IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING INC., et al.

Respondents.

CASE NO. 67,368

COMMERCIAL UNION INSURANCE CO., et al.,

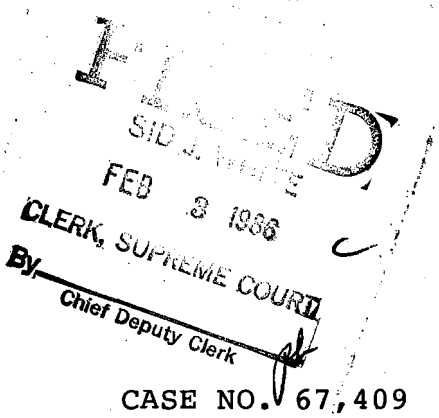
Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING, et al.,

Respondents.

CASE NO. 67,409



BRIEF OF PETITIONERS ON THE MERITS COMMERCIAL UNION INSURANCE COMPANY and ACTION BOLT & TOOL COMPANY

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STATEMENT OF THE FACTS AND THE CASE

This appeal is from the Fourth District Court's decision determining the levels of insurance coverage for the payment of a $1,200,000 verdict for the Plaintiff, as a result of injuries she sustained in an automobile accident. The Appellate Court's decision must be reversed in light of this Court's recent opinions in Allstate v. Fowler, Maryland v. Reliance, and Metropolitan v. Chicago, infra.

An automobile accident occurred in December 1981, which ultimately required a determination of exactly what insurance coverage was available and to what extent. Basically what transpired was that Executive Car and Truck (Executive) entered into a lease agreement (R 310-314) with Lake Park Industrial Supply, for the use of vehicles including a Chevrolet Citation. Action Bolt and Tool Company (Action) succeeded to this lease. Pursuant to the lease Action insured the leased car for the standard $100,000/$300,000 limits.

Action allowed the Citation to be used by its employee Mendelsohn. Mendelsohn was involved in an accident in which he was killed and the other driver, DeSerio, was injured. DeSerio sued the owner of the car, Executive, and its insurer, Industrial Indemnity Insurance Company (Industrial). Industrial's policy provides $500,000 in primary coverage and $5 million in excess coverage.

(R 231-309)

The Plaintiff also sued Mendelsohn and his insurer, Allstate. That policy (R 216-230) was for $100,000 in coverage. The third Defendant was Mendelsohn's employer and the lessee, Action, and its insurer, Commercial Union Insurance Company (Commercial). Its policy provided, $1,000,000 in underlying coverage and $20,000,000 in excess coverage. (R 305-363)

The policies of each insurer contained "other insurance" clauses making their coverage excess over other insurance.

Executive's primary policy with Industrial:

> M. Other Insurance
>
> 1) If at the time of loss there is other insurance written upon the same plan, terms, conditions and provisions as contained in this policy, and such other insurance is also applicable to such loss (all such insurance, including insurance provided by this policy, is referred to as 'contributing insurance'), the company shall be liable for no greater proportion of such loss than the applicable limits of liability under this policy bear to the total applicable limits of all contributing insurance.
>
> 2) If at the time of loss there is other insurance applicable to such loss, other than that as described in (1) above, the company shall not be liable for any loss hereunder until:
>
> (i) the liability of such other insurance had been exhausted, and
>
> (ii) then for only such amount as may exceed the amount due from such other insurance, whether collectible or not.

Executive's excess policy with Industrial:

> If other valid and collectible insurance with any other insurer is available to the assured covering a loss also covered by this policy, other than insurance that is specifically stated to be excess of this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance. UMB-9 4/1/80.

Mendelsohn's policy with Allstate:

> If There is Other Insurance
>
> 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. If more than one policy applies to an accident involving your insured auto, we will bear our proportionate share with other collectible liability insurance. Page 5.

Actions's primary policy with Commercial Union:

> 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. However, while a covered auto which is a trailer is connected to another vehicle the liability coverage this policy provides for the trailer:
>
> a) Is excess while it is connected to a motor vehicle you don't own.
>
> b) Is primary while it is connected to a covered auto you own.

2. When two or more policies cover on the same basis, either excess or primary, 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. Page 4.

Action's excess policy with Commercial Union:

K. OTHER INSURANCE

If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered by this policy, other than insurance that is specifically stated to be in excess of the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance.

