IN THE SUPREME COURT STATE OF FLORIDA

SUPREME COURT CASE NO. 76,432

TRAVELERS INSURANCE COMPANY,

Petitioner,

vs.

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

Respondents,
Cross-Petitioners,

vs.

SOUTHERN AMERICAN INSURANCE COMPANY,

Cross-Respondent.

CROSS-RESPONDENT SOUTHERN AMERICAN'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

This Brief is limited to [Cross-Respondent] Southern American Insurance Company's response to [Cross-Petitioner] Quirk's Brief.

The Plaintiff/Appellant [Cross-Petitioner] will be referred to as Quirk.

This Defendant/Appellee [Cross-Respondent] will be referred to as Southern American.

References to the record on appeal will be made by the letter "R." and page number. Because there seem to be slight discrepancies in the pagination of the record, for the court's convenience references will also be made to the depositions directly (by the person's name, the letters "Depo.," the date of the deposition, and the page number).

Southern American also cites to 3 Appendices:

Appx. 1 -- The UM Rejection Form [R. 513].

Appx. 2 -- Broome's 3/20/87 deposition at 23-24 [R. 502-03]

Appx. 3 -- §§ 626.913 -.927, Fla. Stat. (1983)

Because so many different entities are involved in this appeal, Southern American provides a listing of all those involved, plus a chart, to show the relationship between all the different parties.

Unless otherwise indicated, all emphasis is original.

STATEMENT OF THE CASE AND OF THE FACTS

A. Those Involved in This Appeal

Appellant

James H. Quirk	-- West Coast employee & permissive user of truck [Respondent/Cross-Petitioner]

Appellees

Lynda M. Anthony	-- driver of own car
Queen City Ins.	-- provided UM insurance for Quirk
Key Agency	-- insurance agent for Travelers & insurance broker for West Coast [Respondent]
Travelers Ins.	-- provided primary insurance for West Coast [Petitioner]
Southern American Ins.	-- surplus lines carrier & umbrella insurer of West Coast [Cross-Respondent]

Others

Crump London Underwriters	-- a licensed surplus lines agency; procured West Coast's umbrella ins. from So. American
West Coast	-- employer of Quirk; truck's named insured
John Haines	-- president of West Coast
Joseph Cardinale	-- employee of West Coast
Tom Dignam	-- president of Key Agency
Jo Ann Broome	-- employee of Key Agency
State Farm Ins.	-- insurer of Anthony (tendered its $10,000 policy limits)
Iowa National Ins.	-- insurer of West Coast (its policy does not cover the accident)

THOSE INVOLVED IN THIS APPEAL

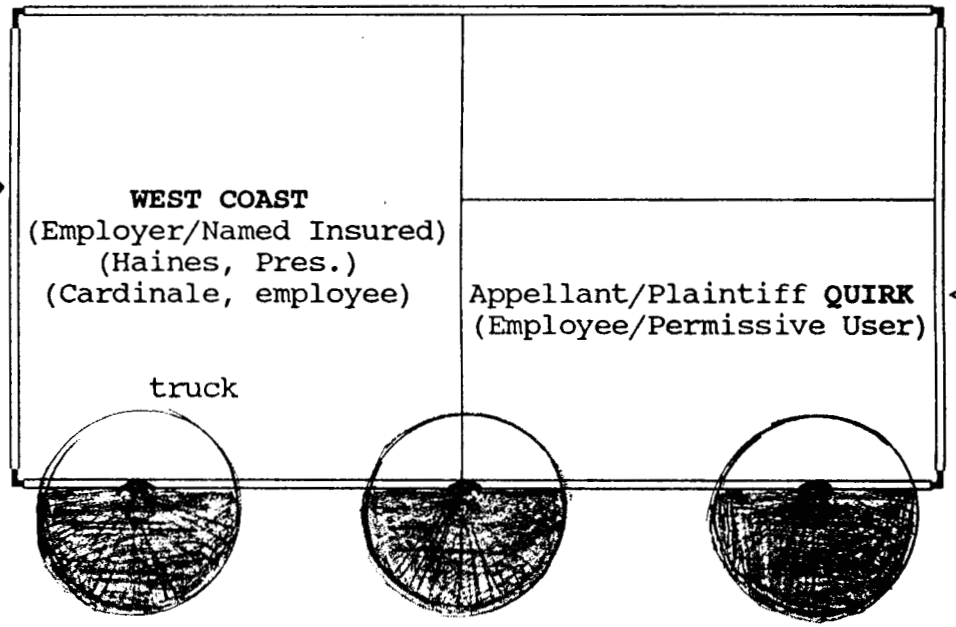
Appellee/Defendant **SO. AMERICAN**
[Surplus Lines Carrier/
Umbrella insurer of **W.C.**]

