

**IN THE  
SUPREME COURT OF FLORIDA**

Docket No. SC04-771

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TAURUS HOLDINGS, INC., et al.,

Plaintiffs-Appellants,

v.

UNITED STATES FIDELITY AND GUARANTY  
COMPANY, et al.,

Defendants-Respondents.

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**ON CERTIFIED QUESTION FROM THE UNITED STATES COURT  
OF APPEALS FOR THE ELEVENTH CIRCUIT**

**DOCKET NO.: 03-14720**

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**AMENDED BRIEF OF *AMICUS CURIAE*  
COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN  
SUPPORT OF  
RESPONDENT UNITED STATES FIDELITY AND GUARANTY  
COMPANY  
FILED BY LEAVE OF COURT**

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### **INTEREST OF AMICUS CURIAE**

The Complex Insurance Claims Litigation Association (“CICLA”) is a trade association of major property and casualty insurance companies.<sup>1</sup> CICLA members provide a substantial percentage of the liability coverage written in Florida. Many of their insurance contracts in Florida, and throughout the nation, contain products-completed operations hazard provisions similar or identical to those at issue in this appeal. Accordingly, CICLA is vitally interested in the judicial interpretation of the products-completed operations hazard.

CICLA has participated in numerous cases throughout the country, including several cases in this Court.<sup>2</sup> As a trade association with a broad outlook on the insurance policy provisions before the Court, CICLA offers its expertise on the proper scope of the products-completed operations provisions, as well as information about their interpretation by courts nationwide. This Court granted CICLA’s motion for leave to appear and permitted CICLA to file this amended brief in an order dated August 27, 2004.

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<sup>1</sup> This brief is filed on behalf of the following CICLA members: ACE Group of Insurance and Reinsurance Companies; AIG Insurance Companies; Farmers Insurance Group of Companies; Hartford Insurance Group; Liberty Mutual Insurance Company; Royal & SunAlliance; Selective Insurance Company; Zurich American Insurance Company. This brief is not filed on behalf of the following CICLA members or their affiliates, who are parties in the case: Chubb & Son, A Division of Federal Insurance Company; St. Paul Fire and Marine Insurance Company; and The Travelers Indemnity Company.

<sup>2</sup> See, e.g., Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161 (Fla. 2003); Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135 (Fla. 1998); Dimmitt Chevrolet, Inc. v. S.E. Fid. Ins. Corp., 636 So. 2d 700 (Fla. 1993).

**SUMMARY OF THE ARGUMENT**

This case involves insurance coverage issues related to injuries arising out of the use of handguns. The policyholders purchased liability coverage, but chose to exclude coverage for off-premises property damage and bodily injury arising out of their handguns. This Court is asked to decide whether the products-completed operations hazard exclusion bars coverage for suits against gun manufacturers by victims of guns, and specifically whether allegations of negligence, negligent supervision, negligent marketing, negligent distribution, negligent advertising, negligent entrustment, public and private nuisance, failure to warn, false advertising, and unfair and deceptive trade practices somehow create insurance coverage for what are in essence excluded products liability claims. For the reasons stated below, CICLA submits that allegations of negligence do not transform products liability claims into some other type of exposure that is outside the products-completed operations hazard exclusion.



## ARGUMENT

### **I. THE PRODUCTS COMPLETED OPERATIONS HAZARD EXCLUSION UNAMBIGUOUSLY BARS COVERAGE FOR THE UNDERLYING INJURIES**

The insurance policies, which exclude the products-completed operations hazard, do not provide coverage here. The underlying lawsuits plainly concern injuries caused by handguns manufactured by the policyholders. Any alleged negligence is inseparable from the handguns and necessarily “aris[es] out of [the policyholders’] product.” Accordingly, the products-completed operations hazard exclusion precludes coverage.

The rules of contract interpretation are well established. Where the policy language is clear and unambiguous, courts are required to give effect to that language. Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 735 (Fla. 2002). “In contract interpretation cases, the issue to be addressed is not what this Court or the petitioner would prefer that the policy cover, but what losses the mutually agreed-upon contractual language covers.” Id. at 739.

