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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.

_____/

# REPLY BRIEF OF PETITIONERS ALLSTATE INSURANCE COMPANY AND THE ESTATE OF ROBERT D. MENDELSOHN IN CASE NO. 67,368 TO BRIEF OF COMMERCIAL UNION INSURANCE COMPANY AND ACTION BOLT AND TOOL COMPANY (RESPONSE TO ALLSTATE BRIEF OF PETITIONER) SERVED ON MARCH 17, 1986

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## AUTHORITIES

## SUMMARY OF ARGUMENT

Commercial Union and Action fail to acknowledge that, where the active tortfeasor does not own the motor vehicle, the first layer of coverage must be provided by the insurer of the owner of the automobile. The only exception to this rule is where a lease situation exists and the lessor/owner, pursuant to Section 627.7263, Florida Statutes (1981), properly shifts primary coverage to the lessee. The owner/lessor's liability under statute, however, is limited to the initial $10,000 under the financial responsibility law. After this, the second level of coverage is dependent first on whether the tortfeasor was an insured under each policy. This, in turn, is based on the principle that an insurance company has no right of indemnification from its insured. Second, if the tortfeasor is an insured within his own personal policy and the policy of the lessor or lessee, the determinative factor on the second level of coverage is the language of the various policies' "other insurance" clause.

In the instant case, Mendelsohn - the tortfeasor - is an insured of Action/Commercial (lessee/insurer) and Allstate (personal policy). As correctly pointed out by Executive/Industrial (lessor/insurer) in its brief on the merits, the lease agreement combined with the language of their own policies allocate responsibility for the second level of coverage (above the $10,000) to Allstate and Commercial because of the fact that Mendelsohn is an insured within

Allstate's and Commercial's policies and the "other insurance" clause of each policy is the same. The result is that the Allstate and Commercial policies would pro-rate in satisfaction of covered losses.

Commercial, however, incorrectly claims that since Mendelsohn did not enter into any agreement to shift liability with Action or Executive, his personal insurance coverage should alone represent the next level of coverage. This is legally and logically unsupportable in view of the fact that, since Mendelsohn is an insured of Commercial, the insurer would be seeking indemnification from its own insured, something it cannot do. Thus, being covered as an insured of Commercial, Mendelsohn need not have entered into any direct agreement with Action or Executive to determine his personal policy's priority of coverage to be at the same level as Commercial's policies.

## ARGUMENT

THE FOURTH DISTRICT ERRED IN DETERMINING THAT THE SECOND LEVEL OF COVERAGE MUST BE PROVIDED BY THE PERMISSIVE DRIVER'S PERSONAL INSURANCE POLICY BECAUSE IT IGNORED THAT THE DRIVER WAS AN ADDITIONAL INSURED WITHIN LESSEE'S POLICIES.

In its answer brief in Case No. 67,368 (served by mail on March 17, 1986), Commercial and Action maintained that Allstate and the Estate of Mendelsohn in their brief on the merits erroneously failed to recognize that parties to automobile lease agreements are free to allocate insurance coverage responsibility through contract. Commercial and Action contend that they have done this in their lease agreement with the leasing company, Executive, and its insurer, Industrial. Moreover, Commercial and Action contend that Mendelsohn, not being a party to this lease agreement, and being the active tortfeasor, requires his personal insurance policy limits to be exhausted after the car owner has paid the statutory financial responsibility minimum of $10,000.00.

Allstate and Mendelsohn submit that, where the active tortfeasor does not own the motor vehicle, the first layer of coverage must be provided by the insurer of the owner of the vehicle. The only exception to this rule is when a lease situation exists and the lessor pursuant to Section 627.7263 Florida Statutes (1981) properly shifts the burden of primary insurance coverage to the lessee. This responsibility,

however, is limited only to $10,000.00 per person, the amount required by the financial responsibility law. In accordance with recent decisions by this Court applicable to the facts of this case, since Mendelsohn comes under the definition of "insured" in all the lessee's insurance policies, the "other insurance" provisions of the various policies must be invoked to determine the priority of coverage. Analysis of such provisions leads inevitably to pro-ration of coverage between the Allstate policy and the Commercial Union primary and umbrella policies.