S T A T E O F F L O R I D A B O R D E R

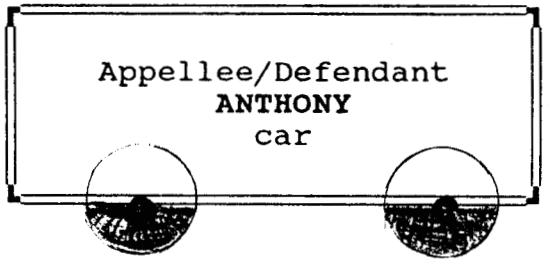
CRUMP LONDON
[Surplus Lines Broker]

Appellee/Defendant **KEY AGENCY**
Broker/Authorized Travelers' Agent
procured insurances for **W.C.** ----->
(Dignam-Pres.; Broome-employee)

Appellee/Defendant **TRAVELERS**
[primary insurer of **W.C.**]



insured by
<----------
Appellee/Defendant
QUEEN CITY
[Personal UM ins.]



insured by
<---------- STATE FARM
[tendered limits]

B. Case & Facts Re: Lack of Jurisdiction

One of Southern American's Co-Defendants, Travelers Insurance, was the first to petition this court for review of Quirk v. Anthony, 563 So.2d 710 (Fla. 2d DCA 1990). Plaintiff Quirk then cross-petitioned for review. Quirk actually filed two jurisdictional briefs. Quirk's first brief, dated August 8, 1990, was improperly characterized as "Petitioner's Jurisdictional Brief." It should have been styled "Respondent/Cross-Petitioner's Jurisdictional Brief." On August 22, 1990, Cross-Respondent Southern American, filed its "Jurisdictional Brief of Cross-Respondent Southern American Insurance Company." This Cross-Respondent's Brief responded to the arguments made by Quirk in his August 8, 1990, "Petitioner's Jurisdictional Brief."

Southern American responded by stating that Quirk apparently misapprehended the use of a jurisdictional "conflict" brief because, in his brief, Quirk went beyond the limited scope of permissible argument. Specifically, Southern American pointed out (1) that both Quirk's statement of the Issue and his Summary of Argument were not proper "conflict" arguments, instead they went to the merits of the case, and (2) that Quirk provided the court with the trial court's order which is irrelevant to a determination of whether this court has conflict jurisdiction.

On August 28, 1990, the Clerk of the Court, Sid J. White, notified Quirk that his brief was wrongly styled and ordered Quirk to refile only one brief (covering both his Response and his Cross-Petition), and resubmit this brief in the proper style.

On September 7, 1990, Cross-Respondent Southern American received Quirk's restyled brief (Service date of brief partially illegible). In addition to "restyling" his brief, Quirk improperly rewrote his brief. Southern American objected, but Quirk's brief was accepted. Consequently, Southern American never got a chance to respond to Quirk's amended jurisdictional brief.

C. Case & Facts Re: Lack of Merit

Quirk is correct in stating (1) that West Coast employed Key Agency to procure insurance for West Coast, and that Key Agency procured insurance for West Coast from Travelers. [R. 231]; and (2) that West Coast again employed Key Agency to procure a $500,000 umbrella policy, and that the policy was issued by Southern American. [Quirk's Brief at 5-7]. Quirk is likewise correct that, as to the procurement of the policy from Travelers, Key Agency was a licensed agent of Travelers. [R. 548].

However, at the outset in his Statement of the Case and Facts, Quirk omits the fact that, while Key Agency was a licensed agent of Travelers, and thus could deal with Travelers directly, Key Agency was not a licensed agent of Southern American and, by law, could not deal with it directly. § 626.914(1), Fla. Stat. (1983). This is because Southern American's umbrella policy was a surplus lines policy -- Southern American is a surplus lines company for the State of Florida. [Depo. Dignam 1/10/89 at 35] [R. 559].

Florida law specifically governs surplus lines insurance. §§ 626.913 -.939, Fla. Stat., (1983) [Southern American's Appx. 3]. By definition, a surplus lines insurer is not admitted to do business in the State of Florida. The coverage was provided by

Southern American only because the coverage was not otherwise available through insurers admitted to do business in the state. [Depo. Dignam 1/10/89 at 35] [R. 559]. Since Southern American is not admitted to do business as an insurance company in Florida, it cannot maintain an agency network in the state. Southern American could not use Key Agency as its agent in Florida even it wished to do so.