These rules apply to interpreting exclusions. “[W]e cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way.” Deni Assocs. Of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998). “[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a

basic policy provision or an exclusionary provision.” Hagen v. Aetna Cas. & Sur. Co., 675 So. 2d 963, 965 (Fla. 5th DCA 1996). These rules recognize that “[i]n the absence of statutory provisions to the contrary, insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations, not inconsistent with public policy and the courts are without the right to add to or take away anything from their contracts.” France v. Liberty Mut. Ins. Co., 380 So. 2d 1155, 1156 (Fla. 3d DCA 1980).<sup>3</sup>

This Court has the power and obligation to make an independent assessment of the governing law. Contrary to the assertions of United Policyholders, the mere existence of a differing judicial interpretation does not automatically demonstrate ambiguity. See, e.g., ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co., 22 Cal. Rptr. 2d 206, 214 n.39 (Cal. Ct. App. 1993) (“[t]he mere fact that judges of diverse jurisdictions disagree does not establish ambiguity”); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 398 n.8 (Mich. 1991) (looking to different judicial approaches to prove ambiguity “merely begs the question”).<sup>4</sup> A contrary

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<sup>3</sup> “[T]he fact that coverage is described in a policy which does not apply to an insured's particular situation neither renders the policy ambiguous nor a nullity.” Dick Courteau's GMC Truck Co. v. Comancho-Colon, 498 So. 2d 1023, 1025 (Fla. 2d DCA 1986).

<sup>4</sup> See also Trico Inds., Inc. v. Travelers Indem. Co., 853 F. Supp. 1190, 1194 (C.D. Cal. 1994) (rejecting the policyholder's argument that differing opinions among state supreme courts is conclusive of ambiguity); Madison Constr. Co. v. Harleysville Mut. Ins. Co., 678 A.2d 802, 807 n.6 (Pa. Super. Ct. 1996), aff'd 735 A.2d 100 (Pa. 1999) (“[W]e will not improvidently ‘jump the gun’ and avoid analyzing the language of the policy merely because various courts have inconsistently interpreted the policy

rule “would mean that every time two reasonable courts (or even two reasonable men) disagreed on the interpretation of a policy of insurance, the issue should be resolved in favor of the insured.” Trinity Universal Ins. Co. v. Robert P. Stapp, Inc., 177 So. 2d 102, 105 (Ala. 1963). Whether an ambiguity reasonably exists depends upon an independent examination and evaluation by the court of the language of the contract and the facts at issue in this case. See Deni, 711 So. 2d at 1139.<sup>5</sup>

The policies at issue define the products-completed operations hazard as:

[A]ll bodily injury and property damage occurring away from premises you own or rent and arising out of your product or your work except:

products that are still in your physical possession;  
or

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language.”); Federal Ins. Co. v. Pacific Sheet Metal Inc., 774 P.2d 538, 540 (Wash. Ct. App. 1989), review denied, 779 P.2d 727 (Wash. 1989) (“the fact that this court differs with [another] court cannot rationally be considered as evidence of an ambiguity.”).

<sup>5</sup> The Florida cases that United Policyholders cite do not support the argument that the existence of judicial divergence of opinion, standing alone, automatically creates ambiguity. See United Policyholders’ Br. at 10-12. Although a court may consider reasoning from different jurisdictions, that is a far cry from a rule that conclusively establishes ambiguity. See, e.g., Lower Paxton Township v. U.S. Fid. & Guar. Co., 557 A.2d 393, 400 n.4 (Pa. Super. Ct. 1989), review denied, 567 A.2d 653 (Pa. 1989) (“Surely we would be abdicating our judicial role were we to decide such cases by the purely mechanical process of searching the nation’s courts to ascertain if there are conflicting decisions.”); Nationwide Mut. Ins. Co. v. Wenger, 278 S.E.2d 874, 877 (Va. 1981) (rejecting the policyholders’ argument that “when a policy is interpreted in a different manner by a number of jurisdictions this in itself creates an ambiguity which then must be construed against the insurance company.”).

work that has not yet been completed or abandoned.

(emphasis added). The policies define “your product” as:

[A]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

1. you;
2. others trading under your name; or
3. a person or organization whose business or assets you have acquired.

Thus, for the exclusion to apply, the injuries must “aris[e] out of” products manufactured, sold, handled, distributed or disposed of by the policyholder. In the present case, it is clear that the injuries arose out of the use of guns manufactured by the policyholders.

**A. The Products-Completed Operations Hazard Exclusion Applies Regardless of Whether the Underlying Complaint Includes Allegations of Negligence**

The policies at issue exclude coverage for injuries “arising out of” the policyholders’ products. The plain language of the policies, therefore, requires a threshold analysis in this case of whether allegations concerning negligence, negligent supervision, negligent marketing, negligent distribution, negligent advertising, and negligent entrustment are claims that “arise out of” the use of handguns.

