No. 02-0843

IN THE SUPREME COURT OF TEXAS

OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY,

Petitioner,

v.

ZEFERINO SANCHEZ,

Respondent.

RESPONDENT ZEFERINO SANCHEZ'S BRIEF ON THE MERITS

STATEMENTS OF FACTS AND PROCEDURAL BACKGROUND

Overview

We see this as a rule-of-law case. The facts are stipulated by the parties. The situation of a claimant asking for insurance policy benefits when he did not pay for those coverages results from two circumstances: 1) An insurer issued a family automobile insurance policy in the name of a husband, without naming the wife, even though the husband-and-wife application and waiver of uninsured motorist ('UM") and personal injury protection ("PIP") coverages was signed only by the wife. This is significant because a Texas statute requires a written waiver of UM and PIP coverages by the person in whose name the policy is issued; 2) An insured was injured while lying underneath his impacted vehicle that had no insurance. This is significant because of a policy exclusion for being "on" or "upon" the vehicle.

Facts

On January 8, 1998, Old American County Mutual Fire Insurance Company ("Old American") received the application of husband and wife, Zeferino and Margarita Sanchez, for automobile insurance. Old American then obtained only from the wife, Margarita Sanchez, a signed written waiver of UM and PIP coverages. Petitioner's Appendix F. For reasons unknown, Old American then issued a policy with no UM and PIP coverage but without naming the wife in the policy, even though only she had signed the waiver of UM and PIP coverages. Old American issued the policy in the sole name of Mr. Sanchez, the declarations page listing only, and misspelling, the name as, "Seferino Sanchez." Petitioner's Appendix E. On January 8, 1999, Old American renewed the policy with a declarations page listing only the name of "Seferino Sanchez" and without a signed waiver of UM and PIP benefits from either, Mr. Sanchez or Mrs. Sanchez. Petitioner's Appendix E.

On April 11, 1999, during the first renewal period of the policy, Mr. Sanchez was injured when an uninsured motorist who was intoxicated crashed into a pickup truck owned by Sanchez but not scheduled as a covered vehicle on the policy. At the time of accident, Sanchez was on his back, underneath the pickup, reaching up to work on the gas hose. The pickup collapsed on Sanchez, severing his spinal cord. Petitioner's Appendix B at 2, and G.

Old American refused to pay Sanchez's claim asserting: 1) That Sanchez was "upon," and thus "occupying," his owned and unscheduled vehicle in accord with a policy exclusion; 2) That Sanchez was "struck by" his owned but unscheduled vehicle in accord with a policy exclusion rather than "struck by" the vehicle of the uninsured; 3) That Sanchez's UM and PIP benefits had been effectively waived by his wife, whom Old American had not named in the policy. Petitioner's

Appendix A.

Procedure

Old American filed suit seeking a declaration that it had no obligation to pay UM or PIP benefits under the policy. Sanchez counter-claimed. Old American moved for summary judgment on the three grounds relied upon in refusing benefits under the policy, based upon facts stipulated by the parties. The trial court granted summary judgment in favor of Old American on the ground that Sanchez sustained injuries while "upon," and thus "occupying," his vehicle in accord with the policy exclusion. The trial court denied summary judgment on the two other grounds, and rendered judgment. Petitioner's Appendix A.

Sanchez appealed the trial court's ruling that the "occupying" exclusion applied. Old American cross-appealed the trial court's ruling that the "struck by" exclusion applied, and also the ruling that UM and PIP benefits had not been effectively waived. The Court of Appeals reversed the trail court, holding that the "occupying" exclusion did not apply, and reversed the trail court's ruling that UM and PIP benefits had been waived. Sanchez moved for rehearing on the issue of whether UM and PIP benefits had been effectively waived, and the Court of Appeals reversed its decision on that issue and also ruled that both the "occupying" policy exclusion and the "struck by" exclusion did not apply. Petitioner's Appendix B. Old American petitioned this Court for review.

SUMMARY OF ARGUMENT

We see this as a rule-of-law case with quirky facts, including the odd manner in which the Respondent's insurance policy was issued. As noted by the Court of Appeals, this dispute results from the issuance of an automobile insurance policy in only the husband's name in spite of an application by husband and wife. Petitioner's Appendix A at 13. The joint application had been

signed only by the wife, and the waiver of UM and PIP benefits had been signed only by the wife. This resulted in two salient facts: 1) An Old American policy was issued in the husband's name; and 2) A waiver was signed only by the wife, whose name was left off the policy. Old American is still silent as to how or why this occurred. Rather that pay this modest claim, Old American brings the claim to court and challenges in court the long-standing statutory requirement that UM and PIP coverages can only be waived in writing by an insured named in the policy. Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code. Petitioner's Appendix C & D. As noted by the Court of Appeals, all of this could have been avoided if Old American had not excluded the wife's name from the policy she applied for. Petitioner's Appendix B at 13. Old American again offers no explanation of why it issued the policy in this manner, but points to the fact that the husband, Respondent, in any event did not pay for UM and PIP benefits. The Texas insurance system is not set up to provide UM and PIP coverages to those who don't pay for coverages. But for the system to work upon a challenging public, all players must perform with competence, if not some measure of excellence. This includes among others the Texas Legislature, the Judiciary, the Department of Insurance, and insurers. The insurer must perform its statutory responsibility to obtain a written waiver from the appropriate person, an insured named in the policy, where UM and PIP coverages are not paid for. If an insurer falls down by obtaining a rejection from the wrong person, or fails to get the rejection in writing as law requires, the system fails and UM and PIP coverages may indeed be there for those who don't pay for them. Old American apparently does not have an eye for its own duties and responsibilities in our system of issuing automobile insurance policies.

