NO. 02-0843

IN THE SUPREME COURT OF TEXAS

OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY,
Petitioner,
v.
ZEFERINO SANCHEZ,
Respondent.

==

On Petition for Review from the Texas Court of Appeals, Third District, at Austin

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PETITIONER OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY'S REPLY BRIEF

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SHANNON H. RATLIFF
State Bar No. 16573000
RATLIFF LAW FIRM PLLC
600 Congress Avenue, Suite 3100
Austin, Texas 78701
(512) 493-9600
(512) 493-9625 [fax]

JAMES J. SCHESKE
State Bar No. 17745443
ROBERT H. PEMBERTON
State Bar No. 00784740
CHRISTOPHER H. TAYLOR
State Bar No. 24013606
AKIN GUMP STRAUSS HAUER & FELD LLP
300 West Sixth Street, Suite 2100
Austin, Texas 78701
(512) 499-6200
(512) 499-6290 [fax]

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ORAL ARGUMENT REQUESTED

ATTORNEYS FOR PETITIONER

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PETITIONER OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY'S REPLY BRIEF

SUMMARY OF REPLY ARGUMENT AND REASONS FOR GRANTING REVIEW

Respondent pronounces this "a rule-of-law case,"[1] and it properly should be. The stipulated facts squarely present several important unresolved legal issues that impact millions of Texas automobile policyholders amid a troubled insurance industry, including:

- The correct interpretation of the statutes permitting Texans to reject UM and PIP coverage;
- The interplay of these statutes with the definitions in standard policy forms;
- The significance in this inquiry of case law holding that an insurance application may be incorporated by reference into an insurance policy;
- The correct interpretation of two exclusions of UM and PIP coverage that have given rise to heated litigation in other states; and
- The implications of this Court's recent decision in *Progressive County Mutual Ins. Co. v. Sink*[2] on these issues.

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[1] Resp. Br. at 3.

[2] 46 Tex. Sup. Ct. J. 658, 2002 WL 32094516 (May 15, 2003) (reh'g filed).

Among other things, *Progressive County*, which this Court decided after Old American filed its initial brief, clarifies that a term in a policy form, like the one at issue in this case, is not mere "contract language for contract purposes,"[3] but is an administrative promulgation of the Board (now Commissioner) of Insurance. This Court also held that policy forms must be interpreted in accordance with "the ordinary, everyday meaning of the words to the general public." All of these holdings add further support to Old American's interpretation of the statutory rejection provisions and the two coverage exclusions at issue in this case. This Court should grant review to address the far-reaching issues presented and ensure resolution consistent with *Progressive County.*

Respondent is correct, to a point, that Texas has encouraged UM and PIP coverage in automobile policies, but he stretches this unremarkable proposition to an illogical extreme. This case involves an individual, Ms. Sanchez, Respondent's spouse, who (1) has standing to purchase automobile insurance for herself and her husband; (2) is within the "first class" of insureds[4] having full rights under the policy; (3) who has rejected UM and PIP coverage in writing on the insurance application; and, consistent with this decision (4) never paid for UM or PIP coverage. Respondent nonetheless urges that Ms. Sanchez's clear expression of intent regarding the levels of coverage she desired her family to purchase can be rendered of no effect if, for whatever reason, it is her husband's name, and not hers, that later formally appears on the declarations page and she does not obtain a special additional endorsement. Ironically, while Respondent makes all manner

[3] Resp. Br. at 13.

[4] *Thompson v. United Services Auto. Ass'n*, 597 S.W.2d 510, 514 (Tex. Civ. App.—Amarillo 1980, no writ) (stating that the "first class" of insureds under an insurance policy is comprised of the named insured and the spouse if a resident of the same household).

of insinuations regarding the manner in which carriers prepare declarations pages, he would make his wife's right to effect her coverage decisions contingent upon those same alleged factors.[5] Similarly, while Respondent admits that "[t]he Texas insurance system is not set up to provide UM and PIP coverages to those who don't pay for coverages,"[6] he asks this Court to do just that. This is unsupported by Texas law.

