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IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs. CASE NO. 65,986

ALLEN L. FOWLER, et al.,

Respondents.
_____/

Discretionary Review of the
District Court of Appeal,
First District

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This is a case where a trial court failed to follow controlling Supreme Court precedent, where the First District compounded that error by its establishment of a new procedure for resolving coverage disputes among insurers in contravention of express Supreme Court language and in conflict with holdings from other district courts, and where the First District ignored the express wishes of the party litigants and ordered remand for pleadings on an issue not raised and not necessary to the disposition of this case.

This case arises from an automobile accident that occurred in April of 1982. At the time of the accident, Kendra Morrison [Morrison], operating a vehicle leased from Enterprise Leasing Company, Inc. [Enterprise], struck a motorcycle operated by Allen L. Fowler [Fowler]. Travelers Insurance Company [Travelers] provided liability insurance for the Enterprise vehicle pursuant to two separate policies. Allstate Insurance Company [Allstate] provided coverage to Morrison's parents Donald and Patricia Morrison, but disputed that its coverage included Morrison herself.

Allstate filed a two-count Complaint for Declaratory Decree (R:107-127) seeking a determination of its coverage. In Count I of the declaratory decree, Allstate questioned whether it provided coverage to Morrison. That issue was later resolved and is not pertinent to this appeal.

Count II of the declaratory decree sought a declaration of the respective coverage rights of Allstate and Travelers. It was alleged that there was a bona fide dispute among Allstate, Enterprise, Travelers and Morrison as to whether the coverage provided by Allstate or Travelers was primary and as to which of the insurance companies should defend Morrison and incur the cost of that defense. Further, Count II of the declaratory judgment action alleged that any insurance coverage provided by Travelers to Enterprise was primary in that the Morrison-Enterprise lease agreement (R:127) did not comply with section 627.7263, Florida Statutes (1981).

Subsequent discovery revealed that Travelers had two insurance policies covering Enterprise: a Business Automobile Policy, policy number T-BAP-181T296-5-81, providing minimum financial responsibility limits of $10,000.00, and an Excess Liability Policy, policy number TEX 181T705-7-81, providing $500,000.00 total coverage inclusive of the $10,000.00 provided by the underlying policy. (R:15-88). Allstate's policy (R:113-125) provided coverage for bodily injury of $250,000.00 per person. (R:102).

Allstate moved for summary judgment against Travelers, alleging that there was no genuine issue of material fact on the issue that Travelers bore primary coverage up to the amount of $500,000.00 or, alternatively, that there was no genuine issue of material fact on the issue that Travelers' excess policy and Allstate's policy were co-excess to Travelers'

primary policy and provided coverage on a pro-rata basis. (R:89-90). The trial court first ruled that Travelers' primary policy provided the first layer of coverage up to its $10,000.00 limits, (R:91-92), and later ruled on the basis of Hartford Accident and Indemnity Co. v. Kellman, 375 So.2d 26 (Fla. 3d DCA 1979) [Appendix B] and Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977), [Appendix C] that since "fault attracts primary responsibility," Allstate's policy (which insured the driver) was not excess to the Travelers excess policy (which insured the owner/lessor). (R:93-95). Thereupon, Travelers moved for summary judgment on the issue that its excess policy was excess over Allstate's policy, (R:96-97), and judgment was granted to Travelers on that point. (R:98).

Allstate then timely appealed the granting of the summary final judgment in favor of Travelers. (R:99). In an opinion filed August 15, 1984, [Allstate Insurance Co. v. Fowler, 9 F.L.W. 1772 (Fla. 1st DCA, August 15, 1984)], [Appendix A]the First District Court of Appeal reversed the trial court's final judgment in favor of Travelers. The appellate court stated that the controlling principle in this action was that

> if Enterprise is only vicariously liable to Fowler because of the dangerous instrumentality doctrine, its insurer is entitled to be subsequent in coverage to that of the negligent driver regardless of policy language. If, however, Enterprise was in any way negligent, it would be a

> joint tortfeasor and "in the same class" with Morrison, and policy terms would control.

9 F.L.W. at 1772 (emphasis supplied). The court went on to state that since there was no finding regarding the nature of Enterprise's liability, the summary judgment in favor of Travelers was error. The court ordered the case remanded for pleadings and proof on the issue of whether Enterprise's liability to Fowler was solely vicarious. 9 F.L.W. at 1773.

In addition, the First District "restricted" the holding of the Supreme Court in Insurance Company of North America to the situation where contract terms would apply only where the insureds were "in the same class of liability." Furthermore, the First District expressly noted "apparent" conflict between its decision in the instant case and the decision of the Second District in Sentry Insurance Co. v. Aetna Insurance Co., 450 So.2d 1233 (Fla. 2d DCA 1984) [Appendix D], wherein the Second District held, on the basis of an unrestricted view of Insurance Company of North America, that priorities among insurers should be decided by reference to the provisions in the respective policies. Lastly, the First District then certified a question as being one of great public importance:

> Is the controlling law of Florida that if a party is only vicariously liable by way of the dangerous instrumentality doctrine, its insurer is entitled to follow that of the negligent driver regardless of policy language?

9 F.L.W. at 1773.

Allstate moved for rehearing or clarification of that appellate court's opinion, in which rehearing Travelers partially concurred with Allstate's argument. By order dated September 19, 1984, the First District denied Allstate's motion for rehearing. Thereupon, Allstate timely filed its notice to invoke the discretionary jurisdiction of the Supreme Court on the grounds that the decision passed upon a question certified to be of great public importance and also that the decision expressly and directly conflicted with a decision of another district court of appeal as well as the Supreme Court on the same question of law.

