OA 6-5-91 027



IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

TRAVELERS INSURANCE COMPANY,

Petitioner,

vs.

Supreme Court
Case No. 76,432

JAMES H. QUIRK and MARIE QUIRK, husband and wife,

Respondents,
Cross-Petitioners

vs.

SOUTHERN AMERICAN INSURANCE COMPANY,

Cross-Respondent.
_____/

# AMICUS CURIAE'S ANSWER BRIEF

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## STATEMENT OF THE CASE AND OF THE FACTS

Amicus Academy of Florida Trial Lawyers ("AFTL") joins in the statement of the case and of the facts contained in the Brief of Respondent, Cross-Petitioners, James H. Quirk and Marie Quirk.

## ISSUE ON APPEAL

I. WHETHER AN INSURER WHO AUTHORIZES AN ENTITY TO OFFER QUOTATIONS FOR AND BIND INSURANCE COVERAGES ON ITS BEHALF THEREBY VESTS THAT ENTITY WITH AUTHORITY, EITHER ACTUAL, IMPLIED OR APPARENT, TO NEGOTIATE THE ISSUANCE OF UNINSURED MOTORIST COVERAGE.

## SUMMARY OF THE ARGUMENT

The District Court's specific holding in this case in fact subsumes two separate conclusions of law. To reach its holding that an independent agent acts on behalf of the its insurer principal in obtaining a rejection of uninsured motorists ("UM") coverage, the District Court first rejected the adoption or application of an inflexible rule that an independent agent acts as the agent of the insured. This conclusion is in accord with both the law applicable to insurance policies in general and Florida jurisprudence addressing the status of insurance agents and insurance brokers. Although insurance policies have received a special scrutiny from the courts, the documents remain, at their core, simple contracts. As a contract, the traditional rules of agency apply to the formation of insurance policies. These principles of general agency reject any dogmatic rule establishing the status of independent agents; instead they allow for the facts of the particular case to determine the role of an independent agent. This is consistent with Florida jurisprudence which applies traditional rules of agency to the formation of insurance contracts.

The second conclusion of the District Court holds that an independent insurance agent, in obtaining a rejection of UM coverage, acts as agent for the insurer. Again, this conclusion is in accord with the generally accepted rules of agency. Because of the facts necessrily associated with the

express grant of authority to an independent insurance agent, an insurer unavoidably vests an independent agent with implied or apparent authority to obtain a rejection of UM coverage from an insured. Accordingly, the Second District's decision is correct and should be affirmed.

## ARGUMENT

### I. THE LAW DOES NOT REQUIRE THAT AN INDEPENDENT INSURANCE AGENT BE CONSIDERED EXCLUSIVELY AN AGENT OF THE INSURED.

#### A. The Law Of Agency Applies To The Formation Of Insurance Policies.

In the District Court, Petitioner Travelers Insurance Company ("Travelers") urged that Key Agency, Inc. ("Key") "is an independent insurance agent and, thus, as a matter of law, a broker in this case." Quirk v. Anthony, 563 So.2d 710, 715 (Fla. 2d DCA 1990). The District Court rejected this proposition. Rather than adopt the rule of law pressed by Travelers, the Court noted "it is often difficulty to decide whether an agent is acting as a broker or an agent. Frequently, the issue is one of fact." Id. at 715 (Citing 3 Couch on Insurance, §25.94 (2nd Rev.Ed. 1984)).

AFTL submits that the District Court was completely correct in rejecting Travelers' contention. An insurance policy is simply a contract and, in a dispute concerning its formation, the ordinary rules governing contracts obtain. Among those applicable rules are the general principles of agency. Thus, the District Court's application of those general rules of agency was entirely correct.

It is axiomatic that an insurance policy is simply a form of contract. Lumbermens Mutual Cas. Co. v. August, 530 So.2d 293, 295 (Fla. 1988) ("the rights and obligations of the parties under an insurance policy are governed by contract law since they arose out of an insurance contract."), Central

Mutual Ins. Co. v. Cropper, 296 So.2d 69, 71 (Fla. 2d DCA 1974) ("the relationship between an insured and his insurer is contractual."), see also Jefferson Ins. Co. v. Fischer, 166 So.2d 129 (Fla. 1964). Although the subject matter of insurance contracts have earned them special treatment, this does not alter the fundamental character of insurance policies. See e.g., Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962), Fla. Stat. §§627.401, et seq.

