has never been an issue in this case for proper consideration. In addition, the public policy of this state, as mandated by the state legislature, has been that only the named insured can reject uninsured motorist coverage, Whitten v. Progresssive Casualty Ins. Co., 410 So.2d 501 (Fla. 1982); Weathers v. Mission Insurance Co., 258 So.2d 277 (Fla. 3d DCA 1972); Protective National Insurance Co. of Omaha v. McCall, 310 So.2d 324 (Fla. 3d DCA 1975). Public policy considerations of this state must take precedence over a unplead, unlitigated, speculative affirmative defense. Moreover, assuming for the sake of argument that this Court considers this issue, it is noted that the policy issued was not in William Acquesta's name. He cannot ratify an agreement between other parties, or a policy not in his name. Therefore, how can he ratify this policy, a seperate independent contract of insurance. William Acquesta's policy of full coverage, including uninsured motorist coverage, was simply

never received by him.

Finally, Respondent, Industrial Fire, argues that the parties should accept the benefits of the bargain. But there was no bargain for the Acquesta's. By law, only William Acquesta can be offered and reject uninsured motorist coverage. Industrial Fire knew this, and when it realized the conflict in the application, instead of contacting the Acquestas to see what their true intentions were or to follow the law and provide uninsured motorist coverage, it chose to reject Crystal's agency and alter the policy. Again, Industrial Fire argues an agency it, itself, did not accept. What William Acquesta bargained for and is mandated by state law and public policy is uninsured motorist coverage.

## CONCLUSION

In conclusion, the trial court's decision should be upheld and the decision of the Fourth District should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 27 day of July, 1984, to Marcia Levine, Attorney at Law, Fazio Dawson & DiSalvo, 633 S. Andrews Ave., Fort Lauderdale, Florida 33301 and Robert Peltz, Esq., Rossman & Baumberger, P.A., Suite 1207, 19 W. Flagler Street, Miami, Florida 33130.

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