The active tortfeasor, Mendelsohn, was covered as an additional insured under the policies issued by Industrial and Commercial Union as was any party vicariously liable for an insured's negligence. (R 231-309, 315-363)

Industrial's policy:

D. WHO IS AN INSURED.

1. For Covered Autos.

a. You are an insured for any covered auto.

b. Anyone else is an insured while using with your permission a covered auto except:

(1) The owner of a covered auto you hire or borrow form one of your employees or a member of his or her household.

(2) Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking or storing autos unless the business is your garage operations.

(3) Your customers, if your business

is shown in the General Declarations as an auto dealership. However, it 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.

c. Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own. LIA-5 4/1/80.

* * * * *

(d) Any additional assured (not being the Named Assured under this policy) included in the Underlying Insurances subject to the provisions in Condition B; but not for broader coverage than is available to such additional Assured under any underlying insurances as set out in attached schedule; UMB-4 4/1/80.

Commercial Union's Policy:

D. WHO IS INSURED.

1. You are an insured for any covered auto.

2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow except:

a) The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.

b) Someone using a covered auto while he or she is working in a business of selling,

> servicing, repairing or parking autos unless that business is yours.
>
> c) Anyone other than your employees, a lessee or borrower of any of their employees, while moving property to or from a covered auto.
>
> 3. Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own. Page 3.

In order to determine which insurer was responsible for coverage as a result of the accident, cross-claims were filed for declaratory relief. (R 156-170) A non-jury trial was held on September 27, 983. (R 152) At the conclusion of the trial the court ruled that Industrial Indemnity provided primary coverage for the limits of its policy because its lease contract with Action failed to shift the duty to provide primary coverage as required by Fla.Stat. Section 627.7263.

During the trial evidence was presented that the second level of coverage should be provided by Industrial as its $5,000,000 excess policy stated that it continued in force as underlying insurance once the primary amount of $500,000 was exhausted. (R 43-44) The trial court determined the levels of coverage to be:

> 1. That INDUSTRIAL INDEMNITY COMPANY provides primary coverage up to its policy limits of $500,000.

2. That INDUSTRIAL INDEMNITY COMPANY provides the secondary level of coverage under its umbrella coverage up to those limits of $5,000,000.

3. That the ALLSTATE INSURANCE COMPANY policy of $100,000 and the COMMERCIAL UNION INSURANCE COMPANY policy of $1,000,000 provide the third level of coverage of a pro rata basis.

4. That the COMMERCIAL UNION INSURANCE COMPANY policy in the amount of $20,000,000 provides the fourth level of coverage up to its limits of $20,000,000.

5. That INDUSTRIAL INDEMNITY COMPANY owes the duty of defense to the Defendants.

(R 364-365)

The proration of the third level of coverage was apparently based on the fact that all the policies contained escape clauses which would void each other and require the insurers to pay a pro rata share of the liability. Executive and Industrial appealed the trial court's Judgment (R 370).

Executive admitted in its Brief that its lease agreement failed to comply with the statutory requirements for shifting the responsibility for primary coverage to Action. (Brief of Appellant at 14) The issues on appeal centered around whether Executive's failure to meet the requirements made it primary liable for only the statutory amount of $10,000 and if so, what would be the priority of

coverage after $10,000.

Commercial Union and Action asserted that its lease with Executive only required it to maintain $100,000 limits, which it did and therefore its liability is capped at $100,000. The provision in the lease requiring Action to indemnify Executive was only for damages not covered by insurance and was not a provision whereby Action agreed to be subsequent in priority of coverage to Executive and Industrial. (R 310-314) Furthermore, if the indemnity clause was construed to make Action primarily liable for coverage over the first $10,000, then this would make the lease agreement ambiguous as it contains no language indicating that Action is liable for primary coverage.

The Fourth District Court of Appeal found that the lack of compliance with Fla.Stat. Section 627.7263 made Executive liable for primary coverage for the amount of $10,000. The second level of coverage was to be provided by Allstate's policy. The court reasoned that for the remainder of the coverage it was up to the contracting parties to allocate the liability. The tortfeasor had no contract with the lessor/Executive or with the lessee/Action so his policy with Allstate was next in line. The Fourth District relied on the rationale in Chicago Ins. Co. v. Soucy, infra, that the insurance of the negligent permissive user is prior to the owner's insurance where the owner was only vicariously

liable. Since Executive and Action were only vicariously liable their insurance would follow that of the tortfeasor.