As an aid to this Court in its determination of this cause, the coverages provided by the three policies in question are set forth as follows:

The Travelers Business Automobile Policy
T-BAP-181TG296-5-81

This is a Business Automobile Policy between Travelers and Enterprise concerning the subject rental vehicle. This policy provided coverage for automobiles owned by Enterprise and also provided coverage to permissive users of said vehicle. (R:28-31). It thus covered both Enterprise and Morrison. The policy states:

> PART IV - LIABILITY INSURANCE
> A. WE WILL PAY
> 1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting

from the ownership, maintenance or use of a covered auto. (R:30).

Concerning who is an insured, the policy states:

> D. WHO IS INSURED
> * * *
> 2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow. . . . (R:31).

Travelers Business Automobile Policy also contained a provision concerning the relation of Travelers' policy to other insurance:

> B. OTHER INSURANCE
> 1. For any covered auto you own this policy provides primary insurance.
>
> * * *
>
> 2. When two or more policies cover on the same basis, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the policies covering on the same basis. (R:33).

The trial court ruled that this policy provided primary coverage up to $10,000.00 because the lease agreement between Travelers' named insured, Enterprise, and Enterprises' permissive user, Morrison, failed to comply with section 627.7263, Florida Statutes (1981).[1] This finding was not appealed by Travelers.

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[1]The district court stated that the Travelers business automobile policy did not comply with section 627.7263, Florida Statutes (1981), and thus provided the first layer of coverage. Clearly, the district court meant to state that it was the automobile lease agreement, rather than the insurance policy, that violated the subject statute.

The Travelers Excess Liability Policy
TEX 181T705-7-81

This is a liability policy between Travelers and Enterprise covering the subject rental motor vehicle. Said policy is labeled an "excess liability policy." (R:15). Its limits of liability, as stated in the declarations sheet and endorsement 8000(4), are $500,000.00. (R:15,26) This policy is stated to provide excess coverage for the underlying policies scheduled in endorsement 8000(2), which includes the business auto policy number T-BAP-181T296-5-81. (R:15, 24). This policy stated that it provides additional coverage to Enterprise when the policy limits of the underlying policies listed in endorsement 8000(2) have been exhausted. The provisions in said policy which discuss coverage are as follows:

> 1. Coverage. To indemnify the insured for such loss as would have been payable under all of the terms of the liability coverages afforded by the underlying policies applicable to the accident or occurrence if the limits of liability stated in Item 4 of the declarations were available under the underlying policies in place of the limits of liability stated in Item 5 of the declarations (hereinafter called the "primary limits"); provided the company's obligation hereunder shall apply only to loss in excess of such primary limits.
>
> 2. Limits of Liability. Subject to paragraph 7, liability under this policy shall attach to the company only after the underlying insurers have paid or been held to pay the full amount of their respective limits of liability as described in the underlying policies, and the limits of liability of the

company under this policy shall then be as follows:

a. If this policy is designated in the declarations as an excess liability policy, the limit of liability stated in Item 4.b. of the declarations is applicable to each accident or occurrence as the total limit of the company's liability for all loss as a result of one accident or occurrence. (R:16).

* * *

7. Maintenance of Underlying Insurance. It is a condition of this policy that the policies of the underlying insurers shall be maintained in full effect during the currency of this policy. If the aggregate limit of liability of underlying policies should be reduced or exhausted, this policy shall apply as though such aggregate has not been reduced or exhausted. (R:18).

Accordingly, the Travelers "excess liability policy" states by its terms that it will pay for any loss "under all of the terms of the liability coverages afforded by the underlying policies" but "liability under this policy shall attach to the company only after the underlying insurers have paid." The underlying policies are specifically designated as those listed in Item 5 of the declarations sheet (R:15) which include Travelers' Business Automobile Policy, T-BAP-181T296-5-81. (R:24). Travelers' Excess Liability Policy does <u>not</u> contain any provision concerning the relation of this policy to any other insurance other than in endorsement 8000(2). This policy by its own terms states that it provides additional coverage to that provided by the Business Automobile Policy to Enterprise

but contains no provision which states that it is excess over insurance provided by another carrier.

Moreover, the Travelers' Excess Liability Policy states that it conforms to the provisions found in the underlying insurance:

> 6. Application of Underlying Insurance. This policy, except where provisions to the contrary appear herein, is subject to all of the conditions, agreements, exclusions and limitations of and shall follow the underlying insurance in all respects, including changes by endorsements, and the insured shall, as soon as practicable, furnish the Company with copies of such changes. (R:17).

Finally, in endorsement 8000(3) (R:25) said policy provides coverage with respect to the comprehensive automobile liability insurance coverage part of the underlying policy with respect to the named insured, Enterprise, and to any partner or executive officer thereof.

The Allstate Automobile Policy

This is an automobile policy between Allstate Insurance Company and Donald and Patricia Morrison. It covers:

> Insured Autos
>
> * * *
>
> (4) A non-owned auto used with the permission of the owner. This auto must not be available or furnished for the regular use of a person insured. (R:116).

The policy further provides:

> <u>If There is Other Insurance</u>
> If a person insured is using a substitute private passenger auto or non-owned auto, our liability insurance will be excess over other collectible insurance. (R:117).

Thus, the Allstate policy contains a <u>specific</u> provision governing the relation of that policy to other insurance. This directly contrasts with the Travelers excess liability policy which contains no provision whatsoever concerning its relation to any insurance other than the Travelers Business Policy.