Respondent's arguments rest largely upon his perception of a "public policy mandate"[7] favoring UM and PIP coverage, but, in actuality, the history of Texas public policy regarding those issues is far more equivocal. The Texas Legislature enacted the PIP statute rather grudgingly, in a "lesser of the evils" effort to placate Congress, which was threatening enactment of a nationwide mandatory no-fault regime that was anathema to more conservative Texas sensibilities. In so doing, the Legislature was adamant that Texans would have the right to reject such coverage, and not be forced to pay for it if they didn't want it. Thus, the Legislature gave "any insured named in the policy" the right to reject the coverage.

Respondent eventually admits that Articles 5.06-1(1) and 5.06-3(a)'s references to "any insured named in the policy" require that the "insurance policy must be looked at to see what insureds are named in the policy."[8] At the time the Legislature enacted both of these statutes, the governing policy form defined "named insured" to include both the

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[5] While Respondent repeatedly speculates concerning matters outside the record, not to mention making various self-styled "findings," Resp. Br. at 4, 6, 23-24, 27, Old American will not belabor a response to these obviously inapposite assertions. How or why the insurance policy, declarations page, and application were completed as they were is beside the point—what is properly at issue is their legal significance.

[6] Resp. Br. at 4.

[7] Resp. Br. at 8.

[8] Resp. Br. 13.

individual named on the declarations page and a spouse, if living in the same household. In other words, Ms. Sanchez would have been a "named insured" as that term was contemplated by the Legislature when it authorized "any insured named in the policy" to reject UM and PIP coverage. Ms. Sanchez's coverage decisions must, therefore, be given effect under Articles 5.06-1(1) and 5.06-3(a).

Likewise, *Progressive County* suggests that Ms. Sanchez should also be considered "an insured named in the policy" by virtue of the current policy form definitions. Ms. Sanchez indisputably falls within the policy definition of "you," the class of insureds having full rights under the policy. As supported by this Court's holding in *Progressive County,* this definition, as part of a standardized policy form, is not mere "private contract" language but an administrative promulgation of the Department of Insurance that delineates the persons who fall within the "first class" of insureds having full rights under the policy. Furthermore, the current definition of "you" is substantively identical to the "named insured" definition used in the policy form in effect at the time the Legislature enacted Articles 5.06-1(1) and 5.06-3(a). The State Board of Insurance adopted the current policy form in 1980 (to be effective in 1981) largely to make the policy easier for the general public to understand. But because that change did not alter the scope of coverage afforded her under the policy, Ms. Sanchez should continue to be considered the equivalent of a "named insured"—and certainly at least "an insured named under the policy"—for purposes of determining her right to reject UM and PIP coverage.

REPLY ARGUMENT

I. Ms. Sanchez's Rejection of UM and PIP Coverage Must Be Given Effect Under Articles 5.06-1(1) and 5.06-3(a).

In insisting that the Court should simply presume away Ms. Sanchez's expressed intent in favor of coverage she rejected and her family never paid for, Respondent is wrong to equate this case to those involving oral rejections of coverage.[9] It is undisputed that Ms. Sanchez unequivocally rejected UM and PIP coverage *in writing* when completing her insurance application. There are no formal defects alleged in this writing—as Justice Hankinson explained in the Dallas opinion cited by Respondent, "the statute does not require a special procedure or special language for the writing, and execution of a satisfactory written rejection requires only minimal effort by the insured."[10] Nor are there any allegations of overreaching by Old American or any other contractual defenses. Rather, the sole issue regarding the enforceability of Ms. Sanchez's rejection of UM and PIP coverage is whether she falls within the class of persons who are "any insured named in the policy" for purposes of Articles 5.06-1(1) and 5.06-3(a).