Therefore, Quirk's Statement of the Case and Facts regarding the Southern American umbrella policy is misleading. Quirk omits one very important company from his facts -- Crump London Underwriters, Inc., a licensed surplus lines agency in the State of Florida, which stood between Key Agency and Southern American. Quirk finally discusses Crump London in his brief at 27-29, but Crump London's position needs to be made clear from the start. What happened is this:

West Coast told Key Agency that West Coast needed an umbrella policy. So, as required by Florida law, Key Agency submitted an application to a surplus lines agent (Crump London) for umbrella coverage for West Coast. [Depo. Dignam 1/10/89 at 37] [R. 561]; § 626.914(1), Fla. Stat. (1983). Key Agency had to go through Crump London because Key Agency was not licensed to act as a surplus lines agent for Southern American. [Depo. Dignam at 35] [R. 561]. The surplus lines agent (Crump London), as required by Florida law, then procured the surplus lines umbrella policy from the surplus lines insurer (Southern American). [Depo. Dignam 1/10/89 at 35] [R. 559]; § 626.915(3), Fla. Stat. (1983).

ISSUES

I. THIS COURT DOES NOT HAVE JURISDICTION FOR THE CROSS-PETITION; THERE IS NO CONFLICT

II. KEY AGENCY IS AN "INSURANCE BROKER"; AN INSURANCE BROKER REPRESENTS THE INSURED, NOT THE INSURER

A. A Broker Represents the Insured and Can Reject UM Coverage for the Insured

B. Under the Facts and Law, Key Agency Is a Broker

C. By Law, Key Agency Could Not Be Southern American's Agent

D. The Facts Show Key Agency Was Not Acting As Southern American's Agent

E. Southern American Requested That the UM Rejection Be Signed; Key Agency, Acting on Behalf of the Insured, Signed It

F. Because Southern American Was an Excess Insurer, It Had No Duty to Provide UM Coverage

SUMMARY OF ARGUMENT

This court lacks jurisdiction to consider the cross-petition because there is no conflict. Consequently, this court should recognize that it improvidently granted the cross-notice and should now deny review.

The affirmance of the summary judgment for Southern American is proper. It is proper no matter what this court decides about the main petition for review. Key Agency signed the UM coverage rejection form, and Southern American relied upon this signed UM coverage rejection form. This reliance is justified because, in providing the UM coverage release, Key Agency (as an insurance broker) acted as the agent of the insured, as a matter of law. As such, West Coast was bound by its agent's act in executing the release and submitting it to Southern American whether or not the agent was, in fact, authorized to do so. Key Agency was not acting as an agent for Southern American, nor could it act for Southern American as a matter of Florida law.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION FOR THE CROSS-PETITION; THERE IS NO CONFLICT

This court's vote on the main petition was 5 to 1 in favor of accepting review. This court's vote on the cross-petition was 4 to 2. Southern American respectfully suggests that, while this court was correct in accepting review of the main petition, it erred in also accepting review of the cross-petition. As this court is aware, this occasionally happens. This court will accept review initially and then realize upon further review that

there is no conflict. In re: Interest of M.P., 472 So.2d 732 (Fla. 1985). When this happens, this court should deny review. Id. at 733.

In the present case, it is certainly understandable that this court erred in initially accepting review. As detailed in the Statement of the Case and Facts, Quirk filed an inappropriate jurisdictional brief. Southern American responded to Quirk's jurisdictional arguments. Then, Quirk was allowed to file a new, re-worked brief, correcting his arguments. Southern American objected, but the new brief was allowed to be filed. The relevance of all this is that Southern American was never given a chance to respond to Quirk's re-worked arguments. Therefore, it was probably never made clear to this court that there was no conflict jurisdiction for the cross-petition.

Although it was not clear then, it should be clear now. In both his first and second jurisdictional briefs, Quirk argued the present case "directly" conflicted with Pawlik v. Stevens, 499 So.2d 61 (Fla. 5th DCA 1986). Yet, in his entire brief (including both the petition and the cross-petition), **QUIRK DOES NOT CITE PAWLIK**. Quirk does not cite Pawlik anywhere, for any proposition, at any time. Quirk merely used Pawlik as a ruse to get before this court. It was inappropriate, and this court should deny review. See, e.g., Hardee v. State, 534 So.2d 706, 708 n.1 (Fla. 1988); White Constr. Co. v. Dupont, 455 So.2d 1026 (Fla. 1984); Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