For the third level of coverage the Appellate Court used the lease agreement between Executive and Action to find that Action had a duty to indemnify Executive for all liability above the statutory amount of $10,000. This was in spite of the fact that the lease agreement only required Action to provide coverage of $100,000 and Action's liability should have been limited to the contract amount. In addition, the indemnity provision was only for damages not covered by insurance. The provision was not written to establish priority of insurance coverage.

Action was held to provide coverage for the full limits of both its underlying and excess policies, before Industrial had to pay its coverage. The court summarized its decision as follows:

> Accordingly, we affirm in part, reverse in part, and remand to the trial court for the entry of a judgment which allocates the responsibility for coverage as follows:
>
> (1) Industrial Indemnity Company in the amount of $10,000;
>
> (2) Allstate Insurance Company in the amount of $100,000;
>
> (3) Commercial Union Insurance Company's primary policy in the amount of $1,000,000;
>
> (4) Commercial Union Insurance

Company's excess policy in the amount of $20,000,000;

(5) Industrial Indemnity Company's primary policy in the amount of $500,000;

(6) Industrial Indemnity Company's excess policy of $5,000,000.

Commercial Union and Action, and Allstate sought Discretionary Jurisdiction in this Court since the decision of the Fourth District was in express and direct conflict with decisions of other District Courts. In November this Court issued three opinions which directly effect the outcome of this appeal on priority of coverage. These cases will be discussed in detail in the Argument section of the Brief. On December 12, 1985, jurisdiction was accepted and this Brief on the merits follows.

SUMMARY OF ARGUMENT

The Appellate Court erred in determining the third level of insurance coverage in this case, after it decided the first and second levels correctly. Under the recent decisions of this Court, the Fourth District incorrectly evaluated the priority of coverage by ignoring the appliable policy language, but instead using the Indemnity provision in the parties' lease argeements. The court should have applied the policy language and prorated. The effect of the decision is to allow an insurer to obtain Indemnity from its own insured, which is clearly contrary to Florida law. Furthermore, requiring Action's insurer to exhaust its primary and excess coverage before Executive's insurer contributes, violates Action's contract with Executive to provide only $100,000 in coverage.

The Fourth District found that the first level of coverage must be provided by the car's owner, Executive, for the statutory amount of $10,000. Executive concedes that it failed to shift the responsibility of primary coverage to the lessee, Action, under Fla.Stat. Section 627.7263. And thus it is liable for the $10,000. Requiring Executive and Industrial to pay primary coverage of $10,000 is consistent with this Court's recent decisions in Fowler and Reliance, infra, and the Fourth District's opinion on the first level of coverage must be affirmed.

Allstate, the insurer of the active tortfeasor, Mendelsohn, was held responsible for the second level of coverage for its limits of $100,000. After the statutory amount of $10,000 is met (in this case by Executive) the parties are free to shift the burden of loss. In the case sub judice Mendelsohn had no agreement with Executive or Action for the allocation of liability, the Fourth District found that Allstate was to provide the second level of coverage as it had not shifted the burden to the other parties. This is the correct evaluation under the INA, infra, case. It is also the same end result as seen in Fowler and Reliance, where the active tortfeasor's insurer follows next after the primary financial responsibility amount is met. The second level of coverage must be affirmed.

Executive and Industrial and Action and Commercial Union, all insured Mendelsohn, the tortfeasor, as an additional insured under their policies. They also insured anyone vicariously liable for negligent acts of an insured. Under Metropolitan v. Chicago, infra, a court may only ignore policy language if a vicariously liable party is entitled to indemnification. The Fourth District ignored the applicable policy language to determine the third level of coverage and looked instead to an indemnity clause in the

lease agreement between Action and Executive, which was erroneous.

The vicariously liable parties in this case, Executive and Action are not entitled to indemnification since their policies covered the tortfeasor as an additional insured. Chicago, infra. By using the indemnity clause in the lease the Fourth District allowed Executive and Industrial to obtain indemnification against its owned insured. Florida law is now well established that an insurer may not sue its insured. Both Action and Mendelsohn were insured by Executive. Giving effect to the indemnity provision is contrary to the public policy and case law of Florida and the provision which must be voided.

