(Corrected Cover)
4/8/86

IN THE SUPREME COURT OF FLORIDA

(orig brief filed 3-10-86)

ALLSTATE INSURANCE COMPANY, and the Estate of ROBERT D. MENDELSOHN,

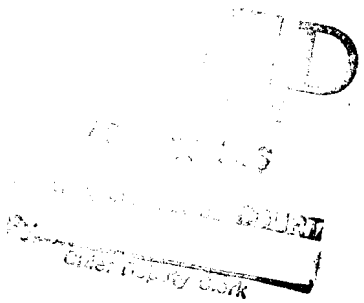
Petitioners,

vs. CASE NO: 67,368

EXECUTIVE CAR & TRUCK LEASING, INC., INDUSTRIAL INDEMNITY INSURANCE COMPANY, ACTION BOLT & TOOL COMPANY, COMMERCIAL UNION INSURANCE COMPANY and ALBERTA DESERIO,

Respondents.

_____/



COMMERCIAL UNION INSURANCE COMPANY, and ACTION BOLT & TOOL COMPANY,

Petitioners,

vs. CASE NO: 67,409

EXECUTIVE CAR & TRUCK LEASING, INC., INDUSTRIAL INDEMNITY INSURANCE COMPANY, ALBERTA DESERIO, ALLSTATE INSURANCE COMPANY, and the ESTATE OF ROBERT D. MENDELSOHN

Respondents.

_____/

MEMORANDUM ANSWER BRIEF OF ALLSTATE INSURANCE COMPANY AND THE ESTATE OF ROBERT D. MENDELSOHN TO BRIEF OF PETITIONERS COMMERCIAL UNION INSURANCE COMPANY AND ACTION BOLT & TOOL COMPANY

WALTON LANTAFF SCHROEDER & CARSON
ATTORNEYS AT LAW
900 ALFRED I. duPONT BUILDING
MIAMI, FLORIDA 33131

IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY, and the Estate of ROBERT D. MENDELSOHN,

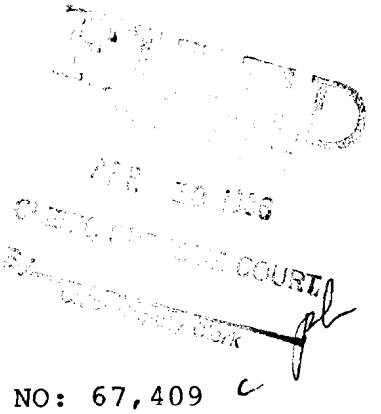
Petitioners,

vs. CASE NO: 67,368

EXECUTIVE CAR & TRUCK LEASING, INC., INDUSTRIAL INDEMNITY INSURANCE COMPANY, ACTION BOLT & TOOL COMPANY, COMMERCIAL UNION INSURANCE COMPANY and ALBERTA DESERIO,

Respondents.

_____/



COMMERCIAL UNION INSURANCE COMPANY, and ACTION BOLT & TOOL COMPANY,

Petitioners,

vs. CASE NO: 67,409

EXECUTIVE CAR & TRUCK LEASING, INC., INDUSTRIAL INDEMNITY INSURANCE COMPANY, ALBERTA DESERIO, ALLSTATE INSURANCE COMPANY, and the ESTATE OF ROBERT D. MENDELSOHN

Respondents.

_____/

NOTICE OF ERRATA

TO

MEMORANDUM ANSWER BRIEF OF ALLSTATE INSURANCE COMPANY AND THE ESTATE OF ROBERT D. MENDELSOHN TO BRIEF OF PETITIONERS COMMERCIAL UNION INSURANCE COMPANY AND ACTION BOLT & TOOL COMPANY

(Mailed March 7, 1986)

Allstate Insurance Company and the Estate of Robert D. Mendelsohn respectfully provide notice that the above-captioned brief of Respondents contains two errors.

First, Respondents failed to include Allstate Insurance Company and the Estate of Robert D. Mendelsohn as Respondents in the caption of Case No: 67,409. A corrected cover page is affixed hereto as an attachment.

