IN THE SUPREME COURT OF FLORIDA

CASE NOS: 67,368 & 67,409

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING, INC., et al.,

Respondents.

COMMERCIAL UNION INSURANCE CO., et al.,

Petitioners,

vs.

EXECUTIVE CAR & TRUCK LEASING, INC., et al.,

Respondents.

---/

RESPONDENTS EXECUTIVE CAR & TRUCK LEASING, INC. AND INDUSTRIAL INDEMNITY INSURANCE COMPANY'S ANSWER BRIEF ON THE MERITS TO THE BRIEFS OF PETITIONERS COMMERCIAL UNION INSURANCE COMPANY, ACTION BOLT & TOOL AND ALLSTATE INSURANCE COMPANY, AND THE ESTATE OF ROBERT D. MENDELSOHN

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PRELIMINARY STATEMENT

Commercial Union Insurance Company and Action Bolt and Tool Company are the Petitioners and are referred to herein as Commercial and Action except that their joint Brief is referred to as Commercial's Initial Brief.

Allstate Insurance Company and the Estate of Robert D. Mendelsohn are also Petitioners and are referred to herein as Allstate and Mendelsohn, except that their joint Initial Brief is referred to as Allstate's Initial Brief.

Executive Car & Truck Leasing, Inc., Industrial Indemnity Insurance Company, and Alberta Deserio are the Respondents and are referred to herein as Executive, Industrial and Deserio, respectively.

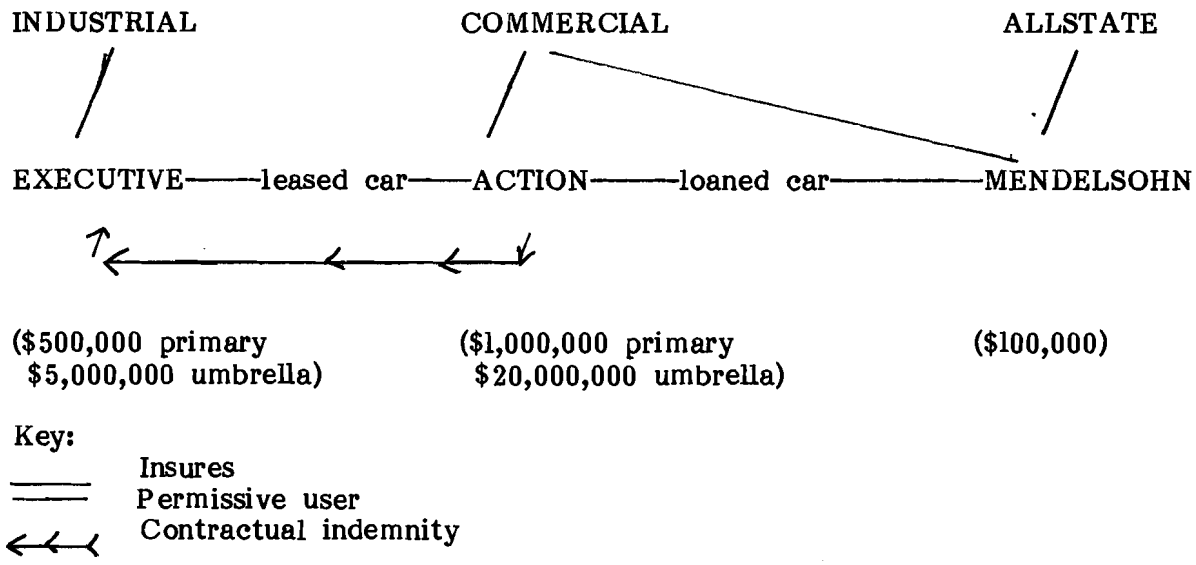
The following symbols will be used:

"A" - Respondent Executive and Industrial's Appendix.

"R" - Record on Appeal.