**1. The Phrase “Arising Out Of” Does Not Require Proximate Cause Under Florida Law**

Florida courts have defined the unambiguous term “arising out of” as:

[B]road, general, and comprehensive terms effecting broad coverage . . . . “Arising out of” are words of much broader significance than [sic] “caused by.” They are ordinarily understood to mean “originating from,” “having its origin in,” “growing out of” or “flowing from . . .”

Ohio Cas. Ins. Co. v. Cont’l Cas. Co., 279 F. Supp. 2d 1281, 1284 (S.D. Fla. 2003) (citations omitted) (interpreting “arising out of” in the context of an automobile exclusion); see also Hagen, 675 So. 2d at 965 (same); Bombolis v. Cont’l Cas. Co., 740 So. 2d 1229 (Fla. 4th DCA 1999) (finding an exclusion for “any claims arising out of . . . any dishonest, fraudulent, criminal or malicious act or omission” unambiguous) (citations omitted); see also Eon Labs. Mfg., Inc. v. Reliance Ins.

Co., 756 A.2d 889, 894 (Del. 2000) (“if there is some meaningful linkage between the product and the third party claim, the ‘arising out of’ language unambiguously applies”); Fibreboard Corp. v. Hartford Accident & Indem. Co., 16 Cal. App. 4th 492, 505 (Cal. Ct. App. 1993) (“arising out of” “identifies a core factual nucleus, i.e., products manufactured, sold or distributed by the insured, and links that nucleus to the bodily injury or property damage covered under the policy”).

Florida law does not equate “arising out of” with proximate cause, but rather requires only some meaningful connection. Gov’t Employees Ins. Co. v. Novak, 453 So. 2d 1116, 1119 (Fla. 1984) (“‘arising out of’ [in the context of automobile coverage] does not mean ‘proximately caused by,’ but has a much broader meaning. All that is required is some nexus between the motor vehicle and the injury.”); Hernandez v. Protective Cas. Ins. Co., 473 So. 2d 1241, 1242 (Fla. 1985) (same). This settled Florida law governs the meaning of “arising out of” here.

Ignoring Florida case law interpreting products-completed operations hazard provisions, the policyholders’ and their amicus point to Westmoreland v. Lumbermens Mut. Cas. Co., 704 So. 2d 176, 180 (Fla. 4th DCA 1997), to support their causation analysis. Westmoreland considered an automobile exclusion, not the products-completed operations hazard coverage at issue. Furthermore, subsequent Florida opinions have refused to follow Westmoreland’s causation analysis. See, e.g., Ohio Cas. Ins. Co., 279 F. Supp. 2d at 1286 (refusing to follow

Westmoreland's theory of causation and finding no ambiguity in the phrase "arising out of"); Allstate Ins. Co. v. Safer, 317 F. Supp. 2d 1345, 1350 n.4, 1354 (M.D. Fla. 2004) (disagreeing with the Westmoreland court's finding that "arising out of" in an exclusion is ambiguous); Am. Sur. & Cas. Co. v. Lake Jackson Pizza, Inc., 788 So. 2d 1096, 1099 (Fla. 1st DCA 2001) (disagreeing with Westmoreland and finding that "arising out of" in the context of an auto exclusion is not ambiguous.). Even the Fourth District Court of Appeal subsequently limited its decision in Westmoreland, explaining that "the ambiguity arose out of more than the words 'arising out of.'" Bombolis, 740 So. 2d at 1230.

United Policyholders principally rely on a case where the insuring provision at issue did not even contain "arising out of" language. Container Corporation of America v. Maryland Casualty Co., 707 So. 2d 733 (Fla. 1998), interpreted an additional insured endorsement providing coverage for "Interest for operations at operations site by [the contractor]." Id. at 735. Although the underlying agreement between the policyholder and the contractor provided for indemnification "arising as a result of the performance . . . of its duties," the insurance policy did not reference that language. Id. Because there was no limiting language in the additional insured endorsement, this Court found coverage for the contractor's negligence. Id. at 736. Moreover, contrary to United Policyholders' contention, this Court's citation to Florida Power and Light in

Container Corp. is of no moment in the case at bar. Florida Power and Light construed an additional insured provision providing coverage “but only with respect to operations by or on behalf of the Named Insured.” Florida Power & Light Co. v. Penn America Ins. Co., 654 So. 2d 276, 279 (Fla. 4th DCA 1995). Similar to Container Corp., the meaning of “arising out of” was not an issue in Florida Power and Light.