A. The Legislature intended to allow Texans to reject UM and PIP coverages when they do not want them.

Respondent acknowledges that "in many states UM coverage is mandatory and must be included in every auto policy sold, period,"[11] but that is not the path that Texas has chosen. Instead, the Texas Legislature has empowered Texans to reject UM, as well

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[9] Resp. Br. at 8, 9 (citing *Texas Farm Bureau Mut. Ins. Co. v. Tatum*, 841 S.W.2d 89, 91 (Tex. App.—Tyler 1992, writ denied) & *Employers Cas. Co. v. Sloan*, 565 S.W.2d 582-85 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.)).

[10] *Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212, 218 (Tex. App.—Dallas 1996, writ denied) (construing Article 5.06-1(1)); *see* Resp. Br. at 13.

[11] Resp. Br. at 9.

as PIP coverage, when they do not desire the coverage and/or don't want to have to pay for it.

There appears to be little available legislative history concerning the UM statute, as it was enacted before the Legislature began retaining audio recordings of its proceedings.[12] It is interesting that the bill that later became Article 5.06-1(1), as introduced, permitted only a "named insured" to reject UM coverage, but was later broadened to include the current "any insured named in the policy" phraseology.[13] But the legislative history concerning the parallel waiver provisions in the PIP statute is more extensive. It reveals that the Texas Legislature enacted the PIP statute somewhat grudgingly, under the threat that Congress would enact a nationwide, mandatory "no-fault" insurance regime if Texas and other states did not act first. As the bill's sponsor explained:

> The national government, two years ago, got into pressure to pass a pure no-fault insurance automobile bill. As you remember, Senator Tower led the fight in the Senate, and the Texas Legislators led the fight in the House and they were able to forestall passage of a national no-fault bill. However, there's a push on in Congress now to pass a pure no-fault bill again. **Senator Tower** said he **can only hold his finger in the dike so long.** The state bars throughout the United States have met and have been told that **if they'll pass something on a state level that it will take away the pressure and probably forestall passage of the no-fault bill on a national level**.
>
> * * *
>
> It's also important to note that if we don't want no-fault, we're going to pass this bill. If you want no-fault vote against this bill.

Debate on Tex. H.B. 143 on the Floor of the House, 63rd Leg., R.S. (March 30, 1973)

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[12] Acts 1967, 60th Leg., ch. 202, § 1.

[13] TEX. S.B. 219, 60th Leg., R.S. (1967) (bill file) (available from the Texas State Archives).

(remarks of Rep. Newton) (tape available from the Office of the House Committee Coordinator) (emphasis added). Essential to the political bargain being struck was that PIP would not be mandatory, and that Texans would not have to pay for PIP coverage if they did not want it:

> An insured would have to reject the coverage in writing if he did not want it. **Nevertheless, it should be clearly and definitely pointed out, that there is not a single driver in the State of Texas who will be compelled to buy this coverage if he does not need it.**
>
> * * *
>
> And it should be emphasized that any motorist in Texas who wants to continue his present medical pay [coverage] can do so. He does not have to take this insurance…. He simply rejects it in writing. And as far as the cost -- we'd hope -- it would reduce premiums -- the bottom dollar figure.… **[T]here's not going to be any cost to any Texan who does not want to…carry this [coverage].**

Id. (emphasis added). Thus, Respondent's emphasis on the "mandate" in favor of PIP and UM is not only overstated,[14] but wholly ignores the mandate that Texans have the right to reject these coverages.

B. At the time Articles 5.06-1(1) and 5.06-3(a) were enacted, "named insured" included a spouse in the same household.

Respondent concedes that the Legislature's use of the phrase "any insured named in the policy" in Articles 5.06-1(1) and 5.06-3(a) necessarily contemplates that the applicable "insurance policy must be looked at to see what insureds are named in the policy."[15] At the time both statutes were enacted, the applicable policy was the Texas

[14] In fact, Representative Newton echoed the view of the Texas Farm Bureau that the push toward mandatory pure no-fault insurance was "un-Texan." *Id.*

[15] Resp. Br. at 13.

Family Auto Policy ("TFAP"), which was the policy form universally governing personal auto insurance for Texas motorists from 1956 until 1981. Thus, it was the TFAP that the Legislature would have been contemplating when drafting the UM and PIP statutes, and it must be presumed to have been aware of its definitions.