STATEMENT OF THE CASE AND THE FACTS

Executive and Industrial would adopt and incorporate herein the Statement of the Case and the Facts from Allstate's Initial Brief but would state in addition thereto, that Commercial insured the negligent driver, Mendelsohn, up to its limits of $21,000,000, as admitted in Commercial's Initial Brief. Also, in hopes of assisting the Court's understanding of the parties and facts involved in this appeal, Industrial and Executive contends that the following diagram more accurately reflects the situation than that submitted in Allstate's Brief:



SUMMARY OF ARGUMENT

The Fourth District Court of Appeal was correct in holding that Industrial, the insurer of the vicariously liable owner, does not have to pay until the exhaustion of the limits of Commercial ($21,000,000) and Allstate ($100,000) of the actively negligent driver, Mendelsohn. This is due to the fact that Industrial is entitled to common law indemnity from Commercial and Allstate because it does not insure Mendelsohn as an additional insured under the policy and because Executive, its insured, is only vicariously liable based upon the Dangerous Instrumentality Doctrine, pursuant to this Court's pronouncements in Allstate Insurance Company v. Fowler, 10 F.L.W. 610 (Fla. November 27, 1985), Maryland Casualty Company v. Reliance Insurance Company, 478 So.2d, 1068 (1985) and Metropolitan Property and Life Insurance Company v. Chicago Insurance Company, 479 So.2d 114 (Fla. 1985).

In addition, the Fourth District Court of Appeal correctly decided that because the parties Executive and Action have contracted in the lease agreement that Executive is entitled to be indemnified by Action of all liability claims are asserted against it by reason of negligent use or operation of the motor vehicle, then Industrial is entitled to contractual indemnity as well.

ARGUMENT

I

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN DETERMINING THAT FOLLOWING THE $10,000.00 PRIMARY COVERAGE REQUIRED BY STATUTE, INDUSTRIAL, THE INSURER OF THE VICARIOUSLY LIABLE OWNER, EXECUTIVE, DOES NOT HAVE TO PAY UNTIL THE EXHAUSTION OF THE COVERAGE OF THE INSURERS, COMMERCIAL AND ALLSTATE, OF THE ACTIVELY NEGLIGENT DRIVER, MENDELSOHN.

The Fourth District Court of Appeal in the underlying case has accurately and succinctly summarized this case as being a matter involving the "order of responsibility for payment upon multiple liability insurers in a suit for personal injuries arising out of an automobile accident", among the following entities:

> "(1) Executive Car and Truck Leasing, Inc., (Executive), owner and lessor of the motor vehicle in question, insured by Industrial Indemnity Insurance Company (Industrial) with a policy for $500,000 underlying coverage and $5,000,000 umbrella coverage;
>
> (2) Action Bolt and Tool Company (Action), lessee of the motor vehicle in question, insured by Commercial Union Insurance Company (Commercial) with a policy for $1,000,000 underlying coverage and $20,000,000 umbrella coverage; and
>
> (3) Mendelsohn, the permissive user and driver of the subject vehicle, insured by Allstate Insurance Company (Allstate) with primary coverage in the amount of $100,000." Executive Car & Truck Leasing vs. Deserio, 470 So.2d 21, at 22 (4th DCA, 1985).

In addition, Commercial has admitted in its Initial Brief that its policy of insurance with $1,000,000 underlying coverage and $20,000,000 umbrella coverage provides coverage as an additional insured to Mendelsohn, the permissive user and negligent driver of the subject vehicle (see Commercial's Initial Brief pages 4, 5, 12, 20, 22, and 26).

This Court has recently decided the cases of Allstate Insurance Company vs. Fowler, 10 F.L.W. 610 (Fla. November 27, 1985), Maryland Casualty Company vs. Reliance Insurance Company, 478 So. 2d 1068 (Fla. 1985) and Metropolitan Property and Life Insurance Company vs. Chicago Insurance Company, 479 So.2d 114 (Fla. 1985). These

cases, together with INA vs. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977) set forth the controlling rules of law which apply to the instant case.

In Fowler, this Court held that where the negligent driver was the permissive user but not the owner of the vehicle, the first or primary layer of coverage is the responsibility of the owner, unless a leased vehicle is involved and the lease properly shifts the coverage pursuant to the requirements of Florida Statute, Section 627.7263:

> "If the active tortfeasor does not own the vehicle that he was negligently operating, the first layer of coverage must come from the insurer of the owner of the vehicle, the only exception being when a lease situation exists and the lessor has properly shifted the burden of primary insurance coverage to the lessee pursuant to Section 627.7263, Florida Statutes (1981). This result is mandated by the financial responsibility laws of this state as outlined in sections 324.151(1)(a) and 324.021(7), Florida Statutes (1981). These statutes require that an owner of a motor vehicle in the state of Florida establish proof of ability to respond to damages to the extent of $10,000 per person for one accident and that any liability policy issued to an owner of a motor vehicle provide a minimum of $10,000 as above described. Thus, the primary insurer of the owner of the motor vehicle is primarily responsible for damages required by the financial responsibility law. Further, this liabillity for primary coverage cannot be avoided by a private contract. Roth v. Old Republic Insurance Co., 269 So.2d 3 (Fla. 1972)." Fowler, at 611.