The policy of the law that an insurer may not obtain indemnity from its own insured certainly takes priority over a private lease agreement. It would appeal that the indemnity provision in the lease agreement is for amounts not covered by insurance. Certainly where all parties have insurance the language of the policies themselves, as well as the public policy that an insurer can not seek indemnity from its own insured, takes precedence over a private lease agreement, where all that is involved is order between policy. Certainly, it would be logical to apply the language in the policies in a case such as this, in addition to the public policy that an insurer can not seek indemnity

from its own insured.

Since Executive and Action are not entitled to indemnification from their own insured, the Fourth District should have looked to the language contained in the policies. Chicago, infra. In doing this it is evident that the policies contain mutually repugnant "other insurance" and escape clauses. The third level of coverage therefore is a pro rata contribution between Industrial and Commercial Union. Additionally, since Commercial Union expressly contracted to provide insurance for the leased car in the amount of $100,000, it portion is limited to the pro rata share on that amount.

The Fourth District's decision on the third level of coverage, requiring Commercial to exhaust its limits before Industrial pays is erroneous, based on this court's latest cases and the result contravenes the public policy and law of Florida. The third level of coverage must be reversed and the case remanded with instructions to limit Commercial Union's contribution to a pro rata share, and moreover this should be based on its available coverage of $100,000 agreed to in the contract.

ARGUMENT

THE APPELLATE COURT ERRED IN DETERMINING THE THIRD LEVEL OF COVERAGE WHEN IT IGNORED THE PROVISIONS OF THE POLICIES, ALLOWED AN INSURER TO OBTAIN INDEMNITY FROM ITS OWN INSURED; AND FAILED TO LIMIT COMMERCIAL'S LIABILITY TO THE CONTRACTED FOR AMOUNT OF $100,000.

The Appellate Court erred in holding that Commercial Union must provide the third level of coverage to the full extent of its primary and excess limits as this is contrary to Florida law. The Supreme Court's recent decisions make clear that an insurer can not seek indemnity from its own insured, which is what the Fourth District allowed here (prior to the Supreme Court's recent decision). Each insurance policy covers the driver as an additional insured and each policy contains "other insurance" and escape clauses which are mutually repugnant; thus, each insurer must contribute its pro rata share of the liability in the third level of coverage. Moreover, it is submitted that Commercial Union cannot be liable for an amount greater than the $100,000 set out in the lease agreement. The Appellate Court erred in finding that Commercial Union was liable to the full extent of its coverage and the decision must be reversed and remanded for determination consistent with Florida law, for proration.

A. PRIORITY OF COVERAGE UNDER INA.

The following is the Fourth District's concise version of the coverage available for the $1.2 million dollar Verdict in this case:

> 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 and Truck Leasing, Inc. v. DeSerio, 10 F.L.W. 1102 (Fla. 4th DCA May 10, 1985)

In order to determine the priority of this coverage the District Court applied a different rationale to each level of coverage. Under this Court's most recent decision the Fourth District erred in ignoring the applicable policy language and it violated this Court's express admonition that indemnification may not be sought from an insured.

1. Industrial provides first level of coverage of $10,000.

Executive Leasing in its Brief in the Fourth District

conceded that its lease agreement with Action failed to meet the statutory requirements to shift the burden of primary coverage. The lease must shift the coverage in bold face type on the face of the agreement. Fla.Stat. Section 627.7263. Because of Executive's lack of compliance with the statute, the trial court found, as owner, Executive was responsible for primary coverage to the full extent of its policy limits. The Fourth District reversed this holding Executive primarily liable for $10,000, the statutory limit of the financial responsibility law. DeSerio, at 1102.

This Court has recently addressed the issue in Allstate Ins. Co. v. Fowler, 10 F.L.W. 610 (Fla. Nov. 29, 1985) and Maryland Casualty Co. v. Reliance Ins. Co., 10 F.L.W. 612 Fla. Nov. 29, 1985), where it was determined that a failure to meet the statutory requirements of Section 627.7263 results in the owner/lessor having to provide primary coverage of the statutory amount of $10,000. Therefore, the Fourth District's opinion as to the first level of coverage in this case must be affirmed.