ARGUMENT

I. THE OPINION OF THE DISTRICT COURT CONFLICTS WITH THE HOLDING OF THE SUPREME COURT IN INSURANCE COMPANY OF NORTH AMERICA V. AVIS RENT-A-CAR SYSTEM, INC., IN THAT IT DEPRIVES THE PARTIES OF THEIR ABILITY TO CONTRACT BETWEEN THEMSELVES TO SHIFT THE BURDEN OF LOSS SO LONG AS THEY MEET THE MINIMUM LIMITS OF THE FINANCIAL RESPONSIBILITY LAW.

This Court's opinion in Insurance Company of North America holds (1) that the public policy of the state as expressed in the financial responsibility laws as well as the dangerous instrumentality doctrine require that the owner be primarily liable for the use of his vehicle, and (2) that once the owner's primary responsibility is satisfied, the parties are free to contract among themselves as to their additional liability.

Sections 324.151(1)(a) and 324.021(7), Florida Statutes (1981), require that the owner of a motor vehicle in the State of Florida must establish proof of ability to respond to damages to the extent of $10,000.00 per person for one accident and that any liability policy issued to an owner of a motor vehicle provide a minimum of $10,000.00 as above described. This statutory scheme, known as the Florida Financial Responsibility Law, adopts the public policy that the owner of any motor vehicle operated in this state shall necessarily be prepared to bear the primary financial

responsibility for the use of said vehicle. In addition, the law is well established that the owner of a motor vehicle bears responsibility as a matter of law for the operation of said vehicle by a permissive user. The owner's responsibility is based on the legal concept that the motor vehicle is a dangerous instrumentality. The dangerous instrumentality doctrine is explained in Chase & Company v. Benefield, 64 So.2d 922, 924 (Fla. 1953):

> [T]he owner of an automobile is charged with knowledge that it is a dangerous instrumentality when in operation on a highway whether moving or standing and if he entrusts it to another, he is liable for its negligent handling . . . Under the laws of this state, if the owner once gives his express or implied consent to another to operate his automobile, he is liable for the negligent operation of it no matter where the driver goes, stops or starts.

Insurance Company of North America reaffirms the public policy of the financial responsibility law and the dangerous instrumentality doctrine. However, once these policies are established and the injured party is protected by the primary coverage of the owner, Insurance Company of North America states that the lessor/owner and lessee/driver are free to contract as to who will provide the next layer of coverage to the injured party.

As stated by the Supreme Court,

> Neither this statute [the financial responsibility law] nor the dangerous instrumentality doctrine asserts any interest of the state with respect to the allocation of risk among commercial enterprises . . . .

348 So.2d at 1154. The Court then voiced its holding:

> We hold that the public policy of the state was satisfied in this case when the injured's beneficiaries were compensated by the vehicle's owner for the neglignt operation of a rented vehicle. The parties were free to contract between themselves to shift the burden of loss so long as they met the requirements of law, and in this case there is no suggestion that those requirements were not met.

348 So.2d at 1154 (emphasis supplied).

In that case, the lessor had $100,000.00 primary coverage and, in addition, had $500,000.00 coverage "in the event any lessee did not carry adequate insurance." 348 So.2d at 1154. The lessee's policy clearly provided that it was not responsible for any primary coverage provided by the lessor but contained no provision concerning excess insurance provided by the lessor. Under these circumstances, the Supreme Court construed the language of the two policies and found the lessor's insurance was primary to the extent of $100,000.00, the lessee's insurance provided the second layer of coverage to the extent of its policy limits, and the lessor's excess insurance would then become applicable.

Accordingly, in Insurance Company of North America, the Supreme Court restated the well established principle that

the language of respective policies will determine questions concerning layers of coverage. Furthermore, the Supreme Court specifically analyzed the policies in question in arriving at its decision.

In the present case at the trial level, the declaratory judgment action sought a determination of the liability of Allstate and Travelers to Fowler, a party injured through the use of a vehicle insured by Travelers and operated by a driver insured by Allstate. In that Enterprise and Morrison are jointly liable to Fowler,[2] a judgment could be entered against Enterprise and Morrison for which both Travelers and Allstate would be jointly liable. Under these circumstances, the trial court was called upon to determine the respective coverage liabilities of Allstate and Travelers in the event of a joint judgment. This it did not do.

Furthermore, the district court in its opinion in this case did not follow Insurance Company of North America and its contractual freedom language. Rather, the district court, as did the trial court, restricted the unqualified holding of Insurance Company of North America only to the situation where

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[2]The lessor/owner and lessee/driver are jointly and severally liable to an injured third party. The owner of a motor vehicle is liable for a negligent act of a permissive user of the vehicle under the dangerous instrumentality doctrine. Chase & Co., supra. Accordingly, the owner of a motor vehicle and the operator of the motor vehicle are joint tortfeasors and may be held jointly and severally liable.

the insureds are "in the same class" -- joint tortfeasors or both vicariously liable or the same insured. 9 F.L.W. at 1772. Even though the district court realized the correct rule of law from Insurance Company of North America when it stated that

> The Florida Supreme Court held that the parties were free to contract among themselves to determine priorities of coverage and ruled that policy language controlled,

9 F.L.W. at 1772, the district court ignored that clear rule because it somehow felt that "Florida case law in this question is confusing, at the very least." 9 F.L.W. at 1772. The district court then "analyzed" the Supreme Court's Insurance Company of North America opinion and concluded that in that case the dispute was between insurers whose insureds were both "apparently" vicariously liable only. 9 F.L.W. at 1772. On the basis of this "apparent" distinguishing factor, the First District, in contravention to its duty as expressed in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), declined to follow Insurance Company of North America's express holding and restricted it.