Commercial and Action argue that Mendelsohn, the active tortfeasor, qualified as an additional insured under all insurance policies involved in this case, but then mistakenly ignore the effect of this fact on the determination of priority of coverage. Commercial and Action apparently do this to give credit to the Fourth District's opinion, which determined 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. Executive Car & Truck Leasing, Inc. v. DeSerio, 470 So.2d 21 (Fla. 4th DCA 1985). 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 Action's policies. As indicated by this Court in recent decisions, there is no right

of indemnification from the tortfeasor and his personal insurer, whether or not the permissive driver negotiated the lease agreement.

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 $100,000.00 policy limits. The Fourth District failed to recognize the fact that Mendelsohn, as the permissive driver of an automobile leased by Action, was 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 coverage. Allstate Ins. Co. v. Fowler, 480 So.2d 1287 (Fla. 1985); Maryland Casualty Co. v. Reliance Ins. Co., 478 So.2d 1068 (Fla. 1985); Metropolitan Property and Life Ins. Co. v. Chicago Ins. Co., 479 So.2d 114 (Fla. 1985).

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 (5th Cir. 1975); Motor Vehicle Casualty Co. v. Atlantic National Ins. Co., 374 So.2d 601 (5th Cir. 1967); Sentryino Co. v. Aetna Ins. Co., 450 So.2d 1233 (Fla. 2d DCA 1984); World Rent-A-Car, Inc. v. Stauffer, 306 So.2d 131 (Fla. 2d DCA 1975), cert. denied, 321 So.2d 557 (Fla. 1975); Auto Owner's Ins. Co. v. Palm Beach County, 157 So.2d 820 (Fla. 2d DCA 1963).

In their answer brief, petitioners Commercial and Action continue the mistake 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 the priority 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. As Mendelsohn is an additional insured under the Commercial and Action policies, it is irrelevant that he did not negotiate such coverage. An insured may not indemnify its own insurer; yet this is what Commercial seeks here.

Paradoxically, Commercial and Action squarely contradict themselves by noting in their brief on the merits 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 clauses necessitate the pro-ration of Commercial's policies and Allstate's at the second level of coverage.

More specifically, in Fowler, this Court held that, where the active tortfeasor was the permissive user but not the owner of the motor vehicle, the first layer of coverage must be provided by the insurer of the owner of the vehicle pursuant to Section 627.7263, Florida Statute (1981). Fowler, supra, at 1289. The only exception to this rule is when a lease situation exists and the lessor, pursuant to Section 627.7263, Florida Statutes, has properly shifted the burden of primary coverage to the lessee. Id. In the case sub judice, the owner/lessor, Executive, and its insurer, Industrial, concede that the lease agreement did not comply with the statutory requirements, and thus there is no serious question at bar that Executive and Industrial must provide the first layer of coverage. However, this responsibility is limited to $10,000 per person, the amount required by Section 627.7263, Florida Statutes, the financial responsibility law. Fowler,

supra, at 1289-90; Maryland Casualty, supra, at 1070; Patton v. Lindo's Rent-A-Car, 415 So.2d 43 (Fla. 2d DCA 1982).

As noted in Fowler, in the situation where no right to indemnification exists, as here where Mendelsohn is an insured of both Allstate and Commercial, the policies' "other insurance" clauses are controlling. In accordance with Fowler, an "other insurance" clause in an insurance policy will only be disregarded if two conditions exists. 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, supra, at 1290. Neither of these conditions mandating disregarding of "other insurance" clauses exist in our case. As correctly noted by respondents, Executive and Industrial in their answer brief (at pages 8-11), their insurance policy and the lease agreement with Action effectively allocates coverage responsibility above the financial responsibility limits of $10,000 coverage to the lessee. Mendelsohn being an insured of both Allstate and Commercial, in turn, requires that these policies be pro-rated in the second level of coverage in accordance with the principles in Fowler.