II. KEY AGENCY IS AN "INSURANCE BROKER"; AN INSURANCE BROKER REPRESENTS THE INSURED, NOT THE INSURER

A. A BROKER REPRESENTS THE INSURED AND CAN REJECT UM COVERAGE FOR THE INSURED

An insurance broker, as agent for the insured, is authorized to reject uninsured motorist coverage. Noaker v. Canadian Universal Ins. Co., 468 So.2d 330, 332 (Fla. 2d DCA 1985). This is in accord with this court's decision in Acquesta v. Industrial Fire & Casualty Co., 467 So.2d 284, 285 (Fla. 1985), which held that a wife had authority to act as her husband's agent and reject UM coverage on her husband's behalf. See also Guarantee Ins. Co. v. Sloop, 473 So.2d 784 (Fla. 2d DCA 1985).

Consequently, Key Agency, as agent for West Coast was authorized to reject UM coverage. "Even if the broker improperly placed [the insured's] signature on the application, the insured rather than the insurer bears the risk of such an error ...." Empire Fire & Marine Ins. Co. v. Koven, 402 So.2d 1352, 1353 (Fla. 4th DCA 1981). Therefore, even if Broome acted improperly in signing Cardinale's signature for West Coast, it is West Coast who bears the risk of that error. It is West Coast who chose Key Agency as its broker, and it is West Coast who bears the risk of its broker's error.

B. UNDER THE FACTS AND LAW, KEY AGENCY IS A BROKER

An insurance broker is distinguished from an insurance agent as follows:

> An 'insurance broker' is one who acts as middle man between the insured and the insurer, and who solicits insurance from the public under no employment from any special

> company, and who, upon securing an order, places it with a company selected by the insured, or, in the absence of such a selection, with a company selected by himself; whereas an 'insurance agent' is one who represents an insurer under an employment by it.

Couch on Insurance 2d § 25.93 (rev. ed. 1984); see also 30 Fla. Jur. 2d, Insurance § 316. Therefore, while an insurance agent does represent the insurer, a broker does not.

The undisputed facts establish that Key Agency is an insurance broker -- Key Agency first began to handle the insurance for various businesses in which John Haines was the principal around February of 1982. [Depo. Dignam 2/17/87 at 7] [R. 223]. In late 1982 or 1983, West Coast was formed with Haines as its President, and Key Agency obtained insurance for that entity as well. Key Agency continued to write insurance for Haines' businesses through 1985. [Depo. Haines 7/12/88 at 8, 13] [R. 113, 118].

When Haines first chose Key Agency to handle the insurance for his companies, he was shopping for an agency that focused on coverage and price. [Depo. Haines 7/12/88 at 11] [R. 116]. He did not desire insurance with any particular insurance company. Id. As testified to by Haines, each year Key Agency was asked by him to submit a quotation on the cost of renewing the existing coverage. [Depo. Haines 7/12/88 at 8] [R. 113]. Haines testified that, in preparing the insurance quotation, he expected Key Agency to shop among the various insurance companies to obtain the best coverage for the best price. [Depo. Haines 7/12/88 at 11, 16-17] [R. 116, 121-22]. Over the years, Key Agency placed the insurance coverage with several different insurance

companies. [Depo. Haines 7/12/88 at 16] [R. 121].

Haines described the relationship between Key Agency (and in particular Tom Dignam, its President) and West Coast (and in particular himself, Haines, its President) as follows:

> He seemed to know what he was doing and so we just more or less left it in his hands to handle things for us and make sure we were covered properly.

[Depo. Haines 7/12/88 at 12] [R. 117].

He relied upon Dignam's experience to advise him. [Depo. Haines 7/12/88 at 12-13] [R. 117-18]. In fact, he never rejected any recommendations Dignam made concerning insurance coverage. [Depo. Haines 7/12/88 at 14] [R. 119]. Once the proposal had been accepted by Haines, Dignam would prepare the paperwork and Haines would sign it on behalf of West Coast without any further review:

> Again, I trusted the man in what he was doing. I assume that everything was all set for me to sign. I just signed the paperwork and that is the way it went.

[Depo. Haines 7/12/88 at 57] [R. 162]. Haines, testifying as the President of the insured, West Coast, is clear in expressing his belief that Key Agency was acting on behalf of West Coast in obtaining the insurance coverage. Depo. Haines 10/28/88 at 3] [R. 425].