The TFAP defined "named insured" as:

> …the individual named in Item 1 of the declarations and ***also includes his spouse, if a resident of the same household***.

Standard Provisions for Automobile Combination Policies, Family Automobile Form (1956) (emphasis added).[16] Ms. Sanchez indisputably would have been a "named insured" under this definition. As such, she is "any insured named in the policy," if not a "named insured," as the Legislature envisioned those terms at the time it enacted Articles 5.06-1(1) and 5.06-3(a). She was intended to be within class of persons who may reject UM and PIP coverage under Articles 5.06-1(1) and 5.06-3(a).

C. Ms. Sanchez is an "insured named in the policy" by virtue of the current policy form.

It is also undisputed that the policy defines "you" to include Ms. Sanchez. As one with the highest tier of rights and responsibilities under the insurance contract, she should be permitted to determine the level and type of coverage under it. *See, e.g., Thompson*, 597 S.W.2d at 514 (the "first class" of insureds under an insurance policy includes the named insured's spouse if a resident of the same household).

[16] *See also Firemen's Insurance Co. v. Burch*, 426 S.W.2d 306, 307 (Tex. Civ. App.—Austin), *rev'd on other grounds*, 442 S.W.2d 331 (Tex. 1968) (discussing the definition of "named insured" in the TFAP).

In his brief, Respondent repeats the mantra that "Statutes Control Contracts; Contracts Do Not Control Statutes," suggesting that the Court should simply ignore the definitions in the policy form when determining whether Ms. Sanchez is an "insured named in the policy."[17] This is wrong in two respects. First, as Respondent admits, "it is true that the insurance policy must be looked at to see what insureds are named in the policy."[18] Second, as this Court recognizes in *Progressive County,* the policy form at issue here is not a mere "contract," but an administrative promulgation of the Board of Insurance.

1. The State Board of Insurance's inclusion of Ms. Sanchez in the policy's definition of "you" made her an "insured named in the policy," or even a "named insured," for purposes of Articles 5.06-1(1) and 5.06-3(a).

It was the State Board of Insurance (the "Board") that chose to include spouses living in the same household in the policy definition of "you." As this Court noted in *Progressive County,* the Board adopted the Texas Personal Auto Policy ("TPAP"), like the standard form policy that is at issue in this case, in 1980 to be effective in 1981 and then amended it in 1983. Because the Board adopted the TPAP form after Articles 5.06-1(1) and 5.06-3(a) were already in force, it is presumed that the Board knew of and considered those statutes when it expressly included spouse in the policy's definition of "you."

Although Respondent contends that this Court should disregard the "private" intent of the parties as reflected by the policy's terms, "the actual intent involved in the

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[17] Resp. Br. at 5, 13.

[18] Resp. Br. at 13.

precise words is as much or more the intent of the Insurance Commission which prescribes the wording of the policy as it is the intent of the parties." *Progressive County*, 2002 WL 32094516 at *3 (quoting *United States Ins. Co. of Waco v. Boyer*, 269 S.W.2d 340, 341 (Tex. 1953)). By urging a result that ignores the definitions approved by the Board and narrows the language chosen by the Legislature, Respondent asks this Court to usurp the Texas Department of Insurance's administrative function and effectively change the policy form adopted by the Commissioner without the formal notice and comment requirements.

Moreover, the term "you" in the TPAP form is the functional equivalent of, if not identical to, the term "named insured."[19] In determining the meaning of terms in a Board-approved TPAP form, courts should also examine prior approved policy forms. *Progressive County Mut. Ins. Co.*, 2002 WL 32094516, at *3. In fact, in approving the current TPAP form, the State Board of Insurance expressed its "intent" that "unless the Texas Personal Auto Policy has clearly changed the scope and nature of a coverage from that provided by the Family Automobile Policy, the courts should be guided by prior decisions construing the provisions of the Family Automobile Policy." *Id.*; Tex. Bd. of Ins., Tex. Automobile Series Letter No. 529 (September 19, 1980). Moreover, the Board stated that many of the changes between the two policy forms were solely to make the new standard policy easier to understand by the general public and not intended to change the meaning of those terms under the new TPAP. *See* Tex. Bd. of Ins., Tex. Automobile

[19] In this Court, for the first time, Respondent argues that only a "named insured" may reject PIP and UM coverages. But because Respondent did not raise that argument at the trial court, or even at the Court of Appeals, he has waived it. *See* TEX. R. APP. P. 33.1. Nonetheless, as discussed below, Respondent's spouse could be deemed a "named insured" for purposes of Articles 5.06-1(1) and 5.06-3(a).