Neither the policyholder nor its amicus point to precedent that is applicable here. Indeed, Florida law on the issue presented supports the application of the products-completed operations hazard.

## **2. Allegations of Negligence Do Not Alter the Applicability of The Products-Completed Operations Hazard Exclusion**

Florida courts repeatedly have concluded that allegations of negligence do not alter the conclusion that the products-completed operations hazard exclusion bars coverage. Rather, as long as the harm alleged in the negligence claim arises out of the policyholder’s products, then the exclusion bars coverage.

In Koikos v. Travelers Ins. Co., 849 So. 2d 263, 265 (Fla. 2003), this Court rejected the argument that a shooting in a restaurant arose out of the restaurant’s negligent failure to provide security. The Court concluded that the injuries arose out of the “shooting incident and not the [policyholder’s] own failure to provide security.” Id. at 271.



Many Florida cases have reached similar conclusions. For example, K-C Mfg. Co. found that under Florida law a cause of action based on the failure to warn of a product defect falls within the products hazard definition. K-C Mfg. Co. v. Shelby Mut. Ins. Co., 434 So. 2d 1004, 1006 (Fla. 1st DCA 1983). The policyholder argued that the products hazard exclusion did not bar coverage for defective design, manufacture and negligent failure to warn of defects. Id. at 1005. Rejecting this argument, the court held that “[t]he negligence alleged is clearly that contemplated by the exclusion.” Id. at 1007.

In another case, a Florida appellate court applied the policy’s products hazard/completed operations aggregate limits to a claim that the policyholder negligently sold a defective gas tank. Associated Elec. & Gas Ins. Servs., Ltd. v. Houston Oil & Gas Co., 552 So. 2d 1110, 1112 (Fla. 3d DCA 1989). Specifically, injured persons alleged that the policyholder negligently filled and failed to secure the gas tanks, failed to inspect the tanks and used a defective tank. Id. at 1111. In applying the products hazard limits, the court found that the allegations of negligence and defective products were inseparable. Id. at 1112. Accordingly, the court held that the injuries arose out of off-premises completed operations. Id.; see also Auto-Owners Ins. Co. v. Marvin Dev. Corp., 805 So. 2d 888 (Fla. 2d DCA 2001) (applying the products-completed operations hazard exclusion to claims of negligent misrepresentation concerning the suitability of a site for construction).

Courts across the country have rejected the argument that whether a claim falls within the products-completed operations hazard depends upon the particular theory alleged. “[I]f the allegation of pre-existing negligence were to be regarded as controlling, the result would be to emasculate the product liability exclusion.” Aetna Cas. & Sur. Co. v. Richmond, 76 Cal. App. 3d 645, 655 (Cal. Ct. App. 1977) (citations omitted) (allegations of negligence in affixing and adjusting ski bindings excluded by the products-completed operations hazard provision); see also Laminated Wood Prods., Co. v. Pedersen, 711 P.2d 165, 170 (Or. Ct. App. 1985) (failure to warn of dangers associated with the product, negligent design, and breach of warranty excluded by the products hazard provision); Fibreboard Corp., 16 Cal. App. 4th at 502 (“[I]t is precisely the conduct of failing to warn that renders the [asbestos] product defective and, hence, calls into play the ‘products hazard’ clause”); Liggett Group, Inc. v. Ace Prop. & Cas. Ins. Co., 798 A.2d 1024, 1033 (Del. 2002) (affirming the lower court’s opinion that claims against a tobacco manufacturer for negligent defect, negligent design, negligent failure to warn and negligent misrepresentation were products claims because “the use of tobacco products was the sole cause of the alleged injuries”).

By contrast, Florida courts have recognized that, when there is no nexus between the product and the injury, the products-completed operations hazard exclusion does not apply because the injuries did not “arise out of” products. In

Florida Farm Bureau Mutual Insurance Co. v. Gaskins, 405 So. 2d 1013 (Fla. 1st DCA 1981), the First District Court of Appeal ruled that damage caused by the policyholder's misdelivery of herbicide instead of insecticide resulted from the policyholder's negligence, not the product itself. In that case, the court concluded that the injury "did not arise out of products." Id. at 1015. Rather, the "proximate cause" was the policyholder's negligence in delivering the wrong product. Id. Accordingly, on the facts of Gaskins, the negligence itself caused the injury and the product was "merely the incidental instrumentality through which the damage was done." Id.