Interestingly, the district court based its actions on the Third District's opinion in Hartford v. Kellman, the case likewise relied upon by the trial court. Kellman, however, clearly is bad law because it too failed to follow this Court's decision in Insurance Company of North America.

In Kellman, the Third District was faced with the situation of deciding coverage among six insurance policies (three primary and three excess) all insuring the same tortfeasor individual. That individual, furthermore, had three legal identities of driver, lessee, and employee with which the district court had to contend. Of importance to this discussion is that the district court ignored the insurers' arguments that contract language controls and that a court should look at specific policy provisions -- such as "other insurance" and "excess" clauses -- in order to determine priority of payment. The Third District went on to note that it was "aware of" [375 So.2d at 30], the Supreme Court's holding in Insurance Company of North America that parties are free to contract between themselves to shift the burden of loss so long as the minimum financial responsibility law was met, but that

> We simply find it unnecessary as did the trial judge, to decide this appeal upon the particular provision of any policy.

375 So.2d at 30 (emphasis supplied). The Third District then enunciated its new law:

> We have not followed these arguments in this decision because we think that the order of responsibility is determinable through the basic principle that the driver is responsible first.

375 So.2d at 30. It was this language which ignores Insurance Company of North America's holding that the First District

seized upon in its opinion in the instant case.[3] The First District has thus continued this meandering away from the express language of the Supreme Court in Insurance Company of North America that contract language controls and has charted a new path that language in a contract of insurance need not be considered except in those instances where the insureds are within "the same class of responsibility." By so doing, the First District has injected into the law of this state unnecessary confusion in the determination of the allocation of risk among commercial enterprises in excess of the minimum financial responsibility limits. Insurers are thus put into a posture of confusion not knowing if a court will ever look at the express language in their policies that state how they relate to each other in just such situations as arose in Kellman and in the instant case. Outside the First and Third Districts, for example, apparently the district courts have been following Insurance Company of North America and have analyzed the policy provisions in each contract of insurance to see how they mesh to provide coverage in excess of the minimum

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[3]It is only in the context of Kellman, which created the concept of "classes" of insureds, that the question certified by the district court arises. Of course, it is Allstate's contention that the concept of "classes" of insureds contradicts the holding of Insurance Company of North America and is irrelevant. Accordingly, it is suggested that the certified question itself is meaningless in that it is based on improper law. The only appropriate response to this question is to clearly reaffirm the holding of Insurance Company of North America and all prior case law that the policy provisions of the respective policies of the insurers control.

financial responsibility level. See, e.g., Sentry Insurance Co. v. Aetna Insurance Co., 450 So.2d 1233 (Fla. 2d DCA 1983). Within those two districts, the situation is otherwise. Thus, insurers are bewildered as to when courts will uphold language agreed-upon with their insureds and when courts will ignore policy language completely and require insurers to provide coverage in excess of that which they contracted to provide for their insureds. Only by this Court reaffirming its holding in Insurance Company of North America and quashing the instant First District opinion as well as the offending language in Kellman will this confusion cease.

Insurance rates are based on sound actuarial principles. One of the most important of said principles is exposure to risk. Insurers in reliance upon this Court's holding in Insurance Company of North America have based their rate structure and charged their customers accordingly. To adopt the holding and reasoning of the First District would result in a change in exposure and would necessitate a revision in rates. Insureds who paid premiums based on current rate structures would not be treated fairly. The shifting of exposure mandated by the district court's opinion would result in some insureds being overcharged and some insureds being undercharged. If Florida is going to adopt a public policy that a driver's policy is always primary, regardless of policy terms, this should be done by the Legislature on a prospective basis and not in mid-stream by court decision.

II. THE DISTRICT COURT ERRED BY NOT RULING AS A MATTER OF LAW THAT ALLSTATE'S POLICY IS SECONDARY TO TRAVELERS' EXCESS POLICY BASED ON THE RESPECTIVE POLICY LANGUAGE.

The proceeding in the trial court below was not an indemnification action but rather an action for declaratory judgment to determine the rights and responsibilities of Travelers and Allstate vis-a-vis the injured plaintiff, Allen Fowler. It is in that context that Allstate stated to the trial court and reiterated to the district court that due to the viability of the dangerous instrumentality doctrine in Florida, the lessor/owner and lessee/driver of a rented motor vehicle are jointly and severally liable in tort to an injured third party (Fowler). Black-letter law states that "in one action against them the plaintiff may take a judgment against some of the defendants or all of them." Anderson v. Crawford, 149 So. 656, 657 (Fla. 1933).

Accordingly, in that both Travelers' insured, Enterprise, and Allstate's insured, Morrison, were jointly and severally liable to the plaintiff, the declaratory judgment action sought an interpretation of the respective coverages of the relevant insurance policies, all of which were available to pay a judgment. Under these circumstances, as mandated by the Supreme Court in Insurance Company of North America, the respective liability of the insurance carriers is governed by

the provisions contained within their policies. The district court thus erred by not ruling as a matter of law that Allstate's policy is secondary to Travelers' excess policy.

There is no disagreement among the parties that the Travelers Business Automobile Policy provided $10,000 of insurance coverage to Enterprise to cover the subject rental vehicle as well as permissive users of said vehicle. There is no disagreement that said Business Automobile Policy stated that for any covered auto Enterprise owned, this policy would provide primary insurance. There is no disagreement that the Business Automobile Policy was, in fact, found to provide primary coverage up to its $10,000.00 limits, which satisfied the minimum limits of the financial responsibility law. There is no disagreement that this ruling was not appealed.