Because UM and PIP coverages are mandated by strong public policy, every Texas personal automobile policy automatically begins with and includes these coverages **whether paid for or not,**

unless waived in accordance with law. Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code. This time-honored statute allows only an insured named in the policy to waive UM and PIP benefits, and the waiver must be written. Petitioner's Appendix C & D. Old American's mistake was repeated a year later when it issued a renewal policy without obtaining a proper waiver for 1999, the year during which the Sanchez loss occurred. Petitioner's Appendix G. Old American distinguishes "named insured" from "any insured named in the policy," claiming the latter is broader. But in defining "named insured" as requiring a name appearing on the declarations page, Old American seals its fate. Even if the distinction is correct, only a "named insured" can reject **future** UM and PIP coverages in renewal policies under the statute. Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code. It is undisputed that Mrs. Sanchez's name is not on the declarations page.

This case is also about the interplay of statute and private contract . The Court of Appeals was faced with precise and interestingly efficient statutory language to determine who is vested with the right to waive UM and PIP coverages for all insured under an automobile policy. The court determined that an insured "named in the policy" simply means an insured **whose name appears in the policy**. Petitioner on the other hand argues that an "insured named in the policy" includes also a spouse **not named** in the policy, but referred to and given "equal rights" under an insurance policy definition if she lives in the same household. Equal levels of coverage in the event of a claim under an insurance policy are not to be confused with the statutory rights and power to waive UM and PIP benefits for all classes of insureds under a policy. That a spouse enjoys **equal coverage rights** under an insurance contract does not somehow confer Texas statutory rights to reject UM and PIP benefits, which are closely guarded rights by public policy. Petitioner would essentially plug this private insurance contract definition into the Texas statute to alter the statute. Contracts don't control

statutes; statutes control contracts. The exclusive class of persons who can reject these coverages have two statutory qualifications only: 1) Their name appears in the policy, and 2) They are an insured under the policy. Old American's assertions about gender and competence of spouses have nothing to do with this case. The Court of Appeals' ruling is the majority view of other jurisdictions.

We believe that this incident of leaving a wife's name off an automobile policy when only she has signed a waiver of UM and PIP benefits is not common. The vast majority of insurers discharge their clear responsibilities under the UM and PIP statutes consistently and efficiently. The Court of Appeals decision merely confirms the standard practice among insurance professionals concerning who rejects UM and PIP benefits. Every first-year agent in Texas will know what is a "named insured" or "an insured named in the policy."

What could indeed jolt the insurance jurisprudence in Texas would be a ruling of this Court, as urged by Old American, that alters a statute with clear and precise language that has served as a guidepost for industry and insureds for more than 30 years. The fact of no published decision on this long-in-the-tooth statute is telling. Does Old American believe the plaintiffs' bar been has been asleep for 30 years? The statutory language of "named in the policy" is just too clear and precise for dispute, except, it seems, for Old American. Old American has not considered the wrecking ball side effects of what it is asking for: 1) A precedent of insurance contracts preempting Texas statutes; 2) The standard form Texas personal automobile policy would include the application with hand written entries, attached to and mailed to every insured as part of each policy; 3) Texas public policy and history of favoring the presence of uninsured motorists coverage would be reversed; 4) An increase in UM and PIP insurance litigation by injured parties who challenge whether the unnamed "spouse" who waived their rights back when the policy was issued was in fact a spouse of the named insured

at that time; 5) Establishing a precedent of "sloppy is OK" in the industry practice of issuing automobile insurance policies, rather than some measure of discipline. This will indirectly lead to more litigation.

Old American's argument that Mr. Sanchez was "upon" his vehicle while lying underneath the vehicle is exceedingly weak. Old American's argument that Sanchez was "struck by" his own vehicle in accord with the policy exclusion is also exceedingly weak. That Old American would bring this claim dispute to the court system, on these arguments, and complain to this Court of a troubled insurance industry, which has the sharp tone of legislative argument, is what is troubling. Old American's repeated argument that an insured gets benefits he doesn't deserve, when it is in fact Old American's dropping of the ball that allowed this coverage to occur, is similarly troubling.

Our underlying position is perhaps well illustrated with a sports analogy. Imagine that Tiger Woods' caddie is cleaning the ball before Tiger putts on the final hole. Tiger leads the tourney by 10 shots. The caddie drops the ball, which freakishly falls onto and moves slightly the coin marking the ball's position. Tiger carefully moves the coin back no closer to the hole, makes his putt, and signs the winning scorecard. Later it is ruled that moving the coin, even if inadvertently, was a one stroke penalty, and thus an incorrect scorecard was signed. Is Tiger **disqualified** even though he played all week with more skill and courage than any other? Every committed golfer instantly knows the answer. The rules prevail. An uncommon **respect** for the rules is the alpha and omega of a game that is enjoyed worldwide and where players actually call penalties on themselves.

The Opinion of the Court of Appeals respects and upholds an important and useful statute, and the ruling should be allowed to stand.

ARGUMENT
I.

A. An Important and Useful Statute Expresses Public Policy.

For more than 30 years, Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code have conferred the right to reject UM and PIP coverages exclusively upon an "insured named in the policy." Petitioner's Appendix C & D. This specific language benefits insurer as well as insured. Old American asks the Court to effectively alter the statute by expanding the class of persons who can exercise this right. This goes against the public policy mandate in favor of UM and PIP coverage. *Stracener v. United Servs. Auto Ass'n,* 777 S.W. 2d 378, 382 (Tex. 1989). This goes against the established rule of strict construction of the written rejection exception provision. *Employers Casualty Co. v. Sloan,* 565 S.W. 2d 580, 583 (Tex. Civ. App.–Austin 1978, writ ref'd n.r.e.). As mentioned in the Opinion of the Court of Appeals, the statute which embodies this public policy, including Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code, is to be interpreted in a manner which favors coverage and the insured. This follows the national approach. "The statute has been held to have a remedial nature, requiring that it be liberally construed in favor of coverage, with strict and narrow construction given to exclusions." *Couch on Insurance 3d* §122.7. The "statutory provisions permitting rejection are to be construed against waiver." *Couch* at §122.39.