Florida courts have made clear that the Gaskins exception is narrow. As explained in Houston Oil & Gas, "[o]nly where negligent service of the insured constitutes 'an act sufficiently removed from the quality of the product in question [will it] escape the exclusionary clause.'" Houston Oil & Gas, 552 So. 2d at 1112 (citations omitted). The court in K-C Mfg. similarly stated that Gaskins applies only where the policyholder allegedly sold "wrong product for a specified purpose." K-C Mfg., 434 So. 2d at 1006; see also Marvin Dev. Corp., 805 So. 2d at 892 (in Gaskins, "the proximate cause of damage was the supplier's negligence in delivering the wrong product, rather than a defect in the product itself"). Thus, the Gaskins line of cases is limited to cases of negligent delivery of a product. See Florida Farm Bureau Mut. Ins. Co. v. James, 608 So. 2d 931, 932 (Fla. 4th DCA

1992) (allegations that feed was defective are products liability claims).

In the present case, the underlying lawsuits allege that the injuries arose out of the use of products manufactured and sold by the policyholder — handguns. Florida law is clear that, if the injuries arose out of the use of products, then the exclusion applies. Although the lawsuits alleged different theories of liability — including negligence, negligent supervision, negligent marketing, negligent distribution, negligent advertising, negligent entrustment, public and private nuisance, failure to warn, false advertising, and unfair and deceptive trade practices — such theories do not create coverage.

Unlike Gaskins, the policyholders here did not mistakenly deliver the wrong product. To the contrary, the policyholders produced a product that was known to be dangerous. Accordingly, any alleged negligence in these suits necessarily flows from the dangerous nature of the handguns and can not be separated from the handguns themselves.

**B. Courts Nationwide Have Concluded that the Products-Completed Operations Hazard Exclusion Precludes Coverage Under Similar Facts**

Courts nationwide have applied the products-completed operations hazard to various allegations of negligence where the harm arises out of the use of guns. CICLA is not aware of any gun liability coverage cases to the contrary.

One appellate court case was strikingly similar to the case at bar. Beretta U.S.A. Corp. v. Fed. Ins. Co., 17 Fed. Appx. 250, 252, 2001 WL 1019745 (4th Cir. 2001). In Beretta, various municipalities sued a policyholder/firearms manufacturer for negligently marketing and distributing guns and for allegedly creating a public nuisance. Id. at 252. The lawsuits also alleged failure to make the firearms safe and prevent misuse, which the policyholder argued was excluded by the products-completed operations hazard provision. Id. at 252 n.1. The court rejected the policyholder's argument that Maryland law limited the products-completed operations hazard exclusion to dangerous and defective products claims. Id. at 254. Instead, the products-completed operations hazard exclusion applied to these claims because the allegations arose out of the policyholder's firearms. Id. at 254.

Similarly, in Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Insurance Co., 220 F.3d 1, 7 (1st Cir. 2000), another case involving gunshot victims, the products-completed operations hazard exclusion was not limited to

defective products claims. In that case, gunshot victims sued a firearms distributor for negligently, willfully, knowingly, and recklessly flooding the firearms market. Id. at 3. The court interpreted “arising out of” as “somewhere between proximate and ‘but for’ causation — an intermediate causation standard” and requiring the court to “consider the ‘source from which the plaintiff’s personal injury originates rather than the specific theories of liability alleged in the complaint.” Id. at 7. (citations omitted). Applying this standard, the court found that “firearms were the immediate source of the plaintiffs’ injuries” and the “contrived” theories of liability “cannot affect the application of the exclusion provision.” Id. Accordingly, the particular liability theories alleged did not disturb the court’s conclusion that the policyholder’s distribution of guns “derived from firearms.” Id. at 8; see also Mass. Bay Ins. Co. v. Bushmaster Firearms, Inc., 324 F. Supp. 2d 110 (D. Me. May 20, 2004) (applying the products-completed operation hazard exclusion to bar coverage for gun-related injuries asserted against a gun manufacturer); Cobbins v. Gen. Accident Fire & Life Assurance Corp., 290 N.E.2d 873, 878 (Ill. 1972) (negligent sale of fireworks to a minor without his parents consent is excluded from coverage by the products-completed operations hazard exclusion where the accident occurred in the minor’s home).

The cases that the policyholders cite do not alter this conclusion. The authority relied upon by the policyholders involved claims against sellers of guns,

not gun manufacturers. In addition, these cases involved allegations of negligence in selling the guns, not failure to take certain precautions regarding the dangerous nature of the product — the handguns.<sup>6</sup> Moreover, as the Brazas court explained, this line of cases requires a court to “read into the text a requirement that is simply not there.” Brazas, 220 F.3d at 6.