There is also no disagreement that the Travelers Excess Liability Policy provided a $500,000 limit of liability covering the subject rental motor vehicle. That policy, furthermore, does not contain <u>any</u> provision stating that it is excess over insurance provided by any other carrier. It does contain, however, a provision stating that it shall follow the underlying Travelers Business Automobile Policy "in all respects." Lastly, it states, in Endorsement 8000(3), that the insured is Enterprise and partners and executive officers of the insured. While Endorsement 8000(3) may be relevant in a later indemnification action between insurers, it is irrelevant <u>vis-a-vis</u> the injured plaintiff in the primary action below.

The Allstate policy provided coverage to the driver of the non-owned automobile used with the permission of the owner. It states, in language so unambiguous as to be capable of only one meaning, "our liability insurance will be excess over other collectible insurance."

The critical question for the district court, then, was whether the Travelers Excess Liability Policy was collectible insurance. The answer, of course, is yes. Even a simple example would bear out this point. If the injured plaintiff received a $500,000 judgment against all tortfeasors, he could collect the total amount solely from Travelers, on the basis of the underlying Business Policy because of its explicit terms and on the basis of the Excess Policy because of the dangerous instrumentality doctrine that the owner of an automobile "is liable for the negligent operation of it no matter where the driver goes, stops, or starts." Chase & Company v. Benefield, 64 So.2d 922, 924 (Fla. 1953). There is no disagreement that the owner (Enterprise) is covered under the Excess Policy because that is what Endorsement 8000(3) clearly states. Therefore, the injured plaintiff could recover the full $500,000 solely from Travelers on the basis of its two policies. Since "collectibility at the time of the accident is what was meant by the policy provision in question," State Farm Mutual Insurance Company v. Vines, 193 So.2d 180, 182 (Fla. 1st DCA 1966), [See also Spurgeon v. State Farm Mutual Insurance

Company, 169 So.2d 343 (Fla. 1st DCA 1964)], the Travelers insurance is undeniably "other collectible insurance." Therefore, since the Allstate policy specifically provides that it is "excess over other collectible insurance," and since the Travelers insurance is other collectible insurance, the Allstate provision is effective. Moreover, since the Travelers Business Automobile Policy states that it is primary and since the Travelers Excess Liability Policy is wholly silent as to whether it is excess [except as to the Travelers primary policy], the only conclusion is that the Allstate policy was, in fact, excess over the two Travelers' policies as all three stood vis-a-vis the injured plaintiff. By not so ruling as a matter of law, the district erred in its opinion below.

III. THE OPINION OF THE DISTRICT COURT CONFLICTS WITH THE CORRECT RULE OF LAW FOLLOWED IN SENTRY INSURANCE COMPANY V. AETNA INSURANCE CO., 450 So.2d 1233 (Fla. 2d DCA 1984).

The opinion of the First District explicitly recognized apparent conflict between it and the opinion of the Second District in Sentry. The First Disrict court expressly noted that Sentry discussed Hartford v. Kellman and then declined to follow Kellman. The First District very tellingly stated that the Sentry court, unlike itself, relied upon the Supreme Court's holding in Insurance Company of North America and had instructed its lower court, again unlike itself, to decide the coverage question before it by analyzing provisions in the respective insurance policies at issue. Notwithstanding that the Sentry court relied upon the Supreme Court precedent of Insurance Company of North America, the First District concluded that the Sentry opinion missed the controlling rule of law.

Sentry discloses a good example of the state of confusion that this area of the law is in at the trial court level because of Kellman and its progeny such as the case below, that have declined to follow the rule of law announced

by the Supreme Court in Insurance Company of North America.[4] A reading of Sentry shows that the insurers in that case argued to the trial court that each was entitled to a judgment as a matter of law on the basis of the Kellman "rule" of responsibility on the basis of the carrier's insured's status or class. In Sentry, Aetna claimed that its policy was an owner's policy and thus last in terms of priority while Sentry claimed that Aetna's policy was in reality a driver's policy since it covered the tortfeasor as an additional insured. Sentry further claimed that its own policy was solely an employer's policy. Each insurer argued to the trial court that Kellman controlled and mandated judgment in its own behalf. Apparently, the trial court granted a summary final judgment in favor of Aetna based upon that court's interpretation of Kellman. The Second District wisely realized the shortcomings of the Kellman rule and remanded the cause back to the trial court to follow Insurance Company of North America instead.

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[4]The Sentry trial court granted summary final judgment in favor of Aetna, apparently finding that Aetna's policy was an owner's policy and not, as argued by Sentry, a driver's policy, while finding at the same time that Sentry's own policy was an employer's policy. The First District in the instant case under review gratuitously offered its opinion that it appeared to it, if it were sitting as the Sentry trial court, that based upon the allegation that Aetna's policy insured the driver while Sentry insured only the employer, that Sentry should have been grantd summary judgment. 9 F.L.W. at 1773. The Sentry appellate court wisely ignored this question of which "class" or "status" followed which, by its own following of Insurance Company of North America and its rule that contract language controls.