B. UM and PIP Coverages Are Automatic and Mandated by Law.

While Old American failed to obtain a proper waiver of UM and PIP coverage, it is Sanchez who is perhaps seen as unjustly seeking benefits he did not pay for. Here, it must be remembered that the presence of UM and PIP coverages in auto policies is not predicated upon whether an insured paid a premium for the coverages, as in the case, for example, of rental car coverage. These coverages are

provided by operation of law, mandated by law and public policy, arrived at by years of hard fought experience. *Guaranty Ins. C. v. Boggs,* 527 S.W. 2d 265, 168 (Tex. Civ. App.- Amarillo 1973, writ dism'd). Indeed, in many states UM coverage is mandatory and must be included in every auto policy sold, period. Texas is among those states that allow a rejection of coverage. But every Texas auto policy starts out with UM and PIP coverage. Coverage is automatic and obtains until effectively waived. See *Employers,* 565 S.W. 2d at 583. If an insurer wants to sell auto insurance in Texas, the insurer must automatically offer this coverage. Articles 5.06-1(1) and 5.06-3(a) embody the public policy which demands it. If an insurer wants to exclude UM and PIP from a policy sold, the insurer has the responsibility to comply with the strict statutory requirements to effect a rejection of coverage. The rejection must be (1) written, and (2) made by a named insured. If the rejection is oral, the insurer must pay UM benefits, even if it seems unjust. *Texas Farm Bureau Mut. Ins. Co v. Tatum,* 841 S.W. 2d 89, 91 (Tex. App. - Tyler 1992). If the insurer gets a waiver by someone other than the insured who is named in the policy, the insurer must pay benefits, even if it seems unjust. *Appleman, Insurance Law and Practice,* Vol. 8 C § 5073.35. The statute puts a duty on the insurer issuing a policy to obtain a lawful waiver of PIP and UM coverages. When this duty is not discharged, the system breaks down, and odd things happen such as an insured retaining UM and PIP coverages not paid for.

C. An Insured Person "named in the policy" Means That the Person's Name Actually Appears in the Policy.

It is not surprising that Old American's challenge of Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code is a case of first impression. The statutory language at issue is so simple, clear, and precise as to be beyond dispute, except for Old American. An insured "named in the policy" is an insured whose **name actually appears** in the policy, not an insured who is referenced in the policy

some way as by group, but rather an insured who is **named** in the policy. The meaning of this is clear. "Named" is defined in the dictionary as "to mention or identify by name." *Websters Third New International Dictionary* 1501 (1981). "Named Insured" is defined in the dictionary as "a person specifically named in an insurance contract as the insured as distinguished from one protected under a policy whether so named or not." *Websters New Third International Dictionary* 1501 (1981).

With Articles 5.06-1(1) and 5.06-3(a) the Legislature defined the class of persons holding the right to reject UM and PIP as "any insured named in the policy." That the Legislature did not include "any insured named in the application" is significant. That the Legislature did not include "spouse of the named insured" is significant. That the Legislature did not include "those with the status of the named insured as set out in the Texas personal auto policy" is significant. This statutory language must be "construed literally, thus rendering ineffective a rejection of uninsured motorist coverage which is made by an insured not actually named in the policy". See *Annot., Construction of Statutory Provision Governing Rejection or Waiver of Uninsured Motorist Coverage,* 55 A.L.R.3d 216. Rejection by a spouse not actually named in the policy is ordinarily held insufficient. *Appleman, Insurance Law and Practice, Vol. 8 C* § 5073.35. Old American would have the Court examine the automobile insurance policy to see which unnamed insured are treated and granted coverages on a parity with the named insured in the insurance policy. This approach is not correct.

D. Old American Does Not Have a Valid Rejection of UM and PIP Benefits Regardless of Its Interpretation of the Statute Because the Policy in Force at the Time of Loss Was a Renewal Policy.

Old American argues that the Legislature in using two phrases within Articles 5.06-1(1) and 5.06-3(a) intended a broader meaning for 1) "any insured named in the policy," than for 2) "the named insured." Old American argues that "the named insured" is limited to names appearing on

the declarations page of the policy, while "any insured named in the policy" includes a spouse who is referenced in the policy but not specifically named in the policy. We note that the policy under examination and in effect at the time of loss, April 11, 1999, was a renewal policy. The January 8, 1998 policy was renewed, but no new rejection form was obtained by Old American. The rejection form dated January 8, 1998 was not re-executed. Under the language of Articles 5.06-1(1) and 5.06-3(a), if the original rejection of UM and PIP benefits is to extend to policies renewed in the future, the original rejection must be by a "named insured."

> The coverages required under this Article shall not be applicable where **any insured named in the policy** shall reject the coverage in writing; provided that unless the named insured thereafter requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the **named insured** has rejected the coverage in connection with a policy previously issued to him by the same insurer or an affiliated insurer.
>
> Petitioner's Appendix C, Articles 5.06-1(1) and 5.06-3(a) Texas Ins. Code (emphasis added**)**.