Second, at page (7) of the above-captioned brief, the following corrections should be made:

3. Commercial Union's remaining $20,900,000 would present the last level of coverage.

* * *

1. Allstate's policy limites of $100,000 should be pro-rated with Commercial's $21,000,000 limits as the second level of the coverage in this case.

(Underlining indicates corrected amount). A corrected copy of page (7) is also attached hereto.

TABLE OF CONTENTS

WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

AUTHORITIES

Preliminary Statement

Allstate Insurance Company and the Estate of Robert D. Mendelsohn are the petitioners in Case No. 67,368 and are referred to herein as Allstate and Mendelsohn.

Action Bolt & Tool Company and Commercial Union Insurance Company are the petitioners in Case No. 67,409 and are referred to herein as Action and Commercial. The two cases have been consolidated for all appellate purposes.

Executive Car and Truck Leasing, Inc., Industrial Indemnity Insurance Company and Alberta DeSerio are the respondents in both actions. These parties are referred to herein as Executive, Industrial and DeSerio.

This memorandum brief is in answer to those portions of the brief on the merits of co-petitioners Action and Commercial which touch upon Allstate's position.

The following symbols will be used:

"R" - Record on Appeal

"A" - Appendix submitted simultaneously with the initial brief of Allstate and Mendelsohn in Case No. 67-368.

STATEMENT OF THE CASE AND FACTS

In this memorandum brief Allstate responds only to those portions of the initial brief of co-petitioners Action and Commercial which touch upon Allstate's position. Allstate otherwise relies on and herein incorporates by reference the

WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

statement of the case and facts set forth in its initial brief on the merits.

SUMMARY OF THE ARGUMENT

Commercial and Action err by ignoring the fact that Mendelsohn was an "additional insured" under each of their policies. A determination of the priority of coverages based upon the language of their policies thus was required. Parodoxically, Commercial and Action admit throughout their brief that Mendelsohn was an additional insured within their policies. As is addressed in Allstate's brief on the merits, the inevitable result of that fact is that Allstate's and Commercial's contract language must be analyzed to determine the priority of coverage.

Separately, accepting arguendo the validity of Commercial's and Action's position that they are responsible for only $100,000 in coverage, inasmuch as Mendelsohn and his personal insurer, Allstate, were additional insureds under the Commercial and Action policies, requires Allstate's policy limits to be pro-rated along with Industrial's policy limits and Commercial's $100,000 as part of the second level of coverage.

ARGUMENT

Incongruously, Commercial and Action argue that Mendelsohn, the active tortfeasor, qualified as an additional insured under all insurance policies involved in this case, but they then mistakenly ignore the effect of this fact on the

WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

determination of priority of coverage with respect to Mendelsohn's personal Allstate policy. Commercial and Action apparently do this to give some credit to the Fourth District's opinion which determines that, since Mendelsohn has no privity of contract with either the lessor (Executive) or the lessee (Action) of the motor vehicle involved in the accident, his personal insurance (with Allstate) should present the second level of coverage in this case. However, as is noted in Allstate's brief on the merits and implicitly admitted by Commercial and Action in their brief on the merits, Mendelsohn was an additional insured under both Action's and Executive's policies. As such, Mendelsohn's lack of privity of contract is irrelevant to the determination of priority of coverage.

As is fully addressed in Allstate's brief on the merits, the Fourth District erred in determining that Allstate, the personal insurer of the tortfeasor, Mendelsohn, would be entirely responsible for providing the second level of insurance coverage in this case up to its $100,000 policy limits. The court ignored the fact that Mendelsohn, as the permissive driver of an automobile leased by Action, became an "additional insured" under Action's policies with Commercial. Because Mendelsohn qualified as an additional insured under both Commercial policies, the language of the Commercial policies as well as Mendelsohn's own Allstate policy must be reviewed to determine the priority of their coverages. Had the Fourth District correctly done this, it would have discovered that