Nevertheless, this Court held in Maryland Casualty Co., that the clear language and intent of the Statute limits this primary responsibility to the amount of $10,000.00:

> "The last sentence of subsection (1) of section 627.7263, Florida Statutes (1981), is determinative of the issue before us. It provides as follows:
>
> > Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.
>
> Words in a statute should be given their plain and ordinary meaning. Graham v. State, 362 So.2d 924 (Fla. 1978). The last sentence of subsection (1) of section 627.7263 states that the lessor's insurance is primary for the limits of liability and personal injury protection as required by ss. 324.021 (7) and 627.736 (emphasis supplied). These sections require liability coverage of $10,000. Therefore, the plain meaning of section 627.7263 requires us to find that Reliance's insurance policy only provides coverage for the first $10,000.00 regardless of the amount of the policy issued by Reliance to the lessor. In further support of Reliance's position, we note that the legislature could have omitted the last sentence of subsection (1) had it intended for the lessor to automatically provide primary coveage up to the full extent of its policy." Maryland Casualty Co., at 1070.

To determine the second level of coverage this Court held in Fowler that the insurer of a vicariously liable owner is entitled to be indemnified by the insurer(s) of an actively negligent driver regardless of the policy language in the "other insurance" clauses of the driver's policy or policies. In order to be entitled to indemnity, and to thus pay only after the exhaustion of the driver's coverage, the insurer of the vicariously liable owner must not insure the actively negligent driver as an additional insured nor can the owner be a joint tortfeasor:

> "As far as the second layer of coverage is concerned, we hold that an insurer of a party who is only vicariously liable and entitled to indemnity is entitled to follow the insurer of the actively negligenty (sic) party despite the fact that the insurance policy issued to the active tortfeasor contains an "other insurance" clause. By so holding, we follow the approach of other jurisdictions in finding that where an insurer provides extended coverage to a party who is only vicariously liable, that insurer's liability is subsequent to an insurer who provides insurance to a party who is primarily liable. Pacific Employers Insurance Co. v. Hartford Accident and Indemnity Co., 228 F.2d 365, 371 (9th Cir), cert. denied, 352 U.S. 826 (1955); Dairyland Products Co. (sic), 203 N. W. 2d 558, 564-65 (Iowa 1973).
>
> This Court has traditionally recognized the freedom of parties to contract and the right to enforce the contract in accordance with language therein. Therefore, we emphasize the narrow range of situations in which a court may disregard specific language contained in an insurance policy. An "other insurance" clause in an insurance policy will only be disregarded if the insurer of the vicariously liable party is also entitled to indemnity. A right of indemnity does not exist if the insurer of the vicariously liable party insures the actively negligent as an additional insured because an insurance company cannot sue its own insured for indemnity. Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976). Further, the insurer of the vicariously liable party is not entitled to indemnity if the vicariously liable party is a joint tortfeasor because there can be no indemnity between joint tortfeasors. Houdaille Industries, Inc. v. Edwards, 374 So.2d 490, 493 (Fla. 1979). Thus, an "other insurance" clause in an insurance policy will only be disregarded if two conditions exist. First, the insurance policy issued to the vicariously liable party must not cover the active tortfeasor as an additional insured. Second, the vicariously liable party must not be a joint tortfeasor." Fowler, at 611.

In order to determine whether the insurer of the vicariously liable owner covers the actively negligent driver as an additional insured, this Court must look to the policy language. For example, in Maryland Casualty Co., the policy contained an "escape clause"

excluding coverage for the negligent driver, and this Court said:

> "This policy contains a classic "escape clause." We will give full effect to this "escape clause" and find that the Reliance policy does not cover the active tortfeasor. See Auto Owners Insurance Co. v. Palm Beach County, 157 So.2d 820 (Fla. 2d DCA 1963)."