Assuming for the sake of argument that Old American is correct in this distinction, while "any insured named in the policy" can reject a contemporaneous policy, only the rejection by "the named insured" is effective to reject UM and PIP benefits in future renewal policies. It is undisputed that only Mrs. Sanchez signed a rejection and did so in 1998. Petitioner's Appendix F. It is undisputed that Mrs. Sanchez's name does not appear on the declarations page of either the 1998 or 1999 policies. Petitioner's Appendices E and G. Hence, there was no rejection by "the named insured" as defined by Old American as required by statute to bind the 1999 renewal policy at issue. *Berry v. Texas Farm Bureau Mut. Ins. Co.*, 782 S.W.2d 246 (Civ. App.- Waco 1989, writ den'd). *Poteet v. State and County Mut. Ins. Co.*, 7 S.W. 3d 679, 670 (Civ. App. - Eastland 1999). Old American's definition of "named insured" defeats its own case.

E. Old American Argues In Error That "any insured named in the policy" Must Include an Unnamed Spouse In Order to Be Distinguished from "named insured," a Term of Art.

The argument is as follows: If "any insured named in the policy" is broader than "named insured" as found by the Court of Appeals, and "named insured" means only names appearing on the declarations page, then "any insured named in the policy" must include a spouse unnamed in the policy. This argument is based upon the erroneous assumption in Petitioner's brief which states: "the **only** place for the inclusion of an insured's name in the policy **is the declarations page**." Petitioner's Brief. P. 18. (emphasis in original)

This is incorrect. In fact "named insureds" not listed on the declarations page are routinely added to the policy by listing the names on an endorsement. This is referred to as "an additional named insured" under the policy as distinguished from "an additional insured." 21 *DORSANEO, TEXAS LITIGATION GUIDE* §341.07(2)(h) at 341-57. *Old Republic Ins. Co. v. Concast, Inc.*, 588 F. Supp. 616, 618 (S.D.N.Y. 1984). The "additional named insured" comes up for example in leases where the landlord wants coverage under the tenant's policy at the "named insured" level, the highest level of coverage. See *Nat. Hills Shopping Ctr., Inc. v. Liberty Mutual Ins.*, 551 F.2d 655,657 (5th Cir. [Ga.] 1977). It should be noted that an insured, not named and with a lower level of protection, can also be added to the policy by not naming individuals but describing the group in the endorsement. For example, in *Urrutia v. Decker*, 992 S.W. 2d 440 (Tex 1999), "lessees and rentees of covered autos" were added as insureds by endorsement. The discussion in *Urrutia* distinguishes additional insureds from named insureds, when stating that the "endorsement enlarged the policy's definition of 'insured,' authorizing the named insured, Penske, to add its rental customers as additional

insureds." *Id.* at 443.

F. In Texas Statutes Control Contract; Contracts Do Not Control Statutes.

Old American argues that contract terms and definitions used in the automobile insurance policy, a private contract between insured and insurer, should override the terms and definitions found in Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code. This is the key issue presented to the Court of Appeals which resulted in reversal of its initial decision. See Appellee's Motion for Rehearing in the Court of Appeals . Appendix A. Opinion of the Court of Appeals at p. 8. Petitioner's Appendix B. Old American notes that in the automobile insurance policy section on definitions, "you" and "your" refer to both the "named insured" and the spouse of the named insured if in the same household. But this lumping together of "named insured" and spouse is contract language for contract purposes. While the UM and PIP statutes have no such definition of "you" or "your," Old American would **plug these insurance contract definitions into the statute.** In Texas contracts do not control statutes; statutes control contracts. Likewise, contract definitions and terms set out in a document to determine rights between an insurer and insured are not probative of the intent behind a legislative enactment. It is the intent of the Legislature that counts, not the intent of the contracting parties. In *Howard v. INA Mutual County Insurance Company*, 933 S.W. 2d 212 (Tex. Civ. App-Dallas 1996), Judge Hankinson writes that the "parties' intent may not be considered in determining whether the insured validly rejected uninsured/underinsured motorists coverage under article 5.06-1(1) of the Texas Insurance Code." *Id.* at 212.

While it is true that the insurance policy must be looked at to see what insureds are named in the policy, the statute does not surrender its definition of the class as **insureds named in the policy**

over to the insurance policy for a new definition, as Old American argues. By looking to see who is named as insured in the policy, the policy is providing factual information so that the statute's definition can be applied. Old American's argument would utilize the policy language to expand the parameters of statute's definition in violation of public policy favoring strict interpretation against waiver in recognized in the overwhelming majority of states, including Texas. *Couch on Insurance 3rd* at §122.39.

G. The Court of Appeals Opinion is In Line With Legal Authority of Other Jurisdictions.

Rejection of UM coverages by a spouse not named in the policy is ordinarily held insufficient. *Appleman, Insurance Law and Practice,* Vol. 8c § 5073.35. We find the Opinion of the Court of Appeals to be in conflict with rulings in only one other jurisdiction, Louisiana. A Louisiana case, *Oncale v. Aetna Casualty & Surety Co,* 417 So. 2d 474 (La. Ct. App. 1982), makes the same mistake our Court of Appeals made in its original decision before reversing itself, in allowing a contract to control a statute: "Where a policy of insurance contains a definition of any word or phrase, this definition is controlling." Id. *Oncale* at 474. Old American asserts that our Court of Appeals is in conflict with the overwhelming majority of other jurisdictions, but cites cases from only six other states. Three of these cases deal with dissimilar statutes. In *Frost v. Department of Labor and Securities of State of Wash*., 954 P.2d 1340 (Wash. Ct. App. 1998), the court relies upon the Washington underinsured motorist (" UIM") statute which specifically includes spouse along with named insured: " 4. A named insured *or spouse* may reject, in writing, underinsured coverage." RCW 48.22.030(4). (emphasis added). In *Goode v. Daugherty,* 694 S.W. 2d 314 (Tenn. Ct. App. 1985), cited by Old American, the court quotes the Tennessee statute: "any document signed by the named insured *or legal representative* which initially rejects coverage or selects lower limits shall be binding

upon every insured." T.C.A. § 56-7-1201 (emphasis original). *Daniels v. Colonial Insurance Co.,* 857 S.W. 2d 162,164 (Ark. 1993), is an underinsured motorist case. The Arkansas Supreme Court's opinion notes that Daniels received a copy of the insurance application. *Daniels* at 164. The opinion makes no mention of the Arkansas UIM statute, which allows rejection of coverage by "a named insured *or applicant for insurance.* " Arkansas Code 23-89-209(a)(2). (emphasis added). The language of these foreign statutes differs critically from "any insured named in the policy" found in Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code.