Series Letter No. 529 (September 19, 1980) (stating that because the terms "accident" and "occurrence" are "virtually synonymous," the Board's use of the term "accident" in the TPAP instead of "occurrence" as used in the prior TFAP did not evidence an intent to change the meaning of the term).

Respondent's policy was on the Texas Personal Auto Policy form. *See* CR 68, 74-75. The prior Family Automobile Policy defined "named insured" as "the individual named in Item I of the declarations and also includes his spouse, if a resident of the same household." *See Burch*, 426 S.W.2d at 307; *Allstate Insurance Company v. Wallace*, 435 S.W.2d 537, 538 (Tex. Civ. App.—Fort Worth, 1968, no writ) (holding that the former wife of the person identified on the declarations page was not a "named insured" only because they were no longer married). While the Board revised the definition of "you" in the approved TPAP form to make it gender neutral, the remainder of the definition of "you" is identical to the definition of "named insured" in the Family Automobile Policy form. *Compare* CR 77, *with Burch*, 426 S.W.2d at 307. Therefore, the term "you" in Respondent's policy is the functional equivalent of, if not exactly the same as, "named insured." In fact, "named insured" as defined by the former TFAP included the spouse at the time the Legislature enacted Articles 5.06-1(1) and 5.06-3(a). As a result, Respondent's wife is, in effect, a "named insured."

2. Respondent's wife had the same rights and benefits available under the policy as Respondent.

Respondent also attempts to make a distinction between Respondent's spouse, who signed the application and is included in the policy's definition of "you," and an

additional named insured, who is added through an endorsement. Respondent argues—without any support—that an additional named insured could validly reject PIP and UM coverages, while Respondent's spouse could not.[20] However, this is a distinction without a difference. It is undisputed that Respondent's spouse has the identical rights as Respondent under the policy and at least the same as, if not more than, any person that might have been added as an additional named insured.

Respondent also argues that if his spouse could reject PIP and UM merely because of her status as an insured under the policy, other insureds, like those persons who borrow or are passengers in a covered auto, could claim the same right.[21] This argument is without any basis as persons who merely borrow or ride as a passenger in an insured's vehicle do not have the same rights as a named insured. Instead, the policy is clear that those insureds, defined as "covered persons," have lesser rights. *See also Thompson*, 597 S.W.2d at 514 ("The second class of insureds is composed of those 'who use' with the consent of the named insured the vehicle(s) to which the policy applies and those who are guests in such vehicle"). Respondent concedes that Respondent and his wife had equal rights under the policy.[22] In fact, in prescribing their rights and benefits, nowhere does the policy even make a distinction between "named insured" and "you." As one with the same rights as a named insured, Respondent's wife's rejection of PIP and UM should also be valid.

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[20] Resp. Br. at 12.
[21] Resp. Br. at 17-18.
[22] Resp. Br. at 5.

Next, in arguing that agency principles do not apply in this case, Respondent also contends that his spouse applied for the policy only in her own right, not as the attorney-in-fact for him.[23] However, if that were true, Respondent would not have been included even as an insured under the policy and would have no coverage at all.