2. ALLSTATE PROVIDES THE SECOND LEVEL OF COVERAGE FOR $100,000.

In evaluating which party should be responsible for the second level of coverage, the Fourth District relied on this Court's opinion in Insurance Co. of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149 (Fla. 1977), and its

own decision in Chicago Ins. Co. v. Soucy, 473 So.2d 683 (Fla. 4th DCA 1984); which this Court reviewed in Metropolitan Property and Life Ins. Co. v. Chicago Inc. Co., 10 F.L.W. 614 (Fla. Nov. 29, 1985), to find that the active tortfeasor's insurance should be next in line to provide primary coverage after the financial responsibility limit of $10,000 is met.

At this point it is necessary to briefly review the recently decided trio of cases on priority of coverage in light of this Court's opinion in INA. The facts in INA are somewhat similar to those below where an employee of the lessee was involved in an auto accident and the plaintiff sued the owner/lessor, Avis, and its insuror, Liberty Mutual, and the employer/lessee and its insurer, INA.

However in INA the lessor provided primary coverage for any rentee for $100,000. INA insured the employer/lessee for $200,000 and Liberty Mutual provide Avis with excess coverage of $500,000. The trial court determined that Liberty Mutual should pay its primary coverage, followed by the lessee's policy for its limits of $200,000 and the remainder to be paid by Liberty Mutual, which was $50,000. Liberty Mutual sought indemnification from INA for the $50,000. In answering the certified question of whether Liberty Mutual was entitled to indemnification from INA in the affirmative, this Court stated that once the public

policy of the state was satisfied regarding the compensation of injured parties through the financial responsibility laws, then the contracting parties were free to shift the burden of loss.

> 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.
>
> 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 negligent 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.
>
> INA, at 1154.

This Court then looked to the insurance contracts to determine that INA was not responsible for any of the $100,000 in primary coverage, as its policy expressly stated it would not be responsible for primary coverage. Liberty Mutual was entitled to indemnification for the $50,000 it paid after INA exhausted its policy limits. This was based on the principle that the insurer of the active tortfeasor

must indemnify a party that is only vicariously liable.

The Fowler, Reliance and Chicago cases address a variation on the determination of priority of coverage. While contract language generally controls once the financial responsibility laws are met, it can be ignored in one specific instance. In Fowler, this Court found that if a party is only vicariously liable and thus entitled to indemnification from the tortfeasor, then its insurer is entitled to follow that of the tortfeasor regardless of the policy language. That in no way abrogates the ability of a lease agreement to shift the owner's normal responsibility for primary coverage if the lease meets the statutory requirements. Therefore, the first level of coverage is always with the vehicle's owner unless it complies with Fla.Stat. Section 627.7263.

In the present case, we still must look to the contracts. The first level of coverage is undisputedly with the owner/lessor, Executive, for the statutory $10,000. Under the new cases, the next in line would be Allstate's policy, as it insured the active tortfeasor and Executive and Action are only vicariously liable. However, both Executive and Action policies also covered Mendelsohn, as an additional insured and they are not entitled to indemnification. Therefore, the new rule in Fowler can not be applied, so we must return to the rationale of the INA

case.

Under INA the parties may contract for the allocation of liability, once the financial responsibility laws are met. As the Fourth District correctly observed, the active tortfeasor, Mendelsohn, who was insured by Allstate had made no agreements for the allocation of liability with either the car's owner, Executive or with the lessee, Action. Therefore, its policy should be exhausted next. Of course, the end result is exactly the same under Fowler or INA, in that, the active tortfeasor's insurance is exhausted before that of the parties who are only vicariously liable. This is perfectly consistent with Florida's public policy. The owner has primary responsibility for the first level of coverage and the next level should be provided by the insurer of the active tortfeasor as fault attracts primary responsibility. INA, supra. The second level of coverage was correctly determined to be that of Allstate, insurer of the active tortfeasor, to the full extent of its policy limits and must be affirmed.