Johnson v. Great American Ins. Co., 541 N.E. 2d 100 (Ohio Ct. App. 1988), is a case where an insured claims that UIM rights of coverage are personal to her and disputes the right of the named insured, her husband, to waive her personal rights of coverage.

The remaining cases cited by Old American are agency cases. *Ridgeway v. Shelter Ins. Co.*, 913 P.2d 1231 (Kans. Ct. App.1996) centers on a fact issue of whether an agency relationship is established, with the court ruling that the "named insured" requirement does not abrogate agency in rejecting coverages. *Id.* At 1235. In a case relied upon heavily by Old American in the courts below, *Acquesta v. Indus. Fire & Cas. Co.,* 467 So. 2d 284 (Fla. 1985), the wife, Crystal, applied for insurance in her husband's name and signed a UM waiver. Industrial recognized that the UM waiver and the "named insured" would not be the same and crossed out the husband's name, and issued the policy in the wife's name, listing her as "named insured" on the declarations page of the policy. After an accident, the husband complained that the policy was supposed to be issued in his name. The Supreme Court of Florida applied agency principles and also adopted the reasoning set forth in the Fourth District Court of Appeal's decision: *Industrial Fire and Cas. Co. v. Acquesta,* 448 So. 2d 1122 (Fla. App.4 Dist.1984). The Fourth District explains:

> Because the application was signed in the various places by Crystal, Industrial crossed out William's name as applicant on the application and put in Crystal's name instead. The policy was issued in Crystal's name.
>
> *Id.* at 1123.
>
> In reaching our opinion we have applied traditional agency law but we have not overlooked the argument of Industrial that Crystal signed as "applicant" and *we notice that the named insured in the policy was the person who rejected the coverage.*
>
> *Id.* at 1123. (emphasis added).

The Court of Appeals Opinion distinguishes decisions from other jurisdictions cited by Old American. Petitioners Appendix B at 12 and 13. Other jurisdictions are in accord with Texas where the intent of the statute controls and intent is gleaned from the statute itself, not from contracting parties. See *Howard* 933 S.W. 2d 212, and, *Republic Bank Dallas v. Interkal, Inc.*, 691 S.W. 605 (Tex. 1985). See *Annot., Construction of Statutory Provision Governing Rejection or Waiver of Uninsured Motorist Coverage,* 55 A.L.R.3d 216.

H. Texas Should Not Follow Other States Whose Insurance Laws and Systems Are Dissimilar.

Perhaps the auto insurance industry and the insurance jurisprudence of other states such as Florida differs from our own and is not the best guide for Texas. For example, Florida does not require bodily injury liability insurance, but only that the motorists be financially responsible up to $10,000/$20,000 limits. Florida's mandatory auto insurance is only for property damage liability up to $10,000. *Florida Statutes Annotated,* Vol. 95.11 § 324.021(7).We believe the collapse-and-near-collapse state of the automobile insurance industry of Florida over many years may relate, at least in part, to an undisciplined insurance jurisprudence. We note that the Florida UM statute allows the lessor in the rental car situation to reject UM coverage. *Florida Statutes Annotated,* Vol. 18c

§627.727. We note that the Florida courts have allowed oral rejection of UM benefits. *Travelers Ins. Co. v. Spencer*, 397 So 2d 358 (Fla. App. 1 Dist. 1981), *Glover v. Aetna Ins. Co.*, 363 So 2d 12, (Fla. App. 1 Dist. 1978).

I. The Law of Agency Is Not Applicable.

Old American muddies the waters in bringing up agency principles not raised before as noted by the Court of Appeals. Petitioner's Appendix B at 12. This case is not about the scope of authority of Mrs. Sanchez, acting as agent for her husband, Mr. Sanchez. No facts have been plead, or stipulated or developed to establish an agency relationship, but now Old American raises an issue of competence of a spouse. Unlike the instant case, the wife in *Industrial* is acting as agent for the husband throughout the application and waiver process. The wife, Crystal, signs the UM waiver as if the husband is signing. But in our case Mrs. Sanchez did not sign the UM and PIP waiver as agent for her husband, the named insured. She acts in her own right and stead. We note that we do not contend, for example, that an attorney-in-fact could not waive UM coverage for his principal. See *Ridway* which holds that the "named insured" requirement does not abrogate agency. 913 P.2d at 1235.

J. Identification of the Insured Vested With the Power to Reject UM and PIP Coverages for All Insureds Under the Policy Must Be Efficient and Unequivocal.