3. The application is part of Respondent's agreement with Old American.

The law of this state at the time Articles 5.06-1(1) and 5.06-3(a) were enacted was that an automobile insurance application was part of the policy if it referred to and incorporated the policy. *See Fidelity Union Life Ins. Co. v. Methven*, 346 S.W.2d 797, 800 (Tex. 1961); *Odom v. Ins. Co. of the State of Pennsylvania*, 455 S.W.2d 195, 199 (Tex. 1970) (application for automobile insurance became part of the policy because it was referenced and incorporated by the policy). That is still the law today. *See Urrutia v. Decker*, 992 S.W.2d 440, 442 (Tex. 1999) (rental agreement became part of automobile insurance policy because the policy expressly referenced the agreement).

Respondent argued that this principle is limited to life insurance cases. However, this Court has applied this well-established rule of contracts law in at least two automobile insurance cases in which the application or another agreement became part of the automobile insurance policy when they referenced or incorporated one another. *See Urrutia*, 992 S.W.2d at 442; *Odom*, 455 S.W.2d at 199.

Moreover, the Insurance Code is clear that an automobile insurance application is an integral part of the insurance agreement, as "[a] contract or agreement not written into [an automobile insurance] application and policy is void and of no effect…." TEX. INS.

[23] Resp. Br. at 17.

CODE art. 5.06(2). Indeed, an insured may be entitled to insurance benefits before the insurer even issues the automobile insurance policy based solely on the parties' as agreement evidenced by the application. *See Hooper v. Ranger County Mut. Ins. Co.*, 487 S.W.2d 856, 858 (Tex. Civ. App.—Texarkana 1972, no writ) (holding that the applicant could recover automobile insurance benefits before the issuance of his policy because he submitted a signed application). Here, because the application expressly referred to and was incorporated into the policy, it became part of Respondent's insurance policy with Old American.

D. The Court of Appeals' opinion is contradicted by the majority of cases from other jurisdictions on this issue.

Respondent's bald assertion that the Court of Appeals' opinion is "in line" with legal authority from other jurisdictions does not make that statement true. In fact, Respondent has failed to cite this Court to a single case from any other jurisdiction that supports the Court of Appeals' opinion. Instead, Respondent has strained to distinguish cases that are indistinguishable.

For example, Respondent attempted to distinguish *Acquesta v. Industrial Fire & Cas. Co.*, 467 So.2d 284 (Fla. 1985) by failing to completely describe the facts. While it is true that the insurer at first scratched through the husband's name and issued the policy only in the applicant wife's name, Mrs. Acquesta asked the insurer to reissue a corrected policy in her husband's name only. For purposes of summary judgment, the trial court accepted the Acquestas' position that the policy should have been issued in the husband's name alone and, therefore, the court of appeals reached this issue and held that the

applicant spouse who was not listed as a named insured could reject PIP and UM coverages. 467 So.2d at 285.

But unlike the wife in *Acquesta*, there is no evidence that either Respondent or his spouse requested that the policy be reissued in both of their names. Thus, Respondent's unfounded allegation that Old American omitted the Respondent's wife's name as a named insured "on purpose" is not only outside of the record and without relevance, but as much the result of Respondent's act or omission as Old American's. In any event, like the Court of Appeals in its opinion, Respondent has failed to cite *any* authority from any other jurisdiction supporting his position.

II. This Court's Recent Opinion in *Progressive County* Shows that the Court of Appeals Improperly Construed the Unambiguous Exclusions At Issue.

As this Court recently reaffirmed, when construing unambiguous insurance provisions, courts should "look to determine the ordinary, everyday meaning of the words to the general public." *Progressive County Mut. Ins. Co.*, 2002 WL 32094516, at *3. The process of construing an insurance policy is "first, an effort to determine the ordinary lay meaning of the words to the general public, and in the light of this meaning, it is second, an examination of the choice the purchaser had and had made." *Id.* (quoting *United States Ins. Co. of Waco v. Boyer*, 269 S.W.2d 340, 341 (Tex. 1953)). Not only did Respondent's spouse (the purchaser) have the choice to buy PIP and UM coverages and choose to reject them, but she also chose not to insure the vehicle involved in the accident at issue.