Mendelsohn's Allstate and Commercial policies all contained excess "other insurance" clauses which were identical in effect. Since the policies which provided all of Mendelsohn's collectible insurance contained the same type of excess clauses, well-established precedent requires pro-rating payment in satisfaction of the judgment based on the proportion of coverage of each policy. See, e.g., Rouse v. Greyhound Rent-A-Car, Inc., 506 F.2d 410, 415-16 (5th Cir. 1975) (A.31, 36-37); Sentryino Co. v. Aetna Ins. Co., 450 So.2d 1233, 1236 (Fla. 2d DCA 1984) (A.22, 25); Auto Owner's Ins. Co. v. Palm Beach County, 157 So.2d 820, 822 (Fla. 2d DCA 1963) (A.26, 28).

Following these principles, the Fourth District's decision concerning the second level of coverage -- which requires Allstate to exhaust its coverage before Commercial's primary and umbrella policies are engaged -- is erroneous. Rather, based on principles recently reaffirmed by this court in the three cases of Allstate Ins. Co. v. Fowler, 10 FLW 610 (Fla. November 27, 1985) (A.13); Maryland Casualty Co. v. Reliance Ins. Co., 10 FLW 612 (Fla. November 27, 1985) (A-15); and Metropolitan Property and Life Ins. Co. v. Chicago Ins. Co., 10 FLW 614 (Fla. November 27, 1985) (A. 17), the second level of coverage should be shared pro-rata among all policies covering Mendelsohn; namely, Allstate, Commercial primary and Commercial umbrella. The Fourth District's decision thus should be reversed and remanded with instructions to pro-rate

the second level of coverage among the Allstate and Commercial policies.

In their brief on the merits, co-petitioners Commercial and Action make the mistake, as did the Fourth District, of ignoring the fact that Mendelsohn was an additional insured under their policies. They thus fail to recognize that an analysis of the language of all relevant policies is required to determine their priorities of coverage. Instead, Commercial and Action stress that there was no privity of contract between themselves and Mendelsohn and conclude that Mendelsohn as an active tortfeasor would be required to indemnify Commercial and Action (Action Brief at p.21). In this respect, of course, privity of contract is immaterial. If Mendelsohn is an additional insured under the Commercial and Action policies, it is irrelevant that he did not negotiate such coverage.

Paradoxically, Commercial and Action squarely contradict themselves by noting in their brief on a number of occasions that Mendelsohn was covered as an additional insured under the policies issued by Industrial and Commercial Union (Action Initial Brief at pp. 4-6, 12, 20, 22, 26). As such, based on the principles recently reaffirmed by this Court in Fowler, Maryland Casualty, and Metropolitan, the "other insurance" clauses, and the language of the relevant policies and the lease agreement, determine the priority of coverage. Of course, as is argued in Allstate's brief on the merits, such

WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

clauses necessitate the pro-ration of Commercial's policies and Allstate's at the second level of coverage.

Further, Commercial ignores the fact that, under Fowler, automobile lessors and lessees by contract may allocate rights and responsibilities under a lease agreement. Based on this error, Commercial contends that, since Action's lease agreement with Executive called for liability insurance to be maintained by Action only up to $100,000, Action should not be liable above that amount until all other insurance is exhausted. Based on this argument, Commercial places the responsibility for the next level of coverage pro-rata among Industrial's $500,000 primary policy, Industrial's $5,000,000 excess policy, and Commercial's primary policy of $100,000.

Although Allstate does not agree with Commercial's position for the reasons set forth in Allstate's initial brief, assuming arguendo that Commercial's argument is accepted by this Court, the conclusions Commercial has reached in applying its argument to the facts is incorrect. It must be recognized that, inasmuch as Commercial argues that Mendelsohn was an additional insured under either the Industrial (lessor's) and Commercial (lessee's) policies, then Mendelsohn's personal policy with Allstate, in accordance with Commercial's arguments, would also pro-rate with Industrial's and Commercial's coverages. Thus, coupling Commercial's lease agreement arguments to the uncontrovertible fact that Mendelsohn was an additional insured under all policies would result in a

corrected priority of coverage in accordance with Commercial's position as follows:

1. Industrial Indemnity in the statutory amount of $10,000.
2. Industrial Indemnity, Commercial Union and Allstate pro rate based on the available coverage:

   Industrial Indemnity primary policy: $500,000

   Industrial Indemnity excess policy: $5,000,000

   Commercial Union primary policy: $100,000

   Allstate primary policy: $100,000
3. Commercial Union's remaining $20,900,000 would present the last level of coverage.