As a general rule, the principles of agency apply to the formation of contracts. Montgomery v. Chamberlain, 543 So.2d 234 (Fla. 2d DCA 1989), Bryan and Sons Corp. v. Kelfstad, 237 So.2d 236, 240 (Fla. 4th DCA 1970), City Nat'l Bank of Miami v. Chitwood Construction Co., 210 So.2d 234 (Fla. 3rd. DCA 1968). The courts have recognized that there is nothing in the nature of insurance contracts that would cause them to be immune from the application of the principles of agency, Fidelity & Cas. Co. of New York v. Britt, 393 So.2d 41 (Fla. 3rd DCA 1981).

### B. The General Principles Of Agency Do Not Permit That, As A Rule, An Independent Insurance Agent Shall Be The Agent Of The Insured.

Travelers urges that the Second District's conclusion that an independent insurance agent is not the insured's broker is "a departure from well-established Florida Law. . . ." (Petitioner's Initial Brief on Merits at p. 8). AFTL suggests that for the Court to hold otherwise, or to accept Travelers' position, would contradict the general rules of agency. These

basic principles do not support a blanket rule affording an independent insurance agent the status of agent of the insured.

The existence and scope of agency are generally questions of fact. Coquina, Ltd. v. Nicholson Cabinet Co., 509 So.2d 1344, 1347 (Fla. 1st DCA 1987), International Assoc. of Bridge, Structural & Ornamental Ironworkers, AFL-CIO v. Blount International, Ltd., 519 So.2d 1009, 1012-13 (Fla. 2d DCA 1987) rev. denied, 531 So.2d 168 (Fla. 1988). Similarly, whether an individual is an agent or an independent contractor is an issue of fact. Dorse v. Armstrong World Indus., Inc., 513 So.2d 1265, 1268n.4 (Fla. 1987). The authority of an agent may be created in any of three ways, each of which is dependent upon the facts of the situation. Although actual authority is normally granted by agreement, authority may also be granted by implication from the agent's express authority or inferred from the circumstances of the transaction. 2 Fla. Jur. 2d, Agency & Employment, §29 (1977), The Florida Bar v. Allstate Ins. Co., 391 So.2d 238 (Fla. 3rd DCA 1980), O'Neal v. Crumpton Builders, Inc., 143 So.2d 344 (Fla. 1st DCA 1962). An agent may also be imbued with apparent authority. Federal Ins. Co. v. Western Waterproofing Co. of America, 500 So.2d 162, 165 (Fla. 1st DCA 1986), Carolina-Georgia Carpet & Textiles, Inc. v. Pelloni, 370 So.2d 450, 451 (Fla. 4th DCA 1979). There are three factual predicates to the existence of apparent authority. Id.

As the Court may surmise, there are an infinite number of factual scenarios involving an insurer, insured and

independent insurance agent that may give rise to a dispute concerning the agent's role in the formation of the insurance contract. There is nothing inherent in the nature of the relationship among those three entities that compels the conclusion that the independent insurance agent acts as the agent of the insured in rejecting UM coverage.[1/] The actual authority granted by an insured to an independent insurance agent may not, or may, authorize the agent to reject UM coverage. Nothing in the nature of the relationship between an insured and an independent insurance agent requires that the insured give the agent this authority. There is nothing in this relationship which necessarily implies that the grant of authority includes the obligation to reject UM coverage. It is obvious that the requisites for apparent agency are not necessarily met; the insured may not, or may, make some representation to the insurer and the insurer may not, or may, change its position in reliance on the representation. The nature of the relationship between an insured and an independent insurance agent does not preclude either factual scenario.

AFTL submits that it is clear that an independent insurance agent should not be considered agent of the insured

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[1/] The converse, however, is not true. As AFTL will argue below, and as the Second District held, the relationship between an insurer and its independent agent necessarily invests the independent agent with authority, either implied or apparent, to act on the insurer's behalf in negotiating the terms of UM coverage.

as a matter of law. The flow of authority from the insured to an independent agent will vary with the circumstances of the particular transaction. Accordingly, the Second District's decision was consistent with the general principles of agency applicable to insurance contracts.