Therefore, the owner's insurer (where the owner was not in any way actively negligent) was entitled to indemnity from the tortfeasor's insurer.

This Court has also held in Fowler, Maryland Casualty Co., and Metropolitan Property and Life Ins. Co., that where the vicariously liable owner's insurer does cover the active tortfeasor as an additional insured, indemnity will not lie, and the respective responsibility for coverage between the insurers is governed by the policy's language:

> "However, Chicago is not entitled to indemnity from Metropolitan because Chicago's policy covers the active tortfeasor, Trueman, as an additional insured. As noted earlier, we will not allow an insurance company (Chicago) to sue its own insured (Trueman) for indemnity.
>
> Policy language will control all situations in which the right to indemnity does not lie. Thus, we must now examine the policy language." Metropolitan Property and Life Ins. Co., at 116.

However, when one of the insurers covers the negligent driver on a primary basis and the other insurer covers the driver as an additional insured but on an excess basis, then the clauses will be given effect, and the excess insurer pays subsequent to the exhaustion of the primary insurer's limits:

> "Chicago's policy provides that its coverage shall be excess to that of any other insurance policy issued to the insured. Metropolitan issued a primary insurance policy to Trueman. These provisions mesh perfectly to require that the policy issued by Metropolitan be exhausted before the policy issued by Chicago can be reached". Metropolitan Property and Life Ins. Co., at 116.

Applying the aforesaid authority to the instant case, the Fourth District correctly determined that the first level of coverage is provided by Industrial up to the amount of $10,000.00 due to the lease's failure to comply with Florida Statute 627.7263. This matter is not now disputed by any of the parties.

To determine the second level of coverage in the manner required by the aforesaid authority, the Court must decide if Industrial, as insurer of the vicariously liable owner, is entitled to indemnity from Allstate, the insurer of the negligent driver, and Commercial Union, the insurer of both the lessee, Action, and the negligent driver, Mendelsohn.

Both Commercial and Allstate concede that they insure Mendelsohn (see Commerical's Initial Brief pages 4, 5, 12, 20, 22 and 26, and Allstate' Initial Brief). It is undisputed that Executive is not a joint tortfeasor and Executive's only liability is that of a vicariously liable owner. Therefore, the question of whether Industrial as Executive's insurer is entitled to common law indemnity against Commercial and Allstate rests with a determination of whether Mendelsohn was an additional insured under Industrial's policy. In Allstate's Initial Brief it concedes that Mendelsohn was not insured by Industrial and that the Fourth District Court's determination of the priority of coverage in regards to Industrial is correct (Allstate's Brief, page 13). Commercial contends in its Initial Brief that Industrial does cover Mendelsohn as an additional insured (see Commercial's Initial Brief pages 4 and 5). This claim by Commercial ignores the language in the Industrial policy which clearly restricts coverage to the owner Executive and excludes coverage for a lessee or a permissive user of a lessee.

The Industrial policy contains the following endorsement:

"LEASING OR RENTAL CONCERNS-EXCLUSION
OF CERTAIN LEASED AUTOS

***

> B. LIABILITY INSURANCE and any required no-fault insurance provided by the policy for a covered auto which is a leased auto is changed by adding the following exclusion:
>
> This insurance does not apply to:
>
> Bodily injury or property damage resulting from the acts or omissions of the lessee, his employees or agents or any person operating the auto with the permission of any of these. "Industrial policy (R231-309), Endorsement, CA 20 11 (A-1).

In addition to the above endorsement, the Industrial policy contains the following endorsement which prevents a lessee or permissive user from being an insured under the policy when the lease requires the lessee to provide coverage to the owner:

"LEASING OR RENTAL CONCERNS-SECOND LEVEL COVERAGE

***

Limit of Liability

$500,000 Each Accident

The limit of liability shown in this endorsement replaces the limit of liability shown elsewhere in the policy or in any leasing agreement of one year or more which requries a lessee to provide primary insurance for you, subject to the following provisions:

A. For the difference between the limit of liability shown in this endorsement and the limit of liability shown in any leasing agreement of one year or more which requires a lessee to provide primary inurance for you, WHO IS INSURED applies except that none of the following is an insured:

1. The lessee;
2. Any employee or agent of the lessee;
3. Any person operating an auto with the permission of any of the above.