Old American points out that Mr. Sanchez and Mrs. Sanchez are both insureds under the policy. It is worth noting that while an auto policy protects different types of insureds, it is only rejection of UM and PIP coverages by the "named insured" that **is binding on all insureds.** An insured named on the declarations page has the greatest coverage, is billed for premiums and owns the policy. But who are these unnamed insureds whose UM and PIP coverages are waived without their consent? Unnamed insureds would include, for example, any person who operates the vehicle

at a time of loss because the insurance **runs with** the vehicle. Likewise, any passenger in the vehicle at the time of loss is protected as an insured. These insureds or potential insured are not identified or even determined when the policy is issued. An automobile policy protects scores of insureds over time depending upon use of the vehicle, and every insured will have automatic UM and PIP coverages unless effectively waived. Which insured, among the tiers of insured with different protections, should have this power to be exercised in the brief stretch of time a policy is sold, when a mistake in identification could be costly? It is not insignificant that Articles 5.06-1(1) and 5.06-3(a) vest within the "named insured," who is the elite insured with greatest protection, the exclusive right to reject UM and PIP for all insureds, with or without their consent. And indeed, the waiver effected by the insured named in the policy is binding upon all other classes of insureds **with or without their consent**. *Couch on Insurance 3rd* §122:50

The can of worms in Old American's approach starts to emerge. If, as Old American argues, we must look beyond the **insured identified by name** in the policy and determine who is a spouse that in fact lives in household of the "named insured, " not identified by name in the policy, the question will arise: Who really is a spouse? Common law spouse? Putative spouse? Did the spouse actually live in the household? Did the spouse live in the household at the time the policy was issued? Was there a separation? Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code do not have to address these questions. Using the precise tool of "named insured" eliminates investigation of family matters. And the insurer determines exactly who is named in the policy when it prints the declarations page and issues the policy.

It is true that some family law type fact issues may necessarily arise in the claims process where a spouse is claiming benefits after a loss. But the field of claimants is limited to that loss. And, there

is more time to investigate the spouse who claims to be a spouse living in the household of the "named insured" if the spouse's level of benefits are in question. Investigators can take statements from witnesses, and records and documents can be examined because there is time to do so. The marketing process, on the other hand, barely allows time for basic underwriting. Sometimes the policy is bound over the phone or on the spot, in for example, an auto dealership, followed by a hurried application. And the penalty for incorrectly determining who can sign the UM and PIP waiver can be costly due to the potential number of insureds under a policy whose rights were waived blanket fashion by the wrong person. Each future operator and passenger of the insured vehicle is a potential UM and PIP claimant who could question whether his or her UM and PIP coverages were waived. Each could have a fact question of the **spouse living in the household** of the named insured who waived the rights some years ago was in fact a **spouse** who did in fact live in the **household.** This problem is highlighted in *Johnson* cited by Old American, where the new wife argues that only she can waive her own rights, not her husband before marriage, even if he was the "named insured." 541 N.E. 2d at 100. Surely the Legislature did not intend this burden of identifying and qualifying a spouse not named to reject UM and PIP coverages every time a policy is sold. The statutory language "named in the policy" pins down with exactitude and efficiency which specific individuals can reject coverage, without reference or investigation at the time of purchase of insurance. Old American's approach, on the other hand, offers confusion, inefficiency and the prospect of needless litigation.

K. Spouses as a Class Can Indeed Reject UM and PIP Coverages So Long as the Spouse is Named in the Policy.

Old American argues repeatedly that the Legislature grants a spouse the right to apply for insurance and yet takes away the right to reject UM and PIP coverages. This argument is catchy but not based upon reality. In practice , the "right to apply for insurance" has little meaning. We know of

no legislation that addresses whether a spouse can apply for insurance, and Old American offers no such legal authority to date. Indeed, most anyone with money in hand to pay a premium can apply for auto insurance. It can be done over the phone, by a spouse, a secretary, a friend, with applications often signed by an agent if signed at all. Application for automobile insurance in practice is little more than requesting a quote of rates. And indeed insurance coverage is often obtained orally as with a binder while there is no application. The issuance of the policy by the insurer is the big deal and the insurer is free to ignore the application provisions and also named applicants as indeed happened to Mr. and Mrs. Sanchez. Authority to effect a rejection of UM and PIP coverages is however significant and governed by statute. Spouses can in fact reject UM and PIP coverages so long as their names are not left off the policy by the insurer.

L. The Application is Not Part of the Texas Personal Automobile Policy.

In its Petition for Review, Old American cited *Fredonia State Bank v. General American Life Ins. Co.*, 881 S.W. 2d 289 (Tex. 1994), for the proposition that the application for auto insurance is part of the insurance policy, and thus Mrs. Sanchez, who is named in the application, is "named in the policy." We pointed out in responding to Old American that *Fredonia* involves a **life insurance** policy, where the application is indeed a part of the policy. The rules and customs of life and health insurance, a distinct area of insurance, differ from the rules of property and casualty insurance, which includes auto and homeowners insurance. In life and health insurance, the policy is made up of the application, the declarations page, the booklet, and the endorsements. The application is attached to and becomes a part of the life policy because it contains representations that become essential terms of the policy, such as age, health history and whether a smoker. In health insurance, the application may also contain underwriting information that is key to issues such as pre-existing condition. On the

other hand, the auto insurance policy is constituted by the declarations page, the booklet and any endorsements, not the application. *See Ortiz v. State Farm Mut. Auto. Ins. Co.*, 955 S.W. 2d 353, 357 (Tex. App. –Dallas 1996, writ denied). *Howard v. INA Mutual County Insurance Company*, 933 S.W. 2d 212 (Tex. Civ. App.-Dallas 1996, writ denied).

If an application for automobile insurance is now part of the Texas personal automobile policy as Old American argues, we have a sweeping change that will cause serious new problems. The application would have to be attached to the policy as an endorsement and mailed to the insured as part of the policy. Every policyholder could request a copy of his/her application to see if this new component part of the policy alters contract rights. What if the application does not fit the policy issued, as here where the signed applicant, Margarita Sanchez, is omitted by name from the policy? What if the application has informal notes or vehicles crossed out, as with the instant application where the subject 1984 Chevrolet pickup is crossed out by hand? Petitioner's Appendix F. Old American, while expressing a concern for the health of a troubled industry, would add new confusion to the process of issuing standard form automobile policies and alter many years of insurance practice in Texas.