### C. Florida Jurisprudence Is Consistent With The Rule That Traditional Principles Of Agency Are Applied To The Formation Of Insurance Contracts.

AFTL submits that the existence of a dispute over the role of an independent insurance agent in rejecting UM coverage stems from a misunderstanding of the law applicable to insurance brokers and insurance agents. As is shown above, the agency status of an individual vis a vis an insurer or insured is generally a matter of fact. It appears, however, that some courts have sought to create "bright-line" rules applicable to the entities typically involved in insurance transactions. These efforts have confused Florida jurisprudence on the subject. Notwithstanding those cases, the majority of Florida case law properly perceives the relationship among insured, insurers and their intermediaries. As these courts have held, the role of the intermediaries is determined by the law of agency.

Certain case law suggests that an individual who obtains insurance coverage for an insured is necessarily an insurance "broker" and, therefore, an agent of the insured. See e.g., AMI Insurance Agency v. Elie, 394 So.2d 1061 (Fla. 3rd DCA 1981), Noaker v. Canadian Universal Ins. Co., 468 So.2d

330 (Fla. 2d DCA 1985). AFTL suggests that this view is founded on an incorrect appreciation of the definitions of an insurance broker and insurance agent. These cases seem to rely on an individual's status as insurance broker or agent to determine whether the individual is acting on behalf of the insurer or insured. This approach places the cart before the horse. Definitionally, a broker is the agent of the insured. See, 3 Couch on Insurance 2d, §25.92 (1960), 16 Appleman, Insurance Law & Practice, §§8726, 8727 (1968). Thus, the threshold question is whether an individual is the agent of the insured. This determination is the prerequisite to the individual's status as broker. Likewise, the status of an individual as an "insurance agent," who is by definition the agent of the insurer, requires the preliminary determination of whether, under the general rules of agency, the individual is the agent of the insurer.

This approach has been applied by this Court and district courts. For example, in Centennial Ins. Co. v. Parnell, 83 So.2d 688 (Fla. 1955), the determination was first made that the intermediary had no authority to bind the insurer. It was only from this determination that the Court concluded that the intermediary was not the agent of the insurer. The court did not rely on any label to make its decision. Similarly, in Auto Owners Ins. Co. v. Yates, 368 So.2d 634 (Fla. 2d DCA 1979), cert. denied, 378 So.2d 351 (Fla. 1979), the court determined that the intermediary had no

authority, either actual or apparent, to bind the insurer. With these factual determinations in hand, the District Court concluded that the intermediary acted as an insurance broker. Id. at 637. See also, Acquesta v. Industrial Fire & Cas. Co., 467 So.2d 284 (Fla. 1985), in which this Court declined to recognize a distinction between an insurance broker and another agent authorized to act on behalf of the insured.

Thus, Florida jurisprudence, consistent with the principles of agency, rejects Travelers' attempt to fashion a rule of law attributing the conduct of an independent insurance agent to the insured. Both generally, and in the context of insurance contracts, the courts have held that agency status is a question of fact. Because there is nothing unique in the relationship between an insured and an independent insurance agent that would cause the insurance agent to inevitably be considered the agent of the insureds, the adoption of such a rule would be incorrect. Accoridngly, the Second District properly reversed the judgment of the trial court.

## II. UNDER GENERAL RULES OF AGENCY, A MULTIPLE-CARRIER AGENT ACTS ON BEHALF OF THE INSURER IN NEGOTIATING THE PROVISIONS OF THE INSURANCE POLICY, INCLUDING UNINSURED MOTORIST COVERAGE.

Although the general rules of agency provide that the existence and scope of agency are generally questions of fact, there are exceptions to this rule. AFTL submits that this case presents one such exception. Given the necessary relationship between an insurer and an "independent insurance agent," the

conduct of the agent, in negotiating UM coverage, should be attributed to the insurer. Under either the doctrine of implied authority or apparent authority, the conduct of the independent agent must be ascribed to its principal, the insurer.