B. PRIORITY OF COVERAGE UNDER FOWLER, RELIANCE, AND CHICAGO.

1. POLICY LANGUAGE CONTROLS

The third level of coverage in this case should be determined in light of this Court's most recent decisions which hold that "policy language will control all situations

in which the right to indemnity does not lie". Chicago at 614. The main distinguishing facts between the case sub judice and Fowler, Reliance and Chicago are: there are three parties involved, the owner, the lessee and the tortfeasor and their respective insurers; the policies all insure the active torfeasor and the policies of Industrial and Commercial Union also insure anyone vicariously liable for an insureds negligence; and each policy contains an "other insurance" clause making it excess over other insurance.

Two of the recent Supreme Court cases dealt with a vicariously liable party entitled to indemnification from the tortfeasor. In this circumstance the policy language was ignored and the insurer of the vicariously liable party was held to be subsequent to the insurer of the active tortfeasor regardless of the insurance contracts. Fowler, supra; Reliance, supra.

However, in Chicago, this Court found no right of indemnification to exist because both companies insured the tortfeasor. The tortfeasor, Trueman, was driving a car owned by LaCavalla Enterprises and caused an accident which injured the plaintiff. Trueman was insured by Metropolitan, and LaCavalla was insured through a primary policy with Travelers and an excess policy with Chicago Insurance. Travelers conceded that its coverage was primary making it

first in priority.

The dispute concerned the second level of coverage between the tortfeasor's insurer, Metropolitan and the owner's excess carrier Chicago. The District Court held that the tortfeasor's policy with Metropolitan must be exhausted first since the car's owner was only vicariously liable. This Court found that this was the right result, but for the wrong reason. Since Chicago also insured Trueman, the tortfeasor, Chicago had no right to indemnification.

> Further, the insurer of a vicariously liable party is not entitled to indemnity when its policy covers the active tort-feasor as an additional insured. This is based upon the premise that an insurance company cannot sue its own insured for indemnity. Fowler, slip op. at 5, citing Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976).
>
> The district court held that Metropolitan's policy limits must be exhausted before Chicago's policy can be reached. The district court reached the correct result but erred in its reasoning. The court held in favor of Chicago because Chicago is entitled to indemnity from Metropolitan. 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.
>
> Chicago, at 614.

In looking at the policies, Chicago's stated that it was excess over any other insurance issued to the insured. Metropolitan's was a primary policy only for Trueman. The result under the insurance contracts was that Metropolitan's policy had to be exhausted before Chicago's policy could be reached. The same result as in the lower court, but under the rationale of Fowler.

2. INDEMNITY PROVISION NOT APPLICABLE TO LEVELS OF COVERAGE.

In deciding the levels of coverage in the present case, the Fourth District, which was without benefit of this Court's recent opinions, found that Industrial had a right of indemnification from Commercial Union. It ignored the applicable policy language and relied solely upon the lease agreement between Executive and Action:

> To determine the third level of insurance as between the owner/lessor and the lessee we must consider the lease agreement between Executive and Action. The pertinent provisions in the lease are as follows:
>
> 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 Insurance in the sum of not less than $100,000.00/$300,000.00 . . .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 appeal. . .

> 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 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.
>
> Thus, the parties have agreed that the lessor is to be completely indemnified by the lessee (except for its statutory responsibility of $10,000 as discussed earlier). Accordingly, Industrial, the lessor's insurance company, should not have to pay until both the Commercial's policies (primary and excess) are exhausted.
>
> DeSerio, at 1103.

Since Executive's policy insured the active tortfeasor as an additional insured, the Fourth District's decision requiring Commercial Union's policy be exhausted before Industrial's based on the indemnity provision violates the principle that an insurer may not sue its own insured for indemnification. To hold that Executive has the right of indemnification against one of its insureds is clearly contrary to public policy and case law. Ray v. Earl, 277 So.2d 73 (Fla. 3d DCA 1973), cert. denied 280 So.2d 685 (Fla. 1973); Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976); Cole v. Southeastern Fidelity

Ins. Co., 10 F.L.W. 1330 (Fla. 3d DCA June 7, 1985). Commercial Union, as an insurer of Mendelsohn, does not have to indemnify Executive and Industrial because if it did Industrial would be suing its own insured, Mendelsohn, and his insurer, Commercial Union, for indemnification, which is not permitted. Moreover, Action is also an additional insured under the Industrial policy, since Industrial's policy covers those vicariously liable for the negligent acts of its insured, Mendelsohn. Again, if Executive sues Action for indemnification it would mean that Executive and Industrial would be suing an insured for indemnification, which is totally improper.