The Sentry court declined to follow Kellman for three reasons. First, it stated that Kellman's language relative to classes of priority was dictum under the facts of that case. Second, it stated that Kellman was distinguishable on its facts. Third, and of importance to this discussion, it stated that it historically has examined "other insurance" clauses and other policy provisions in the various policies and has "given them full force and effect wherever possible." 450 So.2d at 1233. Furthermore:

> In cases where more than one insurer's policy provides coverage for a loss, it is appropriate to review the insurance contracts to see if the documents address the "ranking" or contribution of other insurers. See Insurance Company of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977). There are three principal kinds of so-called "other insurance" clauses: (1) pro rata or proportionate recovery clause; (2) excess insurance clause; (3) escape or no liability clause. Auto-Owners, supra at 822. If applicable "other insurance" clauses are contained in the contracts and the contracts otherwise satisfy the requirements of law, we believe that the priorities among the insurers should be decided by reference to the provisions in the respective policies. See Insurance Company of North America; Auto-Owners.

450 So.2d at 1236 (emphasis supplied).

On the basis that the First District opinion below ignores policy provisions and analyzed "classes of responsibility" instead, the opinion below directly conflicts with the Sentry opinion and Sentry's following of the Supreme Court rule as enunciated in Insurance Company of North America.

IV. THE OPINION OF THE DISTRICT COURT CONFLICTS WITH THE CORRECT RULE OF LAW FOLLOWED IN AETNA CASUALTY & SURETY COMPANY V. MARKET INSURANCE COMPANY, 296 So.2d 555 (Fla. 3d DCA 1974).

The opinion of the First District is in conflict with the opinion of the Third District in Market Insurance Company, [Appendix E] a case apparently ignored by the trial court as well as the First District. Said case, however, is on all fours with the present case.

In Market Insurance Company, plaintiff, Norman, was a pedestrian injured by a motor vehicle rented from National Car Rentals [similar to Enterprise in our case] and driven by defendant Judith Morse [similar to Morrison in our case]. National Car Rentals was insured with Market Insurance Company [similar to Travelers in our case]. Mrs. Morse [similar to Morrison in our case] was insured by Aetna Casualty & Surety Company [similar to Allstate in our case]. National Car Rentals was self-insured for $25,000 [in lieu of our case's Travelers Business Automobile Policy] and was insured by Market [Travelers] pursuant to an excess liability policy in the sum of $975,000. According to the opinion, "Market's [Travelers'] policy did not contain an 'other insurance' clause." 296 So.2d at 557. Aetna's [Allstate's] policy covered Mrs. Morse [Morrison] while she was operating a non-owned vehicle. This policy contained an "other insurance" clause that provided that

Aetna's [Allstate's] coverage for a non-owned vehicle would be excess insurance "over any other valid and collectible insurance." 296 So.2d at 557. The trial court found that National Car Rentals' $25,000 self-insurance [the Travelers Business Automobile Policy] was not other valid and collectible insurance; that Aetna [Allstate] should pay the first $25,000 on behalf of the defendant driver Morse [Morrison]; and that Aetna [Allstate] and Market [Travelers] are co-excess after the initial $25,000 and provide coverage on a prorata basis. The district court disagreed and reversed.

First, the Third District found that National assumed primary coverage up to $25,000 [the Travelers Business Automobile Policy]. Second, it found that Aetna's [Allstate's] policy explicitly provided that its coverage would be excess insurance over any other valid and collectible insurance. On the other hand, it found that the Market [Travelers] excess policy contained no "excess coverage" provision but was wholly silent. The court then stated:

> We find that National's $25,000 self-insurance [the Travelers Business Automobile Policy] and Market's [Traveler's] excess insurance constitute other valid and collectible insurance and in the absence of an excess insurance provision in Market's [Travelers'] policy with National Car Rental [Enterprise Leasing], Aetna's [Allstate's] policy did not come into play as the limit of Market's [Travelers'] coverage ($975,000) [$500,000] in the instant case was not exhausted.

296 So.2d at 358 (emphasis supplied). This case is directly on point with the facts of our case on appeal and mandate a quashing of

the First District's opinion. As per the requirement of Insurance Company of North America, one looks to the policies involved to determine how the parties contracted to bear the burden of loss. In Market Insurance Company as in the present case, there were two excess policies, only one of which contained an "other collectible insurance" clause. The holding in Market Insurance Company was that the excess policy silent on the "other collectible" clause was first-level excess and the policy stating that it was excess over other collectible insurance was second-level excess and only came into play when the first-level excess coverage was exhausted. The trial court below as well as the district court erred in not holding in our case that the Travelers excess policy, silent as to "other collectible" insurance, was first-level excess and that the Allstate policy, with a specific provision stating that it was excess over other collectible insurance, was second-level excess and only came into play when the Travelers excess policy was exhausted. By not so holding, the First District's opinion below is in direct conflict with the opinion in Market Insurance Company, since on the same set of facts it came to an opposite conclusion.

V. THE DISTRICT COURT ERRED BY ORDERING REMAND FOR PLEADINGS AND PROOF ON AN ISSUE NOT RAISED BY THE PARTIES AND NOT NECESSARY TO THE DISPOSITION OF THIS CASE.

The district court reversed the granting of a final judgment in favor of Travelers and remanded with instructions that Enterprise and Travelers be allowed to amend the pleadings and give proof on the question of vicarious liability and indemnity. However, no parties raised this issue, and, furthermore, this issue is not necessary to the disposition of this case. The First District has erred by mandating otherwise.