In support of its position, Old American cites *Fidelity Union Life Ins. Co. v. Methven*, 346 S.W. 2d 797, 800 (Tex. 1961). This is **a life insurance case** that considers whether a change of beneficiary form must be attached to the life insurance policy to be binding. Old American also cites *Odom v. Ins. Co. of the State of Pennsylvania*, 455 S.W. 2d 195, 199 (Tex. 1970) which involves Article 21.16 of the Texas Insurance Code. This statute provides the insurer with a remedy of declaring the policy void in the event of fraudulent statements made on the application form. The statute distinguishes the application form from the policy. *Odom* involved the unusual circumstance of an automobile policy

with the application physically attached to the policy and delivered to the insured as one document. *Odom* relies upon the testimony of Appellant's insurance agent, George Tucker:

> Tucker's deposition further shows that the particular form of the insurance policy in suit was different from what's used by the approved standard Texas forms in that it appeared to be 'more of an application for insurance and a policy all combined into one sort of as a shortcut where you can use the application as a face sheet of the policy.'
>
> *Id.* at 199.

It is undisputed in the instant case that unlike *Odom*, Respondent was issued a standard form automobile policy with no application attached to or incorporated into a single document package. Old American also cites *Urrutia v. Decker*, 992 S.W.2d 440 (Tex. 1999) which involves an endorsement for rental coverage, and an endorsement adding an insured that is not a "named insured." But Old American did not issue an endorsement naming Mrs. Sanchez as an "additional named insured". If this had happened, she would be an "insured named in the policy." Old American, instead, issued the policy without her named as an insured on either the declarations page or on an indorsement.

M. The Insurer, Not The Insured, Has Exclusive Control Over Which Insured(s) Are Named In the Policy.

The argument by Old American that disallowing Mrs. Sanchez's waiver would allow a spouse to sign up for an insurance policy, list the other spouse as the named insured, and then waive PIP and UM and get free benefits without paying for coverage, has no basis in reality. There is no such evidence before the Court on industry practices. In fact, the application is accepted or rejected by the insurer if it wants the business. Before deciding to accept the risk and issuing the policy, the insurer will be able to verify in whose name(s) the vehicle is titled and check driving record and accident history. With this and other information in hand, the insurer alone will determine the "named insured(s)" to be listed on the declarations page when the policy is issued. The insureds named on the

declarations page of the policy need not mirror the names on the application, as indeed happened in this case. The waiver form may or may not be a part of the application form. Thus, it is impossible for the applicant to list the other spouse as the "named insured" on the policy declarations page as Old American argues.

On the other hand, the insurer may decide not to accept the risk, or to perhaps charge a higher premium. Upon issuance of the policy, the insurer will ascertain that the "named insured(s)" on the declarations page coincides with the signature on the UM & PIP waiver forms. This is where Old American dropped the ball, unlike Industrial in the Florida case discussed herein. In *Acquesta v. Indus. Fire & Cas. Co.*, 467 So. 2d 284 (Fla. 1985), the wife who signed the waiver was also the named insured listed on the declarations page because Industrial crossed out the husband's name. Also, it should be noted that Article 21.16 of the Texas Insurance Code protects the insurer against fraud in the application process. The article provides that misrepresentations and deceit by a policyholder made in application for a policy renders the policy null and void.

N. The Court of Appeals Opinion Will Not Invalidate Numerous UM and PIP Rejections of Issued Policies.

We challenge the assertion by Old American that the practice is widespread of not making sure the name on the UM and PIP waiver coincides with the name on the policy. Old American has offered no proof whatsoever to support this claim. Old American seems to be arguing in favor of sloppy practices in the issuance of auto insurance policies. We find that such practices are not common.

What the Court of Appeals Opinion will perhaps do is serve as a reminder, if and where needed, to agents about the "named insured" requirement. While some lawyers may have problems with insurance terminology, every first year agent in Texas including those of Old American will know what is a "named insured" or an "insured named in the policy." Insurers and agents are almost

always diligent and careful in the issuance of policies. Old American can point to no increase in litigation following the ruling of the Court of Appeals. On the other hand, the relief sought by Old American would likely increase litigation, and we are doubtful that other insurers of our state would want to tinker with this statute that pins down for the benefit of insurer and insured specifically and exactly who can reject UM and PIP and who can not. It is Old American who elected to bring this dispute to court.

O. Old American May Have Left the Spouse's Name Off the Policy on Purpose.

Old American obtained an application for a policy in the name of both husband and wife, and a UM and PIP waiver signed by the wife. Old American has not explained why the policy was not issued to both husband and wife as "named insureds." In any event, Old American was perhaps less careful than the insurer in *Industrial Id.* who made sure the person who waived the UM coincided with the person to whom the policy was issued. Or perhaps Old American had a purpose. The Texas personal auto policy provides the spouse of the "named insured" with the same benefits as the "named insured" if he/she lives in the same household. If, however, the spouse of the "named insured" does not reside in the same household, the spouse is provided a lower level of benefits. For example, there is no pedestrian coverage. By removing a spouse's name from the policy, an insurer can thus reduce its exposure. With statistics showing about half of marriages ending in divorce, and given that marital separations are not uncommon, if an insurer issues thousands of policies per year for years, the decision to keep the spouse's name off the declarations page can have financial impact. As a further example, if a wife's name is on the policy, she gets the highest level of benefits no matter where she lives. If only the man's name is on the policy, she may have to prove she is a common law

wife to make her claim. Again, the practice of keeping the spouse's name off the declarations page reduces exposure to risk can have financial impact for the insurer. This may explain why an application for a policy in both names resulted in a policy issued in Mr. Sanchez's name only, or it may not.