To use the indemnity provision in the lease agreement between Action and Executive as a basis for determining the priority of the third level of coverage leads to a result that is totally inconsistent and contrary to this Court's latest pronouncements that an insurer may not sue its insured. As such, the provision is clearly contravenes established public policy and law of this state and is void and unenforceable. Wechsler v. Novak, 26 So.2d 884, 157 Fla. 703 (1946); Bond v. Koscot Interplanetary, Inc., 246 So.2d 6531, (Fla. 4th DCA 1971); Davis v. Ebsco Industries, Inc. 150 So.2d 460 (Fla. 3d DCA 1963).

3. POLICY PROVISIONS DETERMINE PRIORITY OF COVERAGE.

In Cole v. Southeastern, supra, the Third District

foretold this Court's restatement of the principles that an insurer cannot relieve itself of responsibility within its coverage against one of its own insureds and that provisions of insurance policies have a binding effect. Because Industrial and Commercial Union insured the active tortfeasor and are not entitled to indemnification, the third level of coverage can only be determined by examining the policy language.

> This Court has traditionally recognized the freedom of parties to contract and the right to enforce the contract in accordance with the 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 activity negligent as an additional insured because an insurance company cannot sue its own insured for indemnity. (emphasis added)
>
> Fowler, at 611.

The primary policies of Industrial and Commercial Union both have the standard type "other insurance" clauses, while both excess or umbrella policies contain "escape clauses" stating they will not contribute with other insurance. Since the provisions are virtually identical in both sets of policies, they cancel each other out. When there are

mutually repugnant other insurance and/or escape clauses in policies they are rendered nugatory and do not apply. World Rent-A-Car Inc. v. Stauffer, 306 So.2d 131 (Fla. 2d DCA 1974); State Farm Mutual Auto Ins. Co. v. Universal Underwriters Ins. Co., 365 So.2d 778 (Fla. 1st DCA 1978).

When the policy provisions cancel each other, the insurers are then liable pro rata in the respective proportion which the amount of each policy bares to the combined total amount of both policies for the liability in the third level of coverage. Hartford Acc. & Indemnity Co. Inc. v. Liberty Mutual Ins. Co. Inc., 277 So.2d 775 (Fla. 1973); Rouse v. Greyhound Rent-A-Car, Inc., 506 F.2d 410 (5th Cir. 1975). The result of applying these principles to the priority of coverage in this case is as follows:

1) Industrial Indemnity in the statutory amount of $10,000;

2) Allstate, insurer of the active tortfeasor, in the amount of $100,000;

3) Industrial Indemnity and Commercial Union pro rata based on the available coverage:

Industrial Indemnity primary policy - $500,000

Industrial Indemnity excess policy - $5,000,000

Commercial Union primary policy $100,000

Commercial Union is limited to contributing a pro rata

share of $100,000 since this is the amount of coverage Action agreed to obtain for the car in its lease with Executive (R 310-314). Commercial's obligation has been limited to this amount by the contract between the parties and the limitation must be given effect. The Appellate Court erred in determining the third level of coverage based on the indemnity clause in the lease agreement, as the policy provisions must control the priority of coverage under the facts of the case and this Court's most recent decisions. Moreover, the Fourth District's opinion allows an insured to obtain indemnification from its insured which is contrary to Florida law. The Decision of the Appellate Court on the third level of coverage must be reversed and remanded for a proper determination under the latest Florida law.

CONCLUSION

The Appellate Court erred in determining the third level of coverage and this portion of the decision must be reversed and remanded for a determination under Florida law and the lower court must be instructed to limit Commercial Union's contribution to its pro rata share, and moreover this should be based on its contracted for coverage of $100,000. The first two levels of coverage were correctly decided and these portions of the decision must be affirmed.

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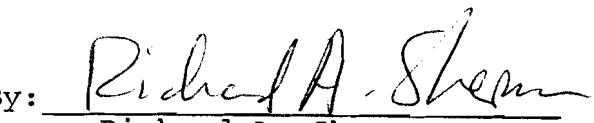
By: 
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CERTIFICATE OF SERVICE

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