This case involves an appeal from the granting of a summary final judgment entered in favor of Travelers in a declaratory judgment action that had sought a determination of coverage rights and obligations of Allstate and Travelers vis-a-vis Morrison, Enterprise, and Fowler. As the trial court as well as the First District was apprised, the action below <u>was</u> a determination of the priority of insurance coverages of Allstate and Travelers in relation to the plaintiff, Allen L. Fowler. The action below was <u>not</u> an action in indemnity[5]

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[5]The out-of-state cases cited by the district court in its opinion are all distinguishable precisely because that court has confused and blended a coverage action vis-a-vis a plaintiff with a later indemnity action solely between

whereby Travelers, as the insurer of the owner of the leased vehicle [Enterprise], was seeking indemnity from Allstate, the insurer of the driver of the leased vehicle. As the record shows, and as the district court itself noted in its opinion, "Enterprise's complaint did not plead its right to indemnity." [9 F.L.W. at 1773]. The underlying declaratory judgment action simply could not be considered to be a claim for indemnity by Travelers against Allstate since Travelers did not ask for such relief. Certainly, the district court should not grant on appeal a remedy not asked for in the trial court below, a remedy never sought by Travelers in any pleading filed in any court below, and a remedy that Travelers itself has stated, in

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insurers. The opinion quotes from Pacific Employers Insurance Co. v. Hartford Accident & Indemnity Co., 228 F.2d 365 (9th Cir. 1955), for the proposition that an insurer whose insured is only vicariously liable has a right of recovery against an insurer whose insured is primarily liable. In Pacific, it is noteworthy, the action was one for indemnity after the injured plaintiff settled with the defendants, a fact of significant distinction with the instant pre-settlement action. In Dairyland Insurance Co. v. Concrete Products Co., 203 N.W.2d 558 (Iowa 1973), the action was one for indemnity. In Maryland Casualty Co. v. New Jersey Manufacturers (Casualty) Insurance Co., 137 A.2d 577 (N.J. App. 1958), one insurer sued the other for indemnity after the settling of the plaintiff's main claim. And, in United States Fire Insurance Co. v. National Union Fire Insurance Co., 165 Cal. Rptr. 726 (Cal. App. 1980), the two insurers likewise were in a contribution/indemnity posture following settlement of the injured plaintiff's claims. All the cited cases, then, are distinguishable since the instant action is not, and was not, an indemnity action, either by the express pleadings filed in this cause or by the implied actions of the parties as tried before the lower court.

its Reply to Allstate's Motion for Rehearing or Clarification filed with the district court, should not be required since it was not raised. Clearly, no party to this action concurs in the district court's requirement that the parties plead anew and then take evidence on the indemnity issue. The reason, of course, why such pleading was mandated by the district court is that court's belief that pleading and proof on this issue are necessary in order to determine if Enterprise and Morrison belong "in the same class" under its theory as put forth in the opinion below. But forcing the parties to plead and then try new issues which were not raised in the trial court solely in an attempt to achieve closure under a novel theory goes beyond the district court's discretion. While Allstate realizes that circuity of action should be avoided, it would be inequitable and beyond the district court's discretion to mandate that issues not raised by the pleadings and not sought by the parties be injected into the action below. Certainly, if both Allstate and Travelers -- for reasons such as each's theory of the case, litigation strategy, wishes of the "home office," local practice, costs, whatever -- seek to litigate their respective rights to Fowler with the determination of whether Allstate owes a duty to indemnify Travelers as a non-issue, the parties should be allowed to do so. Again, the action below was solely a declaratory judgment action in relation to Fowler; whether a later indemnity action is filed between the insurers,

if at all, will be determined by the insurance parties at some future time. To force the insurers to litigate an indemnity action between themselves at the present time against their wishes, as the district court has ordered, is error.

VI. THE DISTRICT COURT ERRED IN APPLYING THE METHODOLOGY SET FORTH IN ITS OPINION TO THE FACTS OF THIS CASE.

Throughout this case, Allstate has argued that the provisions of the respective policies of Allstate and Travelers govern the liability of these insurers to satisfy a judgment obtained by the injured plaintiff, Allen Fowler. Allstate has argued that it is well-established Supreme Court law, pursuant to Insurance Company of North America, that once the public policy of this state has been satisfied in that the minimum requirements of the financial responsibility law have been met, parties are free to contract between themselves with respect to the allocation of risk. Accordingly, Allstate has argued, in order to discern which insurer has contracted for what risk, it is necessary to examine the contracts of insurance provided by the insurers to determine the agreed-upon allocation of risk among these commercial enterprises.

By its opinion in this case, however, the district court has established a new procedure for resolving coverage disputes among insurers whereby the court has distinguished "classes" of defendants. Pursuant to the First District's opinion, the insurer of defendants who are merely vicariously liable is held to be secondarily liable as to coverage

regardless of policy provisions in its contract and that of the other insurers. While Allstate contends that this is error, as argued above, even if the First District's theory is accepted, the First District has incorrectly applied its new methodology to the facts of this case. Accordingly, the opinion of the district court should be quashed.

The First District's opinion states that insurance policy terms apply only where the insureds are "in the same class" or are joint tortfeasors:

> If, however, Enterprise was in any way negligent, it would be a joint tortfeasor and "in the same class" with Morrison, and policy terms would control.

9 F.L.W. at 1772 (emphasis supplied).

> [INA v. Avis] is not explicit as to whether contract terms apply only where insureds are "in the same class" (i.e., joint tortfeasors or both vicariously liable or the same insured), but we believe it should be properly so restricted.

9 F.L.W. at 1772 (emphasis supplied).

> [I]n such a case Enterprise and Morrison would be joint tortfeasors as to Fowler and in the same class and the terms of the policies would control under the rationale of INA v. Avis, supra.