Tom Dignam, the President of Key Agency, testified his company had no relationship whatsoever with Southern American and had no direct contact with them in obtaining this umbrella policy for West Coast. [Depo. Dignam 1/10/89 at 37] [R. 561]. To obtain the insurance, he contacted Crump London located in Sanford, Florida for it to procure the coverage in its capacity as a

licensed surplus lines agent. Id. No one ever requested UM coverage for the umbrella policy (in writing, or otherwise); the policy did not provide UM coverage when issued; and no premium was charged or paid for UM coverage.

Dignam testified that he represents several companies and the determination as to whom to write the coverage with is based on availability. [Depo. Dignam 1/10/89 at 33] [R. 557]. When Haines required a $5 million umbrella policy for West Coast because of the contract requirements of a large job, he contacted Crump London because such a policy was not available from an "authorized" Florida insurer. Crump London, acting as the surplus lines agent, signed the policy as required by § 626.914(1), Fla. Stat. (1983), while Key Agency acted as broker. [Depo. Dignam 1/10/89 at 34] [R. 558].

Dignam also testified he was a member of the Independent Insurance Agents Association of Florida. An independent insurance agent represents more than one company and works only on commission. They are not licensed or contracted directly with a direct writer such as Allstate, State Farm, or Nationwide. They have a right to operate as an independent contractor under the guidelines of each individual company's contract with the agent. The duty of the independent agent is to obtain the best price and availability and handle the coverages as he sees fit to the insured's best advantage. [Depo. Dignam 1/10/89 at 36] [R. 560].

Finally, Dignam testified it was his understanding that, at the time Key Agency personnel affixed Cardinale's signature to the UM coverage rejection form on behalf of West Coast and

submitted it to Southern American via Crump London, they were authorized by West Coast to do so. [Depo. Dignam 1/10/88 at 37-38] [R. 561-62]. Thus, although the issue of this authority is disputed, there is no issue concerning whether this was an inadvertent act or mistake on the part of Key Agency or whether it was an unauthorized and unratified act by someone in the agency without Dignam's authority to do so.

Therefore, the facts establish that Key Agency perfectly fits the textbook definition of a broker. Based on the undisputed material facts, and as a matter of law, Key Agency was acting as a broker: (1) in obtaining the policy of insurance for West Coast with Southern American, and (2) in executing the rejection of UM coverage on behalf of West Coast.

Quirk argues that § 627.727, Fla. Stat., (Supp. 1984), imposes a duty on an insurer (Southern American) to inform its insured (West Coast) of its statutory options for UM coverage. The flaw with this argument is that Key Agency is a broker for West Coast. As such, the insurer's (Southern American's) duty to inform the insured is satisfied by the insurer's notifying of the insured's broker (Key Agency). Noaker, 468 So.2d at 332; see Acquesta, 467 So.2d at 285; see also Sloop, 473 So.2d at 785. Notifying the insured's broker is the same as direct notification of the insured itself. Consequently, Southern American was completely in compliance with § 627.727, Fla. Stat., (Supp. 1984).

Quirk also argues that the mere use of the term "broker" is not "dispositive" (implying that the trial court and the Second District thought it was dispositive). [Quirk's Brief at 27].

This is obviously not what the trial court or the Second District did. Just as Quirk urged, both courts considered the facts in determining whom Key Agency was acting for. The courts correctly concluded that the undisputed facts showed that Key Agency was acting as an agent for West Coast, not for Southern American.

C. BY LAW, KEY AGENCY COULD NOT BE SOUTHERN AMERICAN'S AGENT

Quirk states that "[t]he question of the agency relationship between the parties in this matter is further clouded by the fact" that Southern American is a surplus lines insurer. [Quirk's Brief at 27-28]. The reality is the fact that Southern American is a surplus lines insurer does not "cloud" the issue at all. It is further proof of what the facts have already shown -- that Key Agency was not acting as an agent for Southern American. The policy Key Agency obtained was a "surplus lines" policy. As such, it is specifically governed by Florida's "Surplus Lines Law." §§ 626.913 -.939, Fla. Stat. (1983) [Southern American's Appx. 3].

A surplus lines insurer is, by definition, a foreign (or "unauthorized") insurer not authorized to do business in the state. Couch on Insurance 2d §§ 226:4,:12; 45:626-:627 (rev. ed. 1984). Surplus lines insurance (coverage obtained from a foreign, "unauthorized" insurer) is only obtainable when the policy cannot be obtained from the state's "authorized" insurers. § 626.914, Fla. Stat. (1983). To obtain the Southern American surplus lines policy, Key Agency was required by law to go through a "surplus lines agent," in this case, Crump London. Id. Thus, the surplus lines agent (Crump London) obtained the surplus lines policy from

a surplus lines insurer for the State of Florida (Southern American). [Depo. Dignam 1/10/89 at 35] [R. 559].