B. For the difference between the limit of liability shown in this endorsement and the limit of liability shown elsewhere in the policy, WHO IS INSURED applies except that none of the following is an insured:

1. Any lessee not described in paragraph A above;
2. Any rentee of an auto rented for less than one year;
3. Any employee or agent of the lessee or rentee;
4. Any person operating an auto with the permission of the above." Industrial policy (R231-309), Endorsement CA 20 14 (A-2).

In addition to the aforesaid endorsements, the Industrial policy contains the following exclusion which prevents a lessee or permissive user from being an insured under the policy:

"C. WE WILL NOT COVER - EXCLUSIONS.

This insurance does not apply to:

***

7. Any covered auto while leased or rented to others. This exclusion does not apply to a customer rental auto or demonstrator. (Emphasis added). Industrial policy (R231-309), LIA-4 4/1/80 (A-3).

The Industrial policy also contains another clause which prevents a lessee or permissive user from being an insured under the policy:

> "D. WHO IS AN INSURED.
> 1. For Covered Autos.
> ***
> b. Anyone else is an insured while using with your permission a covered auto except:
> ***
> 3. Your customers, if your business is shown in the General Declarations as an auto dealership. However, if a customer of yours:
> (a) Has no other available insurance (whether primary, excess or contingent), he or she is an insured but only up to the compulsory or financial responsibility law limits where the covered auto is principally garaged.
> (b) has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered auto is principally garaged, he or she is an insured only for the amount by which the compulsory or financial responsibility law limits exceed the limits of his or her other insurance." Industrial policy (R231-309), LIA-5 4/1/80 (A-4).

The businesses shown on the Declaration page of the policy are Roger Dean Chevrolet, Inc., and Executive Car & Truck Leasing, Inc., both automobile dealerships, and the customer in the instant case is Action.

Therefore, since the above clauses determine that the Industrial policy does not cover Mendelsohn, Industrial is entitled to common law indemnity from Commercial and Allstate. Commercial (21,000,000) and Allstate's ($100,000) coverages must be exhausted before the Industrial coverage comes back into effect pursuant to this Court's pronouncements in Fowler, Maryland Casualty Co., and Metropolitan Property and Life Ins. Co., supra.

In addition to common law indemnity, the Fourth District Court of Appeal has correctly held that Commercial's insured, Action, contracted with Industrial's insured, Executive, in the lease agreement for Action to completely indemnify Executive for all liability arising out of an automobile accident involving a negligent permissive user of the vehicle:

> "9. (Lessee) agrees at its expense to procure, keep and maintain in force on said motor vehicle during the term of this lease with Commercial Union Public Liability Inurance in the sum of not less than $100,000/300,000...subject to the terms, provisions and conditions of its motor vehicle liability insurance policy in use for fleets of rental motor vehicles for the benefit and protection of the Owner and Lessee as their respective interests may appear....

> 10. In the event of loss or damage to said motor vehicle occasioned by the negligence of the Lessee, his agents, servants or employees, Lessee will pay to the Owner the amount of such loss or damages so sustained to the extent that same is not covered by said insurance, and will indemnify and save the Owner harmless from or on account of all liability claimed or asserted against the Owner by reason of such negligent use or operation of said motor vehicle, and Lessee does hereby agree to reimburse Owner for all damages it may sustain or become obligated to pay by reason thereof to the extent that the same are not covered and paid for out of the proceeds of such insurance." (emphasis added) Lease between Executive and Action (A-3).

As this Court stated in INA, supra,:

> "The underlying policy of the statute is satisfied once the law's minimum financial protection is provided to injured members of the public. Neither this statute nor the dangerous instrumentality doctrine asserts any interest of the state with respect to the allocation of risk among commercial enterprises or the responsibility of commercial enterprises to furnish more than minimal statutory coverage to their customers...." INA, at 1154.

Therefore, the parties to the lease are entitled to contract regarding their liability (after the $10,000.00 required by Florida Statute 627.7263) and the Fourth District was correct in determining that Action is required to completely indemnify Executive for all liability, and that Action's insurer, Commercial is bound thereby. Thus, Industrial is entitled to be indemnified by Commercial under two theories: common law indemnity and contractual indemnity pursuant to the lease agreement.