9 F.L.W. at 1773 (emphasis supplied). As noted in the last-cited quotation from the district court's opinion, if Enterprise, the motor vehicle owner, and Morrison, the permissive driver, were joint tortfeasors as to Fowler, they

would be "in the same class" and policy terms would control according to the district court's theory. The district court, however, stated that the record did not show that Enterprise and Morrison were joint tortfeasors, and remanded for pleadings and proof on this point.

The district court, though, clearly overlooked well-settled law in the First District that

> the owner and the negligent operator bear the relationship of joint tort-feasors to the injured plaintiff under the principle of imputed negligence.

Gerardi v. Carlisle, 232 So.2d 36, 42 (Fla. 1st DCA 1969). The district court thus overlooked the fact that, as a matter of law, Enterprise and Morrison were joint tortfeasors as to Fowler.

In Gerardi, an injured plaintiff sued a motor vehicle owner for injuries due to the negligent operation of the vehicle by a permissive driver. The plaintiff secured a judgment in his favor and then sued the driver for the same cause of action. The district court discussed at length the argument raised by the driver that the owner and operator of a vehicle that injures a plaintiff do not fall within the legal category of joint tortfeasors. The First District stated that it disagreed with that contention. 232 So.2d at 40. That court reasoned that since the negligence of a motor vehicle

operator is imputed to the owner under respondeat superior, and the tortious act of the operator became the tortious act of the owner, then

> each is a joint tort-feasor and is jointly and severally liable to the injured person.

232 So.2d at 41.

The Gerardi opinion is yet even more instructive in its delineation of the relationship of the defendants to the injured plaintiff as well as the relationship of the defendants to each other. The Gerardi court held that in a suit to recover damages by a plaintiff, the owner and negligent operator bear the relationship of joint tortfeasors to the injured plaintiff. In any later suit that may or may not be brought by an owner against the driver for indemnity, the parties bear to each other the relationship of principal and agent, and indemnity is not foreclosed by the previous finding of a joint tortfeasor relationship vis-a-vis the injured plaintiff. 232 So.2d at 42.

The relationship between co-defendants and their insurers and the injured plaintiff as set forth in Gerardi is exactly the situation brought before the court below in the declaratory judgment action and on appeal to the district court: the relationship of the owner [Enterprise] and its insurer [Travelers], and the driver [Morrison] and her insurer [Allstate], to the injured plaintiff. In this framework, it is

beyond peradventure that Gerardi[6] controls: both Travelers' insured and Allstate's insured are joint tortfeasors and jointly and severally liable to the injured plaintiff as a matter of law. This being so, the district court's opinion should have ended rather quickly and to the effect that since, under its own reasoning, contract terms apply where insureds are in the same class or are joint tortfeasors, and since according to Gerardi the owner and driver are joint tortfeasors and in the same class, then contract terms would apply in the case sub judice. The district court should then have analyzed the respective contracts of insurance to see if there was any language in them as to how each relates to the other. The court would then have found that the Travelers excess policy is silent as to other insurance while the Allstate policy unambiguously stated that it was excess over other collectible

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[6]Gerardi is good law in the First District. In Stembler v. Smith, 242 So.2d 472 (Fla. 1st DCA 1970), the court "declined to swing the ax of appellants' logic to the long established rule of law in this State." 242 So.2d at 473. It cited Gerardi with approval, as well as its holding that "both the driver and the owner are joint tort-feasors." Id. In Gordon v. Phoenix Insurance Company, 242 So.2d 485 (Fla. 1st DCA 1970), the court stated, applying Gerardi, that an owner and a driver "are held as a matter of law to be joint tort-feasors." 242 So.2d at 490. In Thompson v. Haynes, 249 So.2d 69 (Fla. 1st DCA 1971), Gerardi is cited with approval for the proposition that an automobile owner and driver were joint tortfeasors. And, in Phillips v. Hall, 297 So.2d 136 (Fla. 1st DCA 1974), Gerardi is extensively discussed and restricted to situations where the owner or master is either an active tortfeasor or "the owner of a dangerous instrumentality through which a tort is committed by a servant to whom the master has entrusted its operation." 297 So.2d at 136. Said restriction does not distinguish Gerardi from the instant set of facts.

insurance. The district court should then have held, as a matter of law, that the Allstate policy was secondary in coverage to the Travelers excess policy.

While Allstate contends strongly that the district court erred in its analysis of the proper method for resolving coverage issues among insurers, the district court compounded its error by incorrectly applying its own "new" methodology to the facts of this case. For this additional reason, the opinion of the district court should be quashed.

CONCLUSION

Allstate respectfully requests this Court to follow the holding of Insurance Company of North America and interpret the provisions contained within the policies of Travelers and Allstate. Analyzing said policies, this Court will find, as a matter of law, as the trial court and the district court should have found, that Allstate's policy is excess over any "collectible insurance" while the Travelers policies either explicitly state they are primary or are silent with respect to "other insurance." Accordingly, this Court should hold that Allstate's coverage is excess over that provided by both Travelers policies.

The opinion of the district court should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to William S. Burns, Esquire, 400 Southeast Bank Bldg., Jacksonville, Florida 32202; Henry Clay Mitchell, Esquire, P.O. Box 12308, Pensacola, Florida 32581; Albin C. Thompson, Esquire, P.O. Box 711, Fernandina Beach, Florida 32034; and S. Thompson Tygart, Jr., Esquire, 609 Barnett Regency Tower, Jacksonville, Florida 32211, by U.S. Mail this 30 day of October, 1984.

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