As noted above, an agent may exercise implied authority which flows from his express grant of authority. 2 Fla. Jur. 2d, Agency & Employment, §29 (1977), Allstate Ins. Co., supra, O'Neal, supra. In this suit, Key was given the authority by Travelers to offer quotations on insurance and bind coverages on Travelers' behalf. It is a necessary consequence of this authority that Key had the implied authority to discuss the terms of the insurance policy, including the amount of UM coverage. To hold otherwise simply makes no sense. For an individual to quote the price for insurance, and to bind the agreement on behalf of the insurer, he must have the authority to discuss the coverages, including the amount of UM coverage. If he is not impliedly authorized to discuss this with the applicant, the agent could not determine the amount of insurance the applicant desired. The position taken by Travelers would require that the agent be deemed to have no authority whatsoever to discuss the terms of the contract, even though he is authorized to dictate the terms of the contract and accept it on its principal's behalf. The inconsistencies in this position are too profound to permit it to become a rule of law.

Likewise, the indepedent insurance agent possesses apparent authority to negotiate the terms of UM coverage on behalf of the insurer. As noted by the Second District, an independent insurance agent is advertised as an agent for several insurers. 563 So.2d at 716. This manifestation of the authority of the independent agent is sufficient to create apparent agency. There are three requisites of apparent agency: 1) a representation by the principal; 2) reliance on the representation by a third party; and 3) a change of position by that third party in reliance on the representation. Federal Ins. Co., supra, at 165. All three requisites are met by the creation by an insurer of an independent agency. By authorizing the use of its name, the insurer makes a sufficient representation. This representation is, necessarily, relied on by an insured when he negotiates with the independent agent. The insured, justifiably, believes that the independent agent will perform all the obligations of the insurer and that, by completing his agreement with the independent agent, the contract is bound. Thus, all the requirements for the existence of apparent agency are met and are, therefore, the insurer is bound by the conduct of its agent.

Either form of agency is sufficient to bind the insurer. The insurer's grant of actual authority to bind coverages on its behalf necessarily implies that the agent is authorized to discuss those coverages with the insured.

Alternatively, the grant of actual authority is a sufficient representation to the public that the agent is entitled to discuss coverages so as to bind the insurer with those discussions. Both theories lead to the inevitable result that, in the circumstances of this case, Travelers was bound by Key's discussions with the insureds.

The reasoning of the Second District has been adopted by the Third Circuit in a recent case. Rodriguez v. American United Ins. Co., 570 So.2d 365 (Fla. 3rd DCA 1990). Like the instant suit, Rodriguez involved a dispute over the validity of a rejection of UM coverage. The trial court granted summary judgment in favor of the insurer, ruling that the independent insurance agent was the agent of the insured. The Third District reversed, stating:

> [W]e agree with Judge Alrenbernd's analysis in Quirk v Anthony, ... holding that for purposes of obtaining a proper rejection of uninsured motorist coverage, an "independent" agent is the agent of the insurer he or she is licensed to represent. The agent is not a broker for the insured under such circumstances.

Id. at 366.

The soundness of the reasoning of the court below is apparent. The conduct of an independent agent, in negotiating the terms of insurance coverage, can only be attributed to the insurer. This result alone comports with Florida jurisprudence and the law of agency.

## CONCLUSION

Amicus Curiae AFTL submits that the Second District's holding that, concerning the obligation to obtain a proper rejection of UM coverage, an independent agent is the insurance company's agent, when the insurer is one of the agent's licensed companies, should be sustained. The general principles of agency apply to any case involving questions of the formation of an insurance contract. Under those well established principles, the trial court's decision, and the contention urged herein by Travelers, that an independent agent is a "broker," therefore his conduct is binding only on the insured, is incorrect. The role of the intermediary of an insurer and insured is not susceptible to intransigent rules; this issue can only be answered with reference to the general law of agency and the facts of the case. When those rules are applied to the inevitable facts associated with the creation of an independent agency, the necessary and unavoidable conclusion is that the independent agent acts on behalf of the insurer. Accordingly, the decision of the Second District must be affirmed.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Lee D. Gunn, IV, Esq.; Robert Jackson McGill, Esq.; Robert M. Daisley, Esq.; M. Joseph Lieb, Jr., Esq.; Craig Ferrante, Esq.; and Andrew E. Grigsby, Esq. by United States mail this 9th day of March, 1991.

ATTORNEY