Commercial contends that the lease agreement's indemnity provision should not be given effect and that Commercial's liability should be limited to $100,000.00. This contention is incorrect because it ignores the following three factors: 1. The lease does not require $100,000 in insurance to be provided by Commercial Union, but "the sum of not less than $100,000/$300,000" (emphasis added), and Action has chosen to provide $21,000,000 in insurance coverage with Commercial Union; 2. The lease does not provide for indemnity of only $100,000 but for "all liability claimed or asserted against the owner by reason of such negligent use or operation of said motor vehicle" (emphasis added); and 3. Industrial, as insurer of the vicariously liable owner only, is still entitled to common law indemnity from Commercial, as the admitted insurer of the negligent tortfeasor, Mendelsohn, to the extent of its $21,000,000 limits.

Assuming, arguendo, that this Court determines that Industrial is an insurer of the negligent driver, Mendelsohn, as is argued by Commercial Union, then under the law pronounced by this Court in Metropolitan Property and Life Insurance Company, Commercial is nevertheless required to exhaust its limits before Industrial has to pay. Commercial admits that any coverage by Industrial on Mendelsohn would be on an excess basis (Commercial's Initial Brief, pages 2 and 27). Although Commercial contends it would also insure Mendelsohn on only an excess basis, this is incorrect if the policy language in the Commercial policy is consulted. It can be seen that Commercial provides primary coverage to Mendelsohn.

Commercial specifically provided primary insurance for the leased Chevy Citation by means of the following policy provisions:

> "Part IV - Conditions.
> B. Other Insurance.
>
> 1. For any covered auto you own, this policy provides primary insurance. For any covered auto you don't own, the insurance provided by this policy is excess over any other collectible insurance..." (Emphasis added) Commercial policy, page 4, R-333-363)
>
> ***
>
> Part II - Which Autos are covered Autos
> A. Item 2 of the declaration shows the autos that are covered autos or each of your coverages. The numerical symbol explained in Item 3 of the declaration described which autos are covered autos. the symbols entered next to a coverage designates the only autos that are covered autos." (Commercial policy, page 2, R-333-363)"

Item 2 of the declaration page has the number "1" next to liabiltiy coverage for $1,000,000.00. The number "1" refers to the"Description of Covered Auto Designation Symbol" (Page 6 of the policy) which shows that number "1" means "Any Auto" is a covered auto.

In addition, Item 4 of the declaration page, the "Schedule of Covered Autos You Own", indicates that to determine which autos are "Covered Autos You Own" you should "See schedule of automobiles". The Chevrolet Citation, Serial Number 1X687AT205306

is specifically listed in that Schedule, making it a "Covered Auto You Own", therefore making it an automobile on which primary insurance in the amount of $1,000,000 is provided pursuant to the "Other Insurance: clause, supra. The policy even provides for a separate premium for said automobile.

Naturally Commercial's $20,000,000 umbrella policy would pay following exhaustion of the $1,000,000 or would be prorated with the excess coverage of Industrial and Allstate.

If Industrial does insure Mendelsohn, it is on an excess basis, whereas Commercial insures Mendelsohn on a primary basis. The Commercial Union policys in the amount of $21,000,000 must be exhausted before Industrial begins to pay. Metropolitan Property and Life Insurance Company, supra. (at 116).

CONCLUSION

Based upon the aforesaid authority and argument, the Fourth District Court of Appeal's opinion which provides that the policies of Commercial Union ($21,000,000) and Allstate ($100,000) must exhaust their limits before the policy of Industrial must pay (following the $10,000.00 required by Florida Statute 627.7263) is correct and should be affirmed.

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to Luis S. Konski, Esquire, Suite 300, Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; Ronald J. Fruda, Esquire, P.O. Box 190, Boynton Beach, Florida 33435; Larry Klein, Esquire, Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; Richard J. Olack, Esquire, Post Office Drawer E, West Palm Beach, Florida 33402; Carol Anderson, Esquire, Croissant Place, 1313 South Andrews Avenue, Fort Lauderdale, Florida 33316; Dougald D. McMillan, Esquire, 8300 Douglass Avenue, Suite 800, Dallas, Texas 75225; Eric A. Peterson, Esquire, P.O. Drawer 3604, West Palm Beach, Florida 33402; and to Richard A. Sherman, Esquire, Suite 102 N Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301, all by mail this 24th day of February, 1986.

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