Nevertheless, Commercial and Action focus on the Fourth District's incorrect assumption that Mendelsohn was not an insured of both Commercial and Allstate. The Fourth District, however, erred when it stated:

> It is also established that parties may agree to the allocation of liability.

> Truck Discomp Corp. v. Serrano, 362 So.2d 240 (Fla. 1st DCA 1978). In this case, the active tortfeasor, Mendelsohn, who is Allstate's insured, had no agreement for the allocation of liability with either the lessee or the owner/lessor. Accordingly, the driver's insurance policy with Allstate should be exhausted next.

Executive Car & Truck Leasing, Inc. v. DeSerio, 470 So.2d 21, 23 (Fla. 4th DCA 1985). This misapprehension by the Fourth District may be readily understood inasmuch as the Court 1) did not have the guidance of the Fowler line of cases, as well as, 2) it was laboring under the mistaken belief that Mendelsohn was not an insured under Commercial's policy. Had the Fourth District corrected these factors, its decision surely would have been different. Id.

Indeed, based on the Fowler principles, in a recent case factually similar to the case at bar, the Second District came to the conclusions advocated herein. In Quinlan Rental & Leasing, Inc., et al v. Sheila Mae Linnel, ___So.2d___ (Fla. 2d DCA Case No. 85-1016, opinion filed March 5, 1986) (11 FLW 567), the Second District rejected the argument of both the owner of the automobile and the lessee that because they were only vicariously liable for the driver's negligence the negligent driver's policy limits should be exhausted prior to their own policy limits. Commercial and Action make the same argument here. The court in Quinlan held that since, in accordance with Fowler, all insurance policies covered the negligent driver, there was no right of indemnification and

the "other insurance" clauses must be given full force and effect. This was true because the right of indemnity does not exist where the insurer of the vicariously liable party also insures the actually negligent parties as an additional insured. Fowler, supra; Marina del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976).

Furthermore, because Commercial's policy does not contain an escape "other insurance" clause and it insured the driver Mendelsohn as an additional insured, its liability as a matter of law is not subsequent to coverage provided to the driver by his own insurance company. The policies of Allstate and Commercial must therefore be looked at in tandem and a pro-rata division of losses must be made among the Allstate and Commercial policies. Quinlan, supra.

Such pro-ration in this action results in the allocation of coverage as follows:

1. Industrial Indemnity contributes the financial responsibility ceiling of $10,000.00.

2. Allstate will contribute $100,000.00 pro-rata with Commercial's $1,000,000.00 primary policy and Commercial's $20,000,000.00 umbrella policy.

3. Industrial Indemnity's remaining $490,000.00 primary policy and $5,000,000.00 excess policy would follow.

Allstate Insurance Company and the Estate of Richard Mendelsohn therefore submit that the Fourth District erred in

ignoring the fact that Mendelsohn was an "additional insured" under the Commercial primary and umbrella policies and thus was not liable for indemnification to Commercial. This error in turn led to the Fourth District's failure to review the "other insurance" clauses of each policy that determine the priority of coverages. Such an analysis would have revealed that the "other insurance" clauses of the Commercial and Allstate policies are all excess clauses which cancel each other out. Consequently, pro-ration of the Allstate and Commercial coverages on the second level of coverage properly should have been ordered.

## CONCLUSION

The decision of the Fourth District as to the second level of coverage in this case should be reversed and remanded with instructions that Allstate and Commercial contribute to the liability judgment on a pro-rata basis, based on the policy provisions. The first level and last levels of coverage were correctly decided and should not be disturbed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th 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 Ave 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 Lauderdale, Florida 33301.

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