CONCLUSION

Wherefore, based upon the arguments and authorities cited above and in its brief on the merits, Allstate Insurance Company and the Estate of Robert D. Mendelsohn respectfully suggest that:

1. Allstate's policy limits of $100,000 should be pro-rated with Commercial's $21,000,000 limits as the second level of the coverage in this case.

2. Alternately, if Commercial's arguments are accepted as articulated in its brief on the merits, correcting for Commercial's failure to accredit Mendelsohn as an additional insured, results in Allstate's $100,000 limits being pro-rated with Industrial's $5,500,000 and Commercial Union's $100,000.

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for ALLSTATE & MENDELSOHN
169 East Flagler Street
900 Alfred I. duPont Building
Miami, Florida 33131
(305) 379-6411

By: _____
LUIS S. KONSKI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th day of March, 1986 to: ERIC A. PETERSON, ESQUIRE, Peterson & Fogarty, P.A., Post Office Drawer 3604, West Palm Beach, Florida 33402; RONALD J. FRUDA, ESQUIRE, Post Office Box 190, Boynton Beach, Florida 33435; LARRY KLEIN, Esquire, Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; CAROL ANDERSON, Esquire, Croissant Place, 1313 South Andrews Avenue, Fort Lauderdale, Florida 33316; RICHARD J. BLACK, ESQUIRE, Post Office Drawer E, West Palm Beach, Florida 33402; BRIAN C. POWERS, ESQUIRE, 2330 South Congress Avenue, Suite 1-B/Congress Park IV, West Palm Beach, Florida 33406; DOUGLAS D. McMILLIAN, Esquire, 8300 Douglas Avenue, Suite 800, Dallas, Texas 75225; RICHARD A. SHERMAN, ESQUIRE, Suite 102N Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301. Douglas D. McMillian, Esq., 8300 Douglas Ave., Suite 800, Dallas, Texas 75225.

LSK2h/jg

Rev:3/7/86

WALTON LANTAFF SCHROEDER & CARSON
900 ALFRED I. DUPONT BUILDING, MIAMI, FLORIDA, 33131, TELEPHONE (AREA CODE 305) 379-6411

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of April, 1986 to: ERIC A. PETERSON, ESQUIRE, Peterson & Fogarty, P.A., Post Office Drawer 3604, West Palm Beach, Florida 33402; RONALD J. FRUDA, ESQUIRE, Post Office Box 190, Boynton Beach, Florida 33435; LARRY KLEIN, Esquire, Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; CAROL ANDERSON, ESQUIRE, Croissant Place, 1313 South Andrews Avenue, Fort Lauderdale, Florida 33316; RICHARD J. BLACK, ESQUIRE, Post Office Drawer E., West Palm Beach, Florida 33402; BRIAN C. POWERS, ESQUIRE, 2328 10th Avenue North, Suite 6-A/Concept II, Lake Worth, Florida 33461; DOUGLAS D. McMILLIAN, ESQUIRE, 8300 Douglas Avenue, Suite 800, Dallas, Texas 75225; RICHARD A. SHERMAN, ESQUIRE, Suite 102N Justice Building, 524 South Andrews Avenue, Fort Lauderale, Florida 33301.

Respectfully submitted

WALTON LANTAFF SCHROEDER & CARSON
Attorneys for ALLSTATE & MENDELSOHN
169 East Flagler Street
900 Alfred I. duPont Building
Miami, Florida 33131
(305) 379-6411

By: _____
LUIS S. KONSKI