A. **Respondent sustained his injuries when being "struck by" his uninsured vehicle within the plain language of that term.**

When an automobile's propulsion causes one's injuries, that person is "struck by" the vehicle within the plain, ordinary meaning of that term. As Respondent describes it, "the pickup collapsed on" him.[24] Thus, Respondent sustained the injuries for which he seeks benefits when he was "struck by" his pickup.

Respondent attempts to analogize "indirect contact" cases that provide coverage under other provisions of a policy where an uninsured vehicle <u>indirectly</u> caused the insured's injuries.[25] Because the exclusions at issue are unambiguous, the term "struck by" should be construed just as broadly as in those coverage provisions. Certainly if a person is "struck by" a vehicle that starts a chain of events that ultimately results in another vehicle coming into contact with him, a person is "struck by" a vehicle that directly impacts him.

If the pickup was not first struck by an uninsured motorist and instead "fell on" Respondent[26] for some other reason, it could not be disputed that Respondent was "struck by" the pickup. The fact that the pickup was first rear-ended should not change the analysis. Contrary to Respondent's argument, the pickup was not passive in the events that caused his injuries. Instead, the pickup's <u>movement</u> toward and into Respondent was the direct and immediate cause of Respondent's injuries. Under the plain meaning of the

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[24] Resp. Br. at 2.
[25] Resp. Br. at 26-27.
[26] Resp. Br. at 27.

exclusions, Respondent was "struck by" his uninsured vehicle. This Court should grant Old American's petition for review and correct this error.

B. Respondent sustained his injuries while "upon" his uninsured vehicle within the plain language of that term.

Respondent asks this Court to construe the term "upon" exceedingly narrowly and inconsistent with the plain and ordinary meaning of that term. Respondent wants this Court to construe the term "upon" as meaning solely "on top of." The everyday meaning of "upon" to the general public, however, is broader than Respondent suggests. For example, "upon" is commonly understood to mean "in close proximity to," and not necessarily "on top of." For example, as the final assaults commenced at the Alamo, William Barrett Travis is said to have rallied his men with the battle cry, "The [enemies] are *upon* us! And we will give them Hell!"[27] That construction is consistent with the multitude of cases holding that an insured who was close to his vehicle, even if not in physical contact with it, was "upon" the vehicle as that term is intended in an automobile insurance policy. *See* Old American's Brief at 24-26. The Court of Appeals' improper construction of the term "upon" also warrants this Court's review and reversal.

PRAYER

WHEREFORE, Old American prays that this Court grant Old American's Petition for Review, reverse the Court of Appeals' opinion on any or all of the grounds discussed above, render judgment in favor of Old American and grant any and all further relief to which Old American is justly entitled.

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[27] LON TINKLE, 13 DAYS TO GLORY: THE SIEGE OF THE ALAMO 199 (2d ed. 1986) (emphasis added). In fact, at the time Travis supposedly uttered those words, the enemy "upon" him was actually below him, outside the Alamo walls, and not yet in direct physical contact with the defenders. *Id.*

Respectfully submitted,

By: ________________________________

SHANNON H. RATLIFF
State Bar No. 16573000
RATLIFF LAW FIRM PLLC
600 Congress Avenue, Suite 3100
Austin, Texas 78701
(512) 493-9600
(512) 493-9625 [fax]

JAMES J. SCHESKE
State Bar No. 17745443
ROBERT H. PEMBERTON
State Bar No. 00784740
CHRISTOPHER H. TAYLOR
State Bar No. 24013606
AKIN GUMP STRAUSS HAUER & FELD LLP
300 West Sixth Street, Suite 2100
Austin, Texas 78701
(512) 499-6200
(512) 499-6290 [fax]

ATTORNEYS FOR PETITIONER
OLD AMERICAN COUNTY MUTUAL FIRE
INSURANCE COMPANY

PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded to counsel of record by certified mail, return receipt requested on this _____ day of June 2003.

Charles C. Sanders
Attorney at Law
1411 West Avenue, Suite 200
Austin, Texas 78701

Glynn C. Turquand
WALTERS & TURQUAND
816 Congress, Suite 1600
Austin, Texas 78701

____
CHRISTOPHER H. TAYLOR