Therefore, by statutory definition, as a surplus lines insurer, Southern American is not admitted to do business in the State of Florida. §§ 626.913 -.939, Florida Statutes (1983) [Southern American's Appx. 3] [Depo. Dignam 1/10/89 at 35] [R. 559]. Since Southern American is not admitted to do business as an insurance company in Florida, it cannot maintain any agency network in the state. Id. And, specifically, it cannot utilize Key Agency as its agent.

Quirk's argument -- that the surplus lines statute indicates an intent for Key Agency to be Southern American's agent -- is not supported by the statute. Quirk says the statute evinces this intent by the fact that the statute requires that Key Agency's name and address be put on the front of the Southern American policy. [Quirk's Brief at 28-29], relying upon § 626.924, Fla. Stat. (1983) [see Appx. 3]. § 626.924 merely begins by stating:

> Each surplus lines agent through whom a surplus lines coverage is procured [i.e., Crump London] shall write or print on the outside of the policy and on any certificate, cover note, or other confirmation of the insurance his name, address, and identification number and the name and address of the local agent through whom the business originated [i.e., Key Agency]....

This argument is quite a stretch. It reaches even further than the Second District was willing to go in the main decision in radically changing the existing Florida insurance agent/broker law. The mere fact that the statute requires Crump London to put its own

name and address, as well as put Key Agency's name and address, on the policy hardly evinces an intent for Key Agency to be Southern American's agent. And, in fact, as Quirk sort-of acknowledges, the thrust of this statute is not on that language, but on what follows:

> and shall have stamped or written upon the first page of the policy or the certificate, cover note, or confirmation of insurance the words: THIS INSURANCE IS ISSUED PURSUANT TO THE FLORIDA SURPLUS LINES LAW. PERSONS INSURED BY SURPLUS LINES CARRIERS DO NOT HAVE THE PROTECTION OF THE FLORIDA INSURANCE GUARANTY ACT TO THE EXTENT OF ANY RIGHT OF RECOVERY FOR THE OBLIGATION OF AN INSOLVENT UNLICENSED INSURER.

§ 626.924, Fla. Stat. (1983) [see Appx. 3]. The all-capitalized letters appear in the statute itself and show the intent of this section of the statute is to warn insureds that they do not have the protection of FIGA.

D. THE FACTS SHOW KEY AGENCY WAS NOT ACTING AS SOUTHERN AMERICAN'S AGENT

Quirk makes a faulty syllogism, based on a faulty factual premise. Quirk argues: (1) "[i]n the instant case 'KEY AGENCY' was a surplus lines agent;" (2) Southern American is a surplus lines insurer; therefore, (3) Key Agency is Southern American's agent. [Quirk's Brief at 28]. The fault in the syllogism is that Key Agency was not acting as a surplus lines agent for Southern American. It is Crump London who was acting as a surplus lines agent for Southern American. Nothing Quirk cites says otherwise. Quirk cites to Dignam's statement that "I am a surplus lines licensed agent," and that Key Agency had a surplus lines license [R. 559, 222] [Quirk's Brief at 28]. That does not

mean that in this case Dignam (or Key Agency) was functioning as a surplus lines agent. And in fact the record is undisputed that Key Agency was not. The record is undisputed that Crump London was the entity functioning as the surplus lines agent. Dignam stated, "I am not licensed with Southern American, therefore I must rely on the company that has the agent's agreement with Southern American -- that would be Crump London...." [Depo. Dignam 1/10/89 at 35] [R. 561].

Quirk then cites to § 626.914, Fla. Stat., and R. 558 to support his proposition that Key Agency was functioning as the surplus lines agent, and that Crump London was in fact just a counter-signing agent. [Quirk's Brief at 28-29]. Neither § 626.914 or R. 558 support this proposition. § 626.914(1) states that a surplus lines agent can deal with a surplus lines insurer directly only when licensed as the surplus lines insurer's agent. It is undisputed that Key Agency was not licensed to act for Southern American. [Depo. Dignam 1/10/89 at 35] [R. 561]. And in R. 558, Dignam merely states: "I do business with Crump London, which is a general agent for Southern American. I act as a broker for them. They have the control of the policy. The policy is issued and countersigned by them, and I bought it through them." That does not support Quirk's theory that Crump London was merely functioning as a counter-signing general resident agent. The undisputed facts show that only Crump London was acting as the surplus lines agent. And the reason only Crump London was the surplus lines agent is because of the undisputed fact that Key Agency was not licensed with Southern American. [Depo. Dignam

1/10/89 at 35] [R. 561].