Applying varying standards of causation, courts consistently have concluded that injuries resulting from guns are products claims. Courts recognize that “the company, in distributing its firearms, is allegedly negligent precisely because it created the risk of the exact kind of injuries suffered” by the underlying plaintiffs. Brazas, 220 F.3d at 8. Accordingly, these injuries arise out of the use of guns and are excluded by the products-completed operations hazard.

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<sup>6</sup> See, Nautilus Ins. Co. v. Don’s Guns & Galleries, Inc., No. IP 99-0735-C-Y/G, 2000 WL 34251061, at \*4 (S.D. Ind. Jan. 26, 2000) (dealer violated its federal license by selling firearms to an incompetent person); Colony Ins. Co. v. H.R.K., Inc., 728 S.W.2d 848, 851 (Tex. Ct. App. 1987) (sale of a handgun to a mentally unstable individual in violation of federal law); Lessak v. Metro. Cas. Ins. Co., 151 N.E.2d 730 (Ohio 1958) (sale of B-B pellets to a minor in violation of state law).

**C. NO DUTY TO DEFEND EXISTS BECAUSE THE PRODUCTS-COMPLETED OPERATIONS HAZARD EXCLUSION APPLIES TO THE NEGLIGENT DESIGN CLAIMS AT ISSUE IN THIS CASE**

United Policyholders' attempt to create a duty to defend based on allegations of negligent design are meritless. Florida courts have found that allegations of negligence, including defective design, are barred by the products hazard exclusion. K-C Mfg. Co., 434 So. 2d at 1006; see also Liggett Group, Inc., 798 A.2d at 1033 (affirming the lower court's opinion that claims against a tobacco manufacturer, which included negligent design, were products claims); Laminated Wood Prods., 711 P.2d at 170 (negligent design excluded by the products hazard provision). United Policyholders' argument that negligent design is distinguishable from allegations of negligence ignores the critical fact that the underlying lawsuits concern injuries caused by handguns manufactured by the policyholders. Allegations of negligent design do not alter this fact.<sup>7</sup>

**II. ENFORCING THE PRODUCTS-COMPLETED OPERATIONS HAZARD EXCLUSION IS IMPORTANT TO THE INTEGRITY OF THE UNDERWRITING PROCESS**

This Court should refuse to rewrite the insurance contract to include coverage not provided or paid for under the policy. Failure to enforce the clear provisions of insurance contracts would affect the integrity of the insurance

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<sup>7</sup> United Policyholders provide no support whatsoever for its argument. Likewise, United Policyholders make no attempt to distinguish the cases cited above.



underwriting process. Insurance serves an important economic and social function, by allowing individuals and companies to engage in socially useful activities that could not be undertaken if the associated risks had to be borne alone.

Insurers must know at the beginning of their relationships with policyholders which risks they are agreeing to bear under the terms of the insurance contract. No insurer can (or would) agree to write a contract that could cover whatever risks a court subsequently were to conclude might be desirable to cover, notwithstanding the plain language of the policy.

In that regard, the United States Supreme Court observed that the insurance industry is particularly dependent on certainty and predictability in the law:

[The business of insurance] depend[s] on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insured's benefits.

Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 721 (1978).

In this case, the policyholders seek to limit the products-completed operations hazard to reach only product defect claims. The policyholders' proposed reading of the products-completed operations hazard is artificially narrow and is unrealistic in an age of notice pleading and creative lawyering. The policyholders' approach would create coverage for many product-related claims,

which routinely include negligence theories and would thus substantially increase the risk assumed by the insurer. “To extend coverage in this case would therefore simply emasculate the exclusion provision and provide benefits for which the premium was not calculated.” K-C Mfg., 434 So.2d at 1007.

In the long run, the public is best served by adhering to time-tested principles of insurance contract interpretation. These fundamental policy considerations reinforce what Florida law requires: the terms of insurance contracts, like those of any other contract, must be construed according to their plain and ordinary meaning, and should not be distorted to provide free insurance where none was intended.

### **CONCLUSION**

For all of the foregoing reasons, the Complex Insurance Claims Litigation Association respectfully requests that this Court answer the certified question by stating that the products-completed operations hazard exclusion applies to bar coverage for suits against gun manufacturers by victims of guns, even if such suits contain allegations of negligence, negligent supervision, negligent marketing, negligent distribution, negligent advertising, negligent entrustment, public and private nuisance, failure to warn, false advertising, and unfair and deceptive trade practices.

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Respectfully Submitted

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman, 14-point font.

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