II.

A. The Court of Appeals Correctly Held That Respondent Was Not "Upon" and Thus "Occupying" His Vehicle Which Would Bar His Claim Under the Policy Exclusion.

This issue was stated but not argued by Old American in its Petition for Review. The ruling of the Court of Appeals provides a thorough discussion of this issue. Petitioner's Appendix B.

The policy excludes UM and PIP coverages for injury sustained by the insured while "occupying" his owned but unscheduled vehicle. The policy defines occupying as "in, upon, getting in, on, out or off." The pertinent facts as stipulated by the parties are:

> 10. Mr. Sanchez was lying under the Pickup reaching up and grasping and changing over the gas tank hose when the Pickup was impacted from the rear by an uninsured motorist who was intoxicated.
>
> Agreed Stipulations, Petitioner's Appendix G.

Old American paraphrases these facts as: Respondent was beneath the Pickup with his hands and body up in and supporting himself on the underside of the vehicle attempting repairs. Petitioner's Brief. P. 23. The Court of Appeals concludes from the stipulated facts that Mr. Sanchez was **on the ground**, while Old American concludes from the stipulated facts that Mr. Sanchez was **on the truck.**

Old American argues that Mr. Sanchez was upon the truck relying upon *Hart v. Traders & General Insurance Co,* 487 S.W. 2d 415 (Tex. Civ. App. - Fort Worth 1972, writ ref'd n.r.e) where the insured was leaning over working on his motor while resting his weight upon his fender. *Hart* also considered the concept of a "fly on the ceiling; hanging on the wall" but, as noted by the Court of Appeals, even in that circumstance the fly is supported by an object, the wall. The Court of Appeals

reasoned that Mr. Sanchez lying underneath his pickup and reaching up to change a gas-tank hose was supported by the ground, and thus Mr. Sanchez was upon the ground and not upon the pickup.

Mr. Sanchez is distinguished from Mrs. Sanchez and children who were inside the pickup and thus "occupying" the vehicle. As such Mrs. Sanchez and children are not parties to this litigation and made no claim for UM or PIP benefits.

III.

A. The Court of Appeals Correctly Held That Respondent Was "Struck By" the Uninsured Motorist Rather Than "Struck By" His Pickup Which Would Bar His Claim Under the Policy Exclusion.

This issue was stated but not argued by Old American in its Petition for Review. The ruling of the Court of Appeals provides a thorough discussion of this issue. Petitioner's Appendix B.

Old American denied Respondent's claim arguing that Respondent was "struck by" his own pickup within the meaning of a policy exclusion. The phrase "struck by" within the meaning of the policy exclusion refers to the uninsured motorist who rear ended the stationary pickup. If as Old American argues, the phrase could refer to the passive unscheduled vehicle, then under that interpretation there is ambiguity which must be resolved in favor of coverage and the insured.

The undisputed facts are that an uninsured motorist impacted Respondent's stationary pickup from the rear while Respondent was lying under the pickup grasping and changing over a gas tank hose. Petitioner's Appendix B and G.

This Court has held that a passive vehicle can not be the striking force in a collision. See *Gallup v. St. Paul Ins. Co.*, 515 S.W. 2d 249, 249 (Tex. 1974). *Gallu*p holds that policy language

"being struck by an automobile" does not include a vehicle standing still when it is run into. *Gallup,* 515 S.W. 2d at 893. This Court held in *Houston Fire and Cas. Ins. Co. v. Kahn,* 359 S.W. 2d 892, (Tex. 1962) that "the automobile causing the injury must have been a *causative force* in the collision before it can be said to have *struck* the insured." Id at 892 (emphasis added).

Old American argues that only Sanchez's own pickup came into direct contact with him, causing his injuries. This interpretation of "struck by" is exceedingly narrow and ignores the indirect contact rule. Texas recognizes the indirect contact rule. In *Williams v. Allstate Ins. Co.*, 849 S.W. 2d 859, 861(Tex. App.-Beaumont 1993, no writ), the court permitted recovery where the uninsured vehicle "created an uninterrupted chain of physical events between another motor vehicle/vehicles which ultimately resulted in the insured's injury." *Id*. The policy phrase "struck by" refers to the uninsured motorist or vehicle that caused the collision and affirmatively struck the parked vehicle. As noted by the Court of Appeals, the uninsured motorist (car A) hit Sanchez's passive truck (car B), which fell on Sanchez and severed his spinal chord. Petitioner's Appendix B and G..

SUMMARY

We see this as a rule-of-law case. An error in the issuance of an insurance policy combined with unusual facts is no reason to change the law. Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code have for many years served as a clear road marker for industry and insureds. With no legislative process, no debate, no enactment or amendment, Old American asks the court to alter this statute to allow a class of persons not so intended to reject UM and PIP coverage. This Court in *Republic Bank Dallas v. Interkal,* 691 S.W.2d 605 (Tex. 1985) held that:

> courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all its terms. They must find its intent in its language and not elsewhere.

Id. at 607.

PRAYER

Respondent, Zeferino Sanchez, asks the Court to deny Old American's Petition for Review, and remand this case for judgment in accord with the Opinion of The Court of Appeals, and grant Respondent any further relief to which he may be justly entitled.

Respectfully submitted,

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The undersigned hereby certifies that a true copy of the foregoing has been forwarded to all known counsel of record by certified mail or facsimile transmission, on this day of May, 2003.

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