Further, if the Court will look at the rejection form, it will see that actually Broome signed Joe Cardinale's signature on the form. [Southern American's Appx. 1] [R. 513]. Cardinale, of course, was an employee of West Coast, not an employee of Southern American. Broome then wrote Dignam's name next to Joe Cardinale's signature and her own initials. Dignam was questioned about this. [Depo. Dignam 2/17/87 at 60] [R. 276]. It is clear that he was somewhat confused and started to state that he was "theoretically" representing Southern American (This one statement is what Quirk relies upon in saying there were disputed issues of fact.) However, Dignam then corrected himself to state that it should have been signed by Frances L. Brown, who is not an employee of Key Agency. The surplus lines agent was required to countersign the policy and each endorsement. This is made clear at his later deposition:

> A. As to my understanding, I am not licensed with Southern American, therefore I must rely on the company that has the agent's agreement with Southern American -- that would be Crump London Underwriters -- that the policy is issued correctly and countersigned by them.
>
> Q. So your dealings were strictly with Crump London? You had no direct dealings with Southern American?
>
> A. No, sir.

[Depo. Dignam 1/10/89 at 37] [R. 561].

E. SOUTHERN AMERICAN REQUESTED THAT THE UM REJECTION BE SIGNED; KEY AGENCY, ACTING ON BEHALF OF THE INSURED, SIGNED IT

The procedure for rejecting UM coverage was discussed by Thomas M. Dignam, the President of Key Agency. He described the sequence as follows:

A. Yes, sir. The policy comes in the mail, normally we are four to a week behind in processing. So this policy probably was sitting in her basket for at least a week prior to this 12/3. And when it came time to process, when she got to this part of the stack, the policy was pulled out, billed, then our computer gets out the billing about three or four days later. And at the time that was done, the policy is separated into the insured's copy and our copy.

At that time this rejection of uninsured motorist coverage was probably signed by Jo Ann, mailed back to the company.

[Depo. Dignam 2/17/87 at 21] [R. 237].

This understanding was confirmed by the employee who actually handled the processing of the policy, Jo Ann Broome. In her deposition, Broome testified that on December 3, 1984 she billed the policy by making up an invoice request and put it in for the computer to bill West Coast. [Depo. Broome 3/20/87 at 9-10] [R. 488-89]. On the same date she executed the rejection of UM coverage on behalf of the insured West Coast and sent it back to Southern American. [Depo. Broome 3/20/87 at 11, 16] [R. 490, 495]. Broome testified that, other than sending the rejection to Southern American, **SHE DID NOT HAVE ANY CONTACT AT ALL WITH SOUTHERN AMERICAN.** [Depo. Broome 3/20/87 at 17] [R. 496].[1]

In Quirk's brief to the Second District, Quirk argued that Southern American asked Key Agency to fulfill its duty to obtain a "valid, knowing" rejection. On this appeal, Quirk has abandoned that position because it is clear that the record does not support it. All Broome says is Southern American asked that the rejection be signed:

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[1] A copy of the UM coverage rejection was also sent to the insured, West Coast. [Depo. Broome 3/20/87 at 16] [R. 495].

> Q. So, is it safe in me saying that it was standard office procedure at Key Agency at that time that when this paperwork was done if there was not a rejection of uninsured motorist coverage at that time that you would go ahead and fill one out and sign the person's name.
>
> A. No, evidently it's practice of Southern American Insurance Company -- every company does it different. Evidently, they sent this along with the policy and asked that it be signed.
>
> ....
>
> Q. I'm sorry, when they sent Exhibit Four, what happened?
>
> A. They sent Exhibit One along with it asking for a signature.

[Depo. Broome 3/20/87 at 24] [R. 502-03] [Southern American's Appx. 2].

It is rare that a factual record is so clear in establishing, as a matter of law, that an insurance agency was acting as a broker and agent of the insured as exists in this record. The testimony is unrefuted that there was no business relationship whatsoever between Key Agency and Southern American. There were no direct dealings between Key Agency and Southern American since the agency had to go through a separate surplus lines agent, Crump London. Key Agency did not even have Southern American's form for rejecting UM coverage and did not obtain it until it came with the policy. At that time, acting on behalf of the insured (West Coast), Key Agency signed the UM coverage rejection form and sent it back. Under such circumstances, if such an act was not authorized, it is the insured, West Coast, who bears the consequences of its agent's acts. Empire Fire & Marine Ins. Co. v. Koven, 402 So.2d 1352 (Fla. 4th DCA 1981); Auto Owners Ins. Co. v. Yates, 368 So.2d 634 (Fla. 2d DCA 1979); Noaker v. Canadian Universal Ins.

