IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,368

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

EXECUTIVE CAR and TRUCK LEASING, INC., and INDUSTRIAL INDEMNITY INSURANCE COMPANY,

Respondents.

COMMERCIAL UNION INSURANCE COMPANY
and
ACTION BOLT & TOOL COMPANY

RESPONSE TO
PETITION TO INVOKE DISCRETIONARY REVIEW OF
DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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SUMMARY OF ARGUMENT

Commercial Union Insurance Company, insurer of the Lessee Action Bolt & Tool, agrees with Allstate's position that there is direct and express conflict between the Fourth District Court of Appeal's opinion in DeSerio and cases from other District Courts of Appeal, i.e., Sunshine Dodge, infra; and Cole v. Southeastern, infra. Commercial has filed a similar Petition to Invoke Jurisdiction in the Supreme Court to review the same insurance coverage question.

DIRECT AND EXPRESS CONFLICT

The trial court in DeSerio found that the owner/lessor's insurer, Industrial, provided primary coverage up to its policy limits. This was because its insured, Executive, failed to comply with the requirements of Fla. Stat. Section 627.7363(1). By not stating in bold face type on the face of the lease agreement that Action, the lessee, had primary coverage, Executive was held to provide primary coverage to the full extent of its policy limits. The trial court's holding was in accord with two recent decisions: Sunshine Dodge v. Ketchum, infra, from the Fifth District; and Cole v. Southeastern Fidelity, infra, authored by Chief Judge Schwartz of the Third District.

The Fourth District Court of Appeal reversed the trial court and held that Executive's failure to comply with

Section 627.7263(1) meant that Executive's insurer, Industrial, had to provide primary coverage only for $10,000 and not for its full liability limits.

The Third District in Cole held that the exact opposite when it found that, when the lessor failed to comply with the requirements of Section 627.7263(1), the lessor had to provide primary coverage to the full extent of its policy limits. Judge Schwartz notes in Cole the lack of uniformity in the District Court's decisions on this insurance question.

Similarly in Sunshine Dodge the Fifth District held that the lack of compliance with Section 627.7263(1) results in the lessor having to provide primary coverage. The Fifth District did not restrict this coverage to the statutory $10,000.

There is express and direct conflict between the Fourth District's opinion in DeSerio and the cases form the Third and Fifth Districts, Sunshine Dodge and Cole, as DeSerio holds the exact opposite of these cases.

PRIMA FACIE EXPRESS CONFLICT

The Fourth District in DeSerio based its limitation of primary coverage to $10,000 on Reliance Ins. Co. v. Maryland Casualty Co., infra. (A 1) Reliance and two companion cases on point, Allstate v. Value Rent-A-Car, infra, (A 4) and Allstate v. Fowler, infra (A 12) are now pending review

in the Supreme Court. When a District Court's decision relies on a case as controlling authority and that case is being reviewed by the Supreme Court, there is prima facie express conflict. Jollie v. State, infra. Therefore since the Supreme Court has accepted jurisdiction to review three cases that all have the same insurance question that is addressed in DeSerio, there is prima facie conflict and the Supreme Court has jurisdiction to review DeSerio also to resolve the disharmony.

ARGUMENT

THERE IS EXPRESS AND DIRECT CONFLICT WITH THE DECISION BELOW AND SUNSHINE DODGE INC. V. KETCHUM, INFRA, COLE V. SOUTHEASTERN FIDELITY INS. CO., INFRA, AND PRIMA FACIE CONFLICT WITH RELIANCE INS. CO. V. MARYLAND CASUALTY CO., INFRA, ALLSTATE V. VALUE RENT-A-CAR, INFRA, AND ALLSTATE V. FOWLER, INFRA AND THE SUPREME COURT SHOULD EXERCISE ITS JURISDICTION TO RESOLVE THESE CONFLICTS.

Commercial Union Insurance Company and Action Bolt & Tool Company are Petitioners in a similar certiorari proceeding pending before the Supreme Court (Case No. 67, 409) on the same insurance coverage issue. Commercial Union agrees with the Petitioner, Allstate, that there is direct and express conflict between the decision in DeSerio and cases from other District Courts, i.e. Sunshine Dodge, infra and Cole v. Southeastern, infra. The Supreme Court should exercise its jurisdiction and resolve these conflicts.

There is a lack of uniformity in the decisions of the District Courts of Florida on the extent of primary insurance coverage when a lessor fails to comply with Fla. Stat. Section 627.7263(1) to shift primary coverage to the lessee. The statute requires the lessor to state in bold face type on the front of the lease agreement that the lessee is responsible for primary insurance coverage. Executive did not follow these statutory requirements to shift its duty of primary coverage to Action and its insurer

Commercial.

The trial court in DeSerio found that Industrial Indemnity insurer of Executive , the owner/lessor, was responsible for primary coverage to the full extent of its limits. This was in accord with the recent decisions of the Fifth District in Sunshine Dodge, Inc. v. Ketchum, 445 So.2d 395 (Fla. 5th DCA 1984), and that of the Third District in Cole v. Southeastern Fidelity Ins. Co., 10 F.L.W. 1331 (Fla. 3d DCA, May 28, 1985).