Co., 468 So.2d 330 (Fla. 2d DCA 1985); Acquesta v. Industrial Fire & Casualty Co., 467 So.2d 284 (Fla. 1985); Guarantee Ins. Co. v. Sloop, 473 So.2d 784 (Fla. 2d DCA 1985). The Second District correctly stated this principle. Quirk, 563 So.2d at 715 & n.5.

F. BECAUSE SOUTHERN AMERICAN WAS AN EXCESS INSURER, IT HAD NO DUTY TO PROVIDE UM COVERAGE

As Quirk points out, the Second District cited an additional, separate ground as support for its holding. Quirk, 563 So.2d at 716. The Second District correctly pointed out that Southern American, as an excess insurer, was not obligated to provide UM coverage under the amendment to the statute.[2] Southern American only needed to make the coverage available as a part of the application and "at the written request of the insured." Id. at 716. What Quirk ignores is the fact that Southern American did make UM available -- it made it available by sending the UM rejection form to be signed. [Southern American's Appx. 1&2] [Depo. Broome 3/20/87 at 24] [R. 399, 502-03, 513]. Therefore, the requirements of the statute were met -- (1) Southern American made UM coverage available; and (2) there was never a written request by the insured.

Quirk's response is that Southern American did not technically comply with the statute because there is nothing in the record to

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[2] This amendment to the statute took effect October 1, 1984. § 627.727, Fla. Stat. (Supp. 1984). The policy itself took effect on October 26, 1984, as did the UM rejection. [R. 513] [Southern American's Appx. 1]. Therefore, cites to § 627.727 are to the (Supp. 1984) statute. [Cites to the Surplus Lines Insurance Statute are to the (1983) version because it was not amended in 1984.]

show that UM was made a part of the application. [Quirk's Brief at 30]. However, the response to that is as follows:

1. The intent of the statute was certainly complied with. The amended statute indicates its concern is that UM be clearly and precisely offered as part of a primary policy. There are definite steps which must be complied with before UM can be rejected. § 627.727(1), Fla. Stat. (Supp. 1984). On the other hand, as the Second District appeared to recognize, the Legislature wants UM on excess policies to be more of a true "option" which is much more easily and less formally rejectable.

2. This argument is only a red herring. Key Agency, acting as agent for West Coast, did not request (in writing or otherwise) UM coverage on the excess policy. Key Agency, acting as agent for West Coast, **DID NOT WANT UM COVERAGE.** [See, e.g., R. 261-62]. Key Agency had the authority to procure the coverage it knew West Coast needed. Key Agency knew West Coast did not want UM coverage.

CONCLUSION

There is no conflict between Pawlik and the Second District's opinion for Southern American. Therefore, this court does not have jurisdiction to decide the cross petition. Even it does, based on the undisputed material facts in this case, Key Agency was acting as an insurance broker on behalf of West Coast in obtaining the Southern American policy. As such, West Coast was bound by Key Agency's act of executing and forwarding on to Southern American via Crump London, the rejection of UM coverage. This is true whether Key Agency was authorized to do so or not. Hence the Second District properly affirmed the summary judgment for

Southern American as matter of law. This court should either deny review of the cross-petition or affirm the Second District's affirmance of Southern American's summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of April 1991 to: **ROBERT JACKSON McGILL, ESQ.,** Attorney for Plaintiffs [Respondents/Cross-Petitioners], 1515 S. Tamiami Trail, Suite 1, Venice, FL 34292; **LEE D. GUNN, IV, ESQ.,** GUNN, OGDEN & SULLIVAN, P.A., Attorneys for Defendant [Petitioner] TRAVELERS, Post Office Box 1006, Tampa, FL 33601; **M. JOSEPH LIEB, JR., ESQ.,** Post Office Box 1238, Sarasota, FL 34230; **CRAIG FERRANTE, ESQ.,** HENDERSON, FRANKLIN, STARNES & HOLT, Attorneys for Defendant QUEEN CITY, Post Office Box 280, Fort Myers, FL 33902-0280, and **ROBERT M. DAISLEY, ESQ.,** ANNIS, MITCHELL, COCKLEY, EDWARDS & ROEHN, P.A., Attorneys for Defendant [Respondent] KEY AGENCY, Post Office Box 3433, Tampa, FL 33601.

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