However, the Fourth District Court of Appeal reversed the lower court's finding. It held that, based on the authority of Reliance Ins. Co. v. Maryland Casualty Co., 453 So.2d 854 (Fla. 4th DCA 1984), review granted, Fla. Case No. 65, 873 (10 F.L.W. April 5, 1985). The owner/lessor was only responsible for the statutory amount of $10,000 as primary coverage. This determination by the District Court directly and expressly conflicts with the decision in Sunshine Dodge, supra and in Cole, supra, as they both hold that the owner and/or lessor must pay the full extent of his liability before any other insurance company.

DIRECT AND EXPRESS CONFLICT WITH COLE AND SUNSHINE DODGE

The Fourth District in DeSerio has expressly held that based upon Reliance, Industrial, (insurer of the Executive), is to provide primary coverage only up to the statutory amount of $10,000 and this directly and expressly conflicts

with Cole v. Southeastern Fidelity, (A 17) which holds the exact opposite. In Cole the Third District found that when the lease agreement fails to meet the statutory requirements to shift primary coverage to the lessee, then the owner/lessor is responsible for primary coverage to the entire extent of its liability limits.

Mr. Cole was insured by State Farm in Canada, where he lived. He came to Miami and rented a car from Holiday Rent-A-Car, who was insured by Southeastern Fidelity for $300,000. Both policies were excess as applied to non-owned autos. It was undisputed that because Southeastern had failed to comply with 627.7263(1) that it was liable for the first $10,000 in coverage. The trial court then found State Farm, the driver's insurer, liable for its limits and only when those were exhausted would Southeastern have to provide coverage. State Farm appealed and the Third District reversed holding the owner/lessor's insurer, Southeastern, liable not only for the first $10,000 but also liable for primary coverage to the full extent of its limits - $300,000.

Chief Judge Schwartz notes in Cole that there is a lack of uniformity in Florida in this field. He further points out that it is not clear why in Reliance and DeSerio the failure to comply with 627.7263(1) to shift primary coverage from the lessor to the lessee should effect the applicable

policies. Apparently Sunshine Dodge is the only case that has the correct analysis of this insurance question. State Farm was a excess policy, as was Action's policy with Commercial Union in DeSerio. It was held in Cole that State Farm was to pay only after the full exhaustion of Southeastern's policy limits. Likewise, applying the Cole rationale to DeSerio, the excess policy of Action with Commercial does not come into play until the full extent of Industrial's liability limits are exhausted and then the full limits of Allstate's policy is exhausted.

In Sunshine Dodge, Inc. v. Ketchum, supra, the insurance issue was tried before there was a determination of liability. However, Sunshine Dodge states that the primary coverage is with the lessor. The Fifth District notes that because Sunshine failed to meet the requirements of Fla. Stat. Section 627.7263(1) which requires that the lease agreement state in bold type that the lessee has the responsibility to provide for primary insurance coverage. The court does not say that this primary coverage is limited to $10,000. The Third District relied on Sunshine Dodge as a correct analysis of the law and found that the owner/lessor was liable for the full extent of its liability limits before the driver's insurance came into play.

The cases of Sunshine Dodge and Cole are in direct conflict with DeSerio, where the fourth District held the

owner/lessor was liable only up to the statutory amount of $10,000 in providing primary coverage. The Supreme Court has jurisdiction in the present case because there is express and direct conflict with the decision below and the decisions of the Third District and Fifth District in Cole and Sunshine Dodge. The Court should grant review in this case to resolve the common problem of priority of levels of insurance coverage, especially in the present situation where the lessor/Executive has clearly failed to shift primary coverage to the lessee/Action.

PRIMA FACIE EXPRESS CONFLICT WITH RELIANCE INS. CO. V. MARYLAND CASUALTY COMPANY.

In addition to the express and direct conflict between DeSerio, Sunshine Dodge and Cole, there is prima facie express conflict with three more cases pending review in the Supreme Court. The Fourth District cited Reliance Ins. Co. v. Maryland Casualty Co., supra, (A 1) as controlling authority for limiting the primary coverage of Industrial to $10,000. Reliance (A 1) and two companion cases, Allstate Ins. Co. v. Value Rent-A-Car of Florida Inc., 463 So.2d 320 (Fla. 5th DCA 1985) review granted, Fla. Case No. 66, 726; (A 4) and Allstate Insurance Co. v. Fowler , 455 So.2d 506 (Fla. 1st DCA 1984) review granted, Fla. Case No. 65, 986 (A 12) are all pending review by the Supreme Court. All three cases deal with the same insurance coverage issue when

the lessor fails to meet the requirements of Fla. Stat. Section 627.7263(1) for shifting primary coverage to the lessee.

When the District Court of Appeal cites as controlling authority a decision that is pending review by the Supreme Court this constitutes prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. Jollie v. State, 405 So.2d 418 (Fla. 1981); R.J.B. v. State, 408 So.2d 1048 (Fla. 1982); R.L.W. v. State, 409 So.2d 1072 (Fla. 1st DCA 1982).

Since the authority relied upon by the Fourth District in DeSerio is going to be reviewed by this Court there is no question that there is jurisdiction for the Supreme Court to review the DeSerio decision also. In addition, the case law in Florida is confused as to the coverage issues involved in DeSerio. It would greatly benefit the future adjudication of accident cases of this type if the Supreme Court would accept jurisdiction of the DeSerio case and provide the necessary guidelines for resolving all the coverage issues questions.

CONCLUSION

It is respectfully submitted that the decision in the present case is in express and direct conflict with decisions of other District Courts of Appeal, therefore the Supreme Court has jurisdiction to review the case and resolve these conflicts.

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By: 
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CERTIFICATE OF SERVICE

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