IN THE SUPREME COURT OF FLORIDA

TAURUS HOLDINGS, INC., and
TAURUS INTERNATIONAL
MANUFACTURING, INC.,

Petitioners,

v. CASE NO.: SC04-771

UNITED STATES FIDELITY AND
GUARANTY COMPANY, PACIFIC
INSURANCE COMPANY, LIMITED,
FEDERAL INSURANCE COMPANY,
GREAT NORTHERN INSURANCE
COMPANY, UNITED NATIONAL
INSURANCE COMPANY, FIREMAN'S
FUND INSURANCE COMPANY, and
NAUTILUS INSURANCE COMPANY,

Respondents.
_____/

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

AMENDED BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PETITIONERS FILED BY LEAVE OF COURT

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Statement of Interest of Amicus Curiae

Amicus Curiae United Policyholders ("U.P.") is a non-profit organization founded in 1991 to educate the public on insurance issues and consumer rights. U.P. is funded by donations and grants from individuals, corporations, and foundations. U.P. fulfills its mission in several ways. First, U.P. serves as a resource for insureds by providing consumer-oriented insurance information through publications and programs. Second, U.P. monitors developments in the insurance industry that may affect the interests of all insureds. U.P. receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory oversight proceedings.

Based on its monitoring of legal and marketplace developments and the real-life experiences of insureds, U.P. regularly submits amicus briefs to provide appellate courts around the country with a policyholder's perspective in cases involving insurance principles that are likely to have widespread impact. This is such a case. Since 1992, U.P. has filed amicus briefs on behalf of policyholders in over one hundred insurance cases throughout the United States. U.P.'s amicus brief was cited in the United States Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299, 313-14 (1999). U.P. was the only national consumer organization to submit an amicus brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408 (2003). U.P.'s arguments were adopted by the California

Supreme Court in *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999). This Court has previously granted leave for U.P. to file an amicus brief. *Allstate Indem. Co. v. Ruiz*, 780 So.2d 239 (Fla. 4th DCA 2001), *juris. accepted*, 796 So. 2d 535 (Fla. 2001)(No. SC01-893).

Summary of Argument

This case presents the Court with the opportunity to affirm that the undefined insurance policy phrase "arising out of" is ambiguous. "Arising out of" is perhaps the phrase utilized most frequently by insurers in drafting their policies. Indeed, it appears throughout the insurance policies involved in this dispute, and it lies at the very heart of the specific exclusion debated here. Unfortunately for the policyholder, "arising out of" is also perhaps the least understood of all policy terms.

Courts have long struggled with the meaning of "arising out of." Many determine it to be ambiguous; many more find it to be unambiguous. Despite a prior statement from this Court that the phrase is ambiguous, disagreement still rages among Florida's District Courts of Appeal as well as its Federal District Courts. This long-standing disagreement among learned courts, in and of itself, is conclusive of ambiguity.

Despite its inherent ambiguity, insurers continue to utilize the phrase and, unlike so many other important policy terms, the insurers decline to provide a

definition to aid the policyholder and courts. A reason is that not even the insurers can agree on a meaning. Insurers argue for either a narrow or broad construction, depending on which meets their objective at the time. The objective of course being one of no coverage. Insurers cannot even agree that the phrase is unambiguous, with some breaking ranks to assert that "arising out of" is in fact ambiguous.

U.P. urges the Court to continue to protect the Florida policyholder, unable to negotiate either the phrase out of or a definition into its policy, to follow prior precedent and hold that, where undefined in an insurance policy, "arising out of" is ambiguous. Consistent with well-reasoned authority, U.P. further urges the Court to hold that, where used undefined in an exclusion, "arising out of" means "proximately caused by."

This case also presents the Court with the opportunity to affirm the well-established difference between a liability insurer's duty to defend and its duty to indemnify. Even assuming the exclusion at issue here applies to some of the claims alleged against the policyholder, namely those claims based on the policyholder's alleged manufacture or sale or its product, it does not apply to the alternative claims based on the policyholder's alleged design of its product. Thus, even though facts extrinsic to the underlying complaints may suggest that a duty to

indemnify may never arise, those facts should not be used to defeat the insurers' duty to defend.

Argument[1]

1. Where undefined in an insurance policy, "arising out of" is ambiguous.

This Court's analysis should begin from the baseline that "insurance policies, which are prepared by experts in a very complex area and involving the intricate interplay of the various provisions of a given policy, are difficult for a layman to understand." *Nixon v. United States Fid. & Guar. Co.*, 290 So.2d 26, 29 (Fla. 1973). As recently stated by the Fifth DCA:

> When determining the meaning and scope of an exclusion clause or other provisions of an insurance policy, legal niceties, technical terms, and phraseology extracted from the vernacular of the insurance industry should never transcend the common understanding of the ordinary person. Therefore, the proper inquiry is not whether a legal scholar can, with learned deliberation, comprehend the meaning of an insurance policy provision, but instead, whether it is understandable to a layperson.

Hrynkiw v. Allstate Floridian Ins. Co., 844 So. 2d 739, 741-742 (Fla. 5th DCA 2003). With these basic principles in mind, where undefined in an insurance policy, "arising out of" is ambiguous. *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 181 (Fla. 4th DCA 1997). The exclusion debated here hinges on this ambiguous phrase:

[1] U.P. of course wholeheartedly supports Taurus' arguments specific to the "products hazard" exclusion, and anything that U.P. could add to Taurus' arguments would be superfluous.

> This insurance does not apply to "bodily injury" or "property damage" included within the "products-completed operations hazard."
>
> * * *
>
> "Products-completed operations hazard":
>
> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and *arising out of* "your product."

(Emphasis added). Applying *Westmoreland* to this exclusion, Judge Jordan of the Southern District held that "arising out of" was ambiguous. Ten months later, the insurance companies were able to convince Judge Jordan that this Court, in *Koikos v. Travelers Insurance Co.*, 849 So. 2d 263 (Fla. 2003), had determined that "arising out of" was not ambiguous. However, in *Koikos* this Court did not determine that "arising out of" was unambiguous. UP suggests that, rather than in *Koikos*, the "arising out of" ambiguity question was determined by this Court in *Container Corporation of America v. Maryland Casualty Co.*, 707 So.2d 733 (Fla. 1998), a landmark decision apparently never brought to the attention of either Judge Jordan or the Eleventh Circuit.

Container is significant in several respects, not the least of which is the fact that the Court was reviewing a decision from the First DCA, *Container Corp. of Am. v. Md. Cas. Co.*, 687 So.2d 273 (Fla. 1st DCA 1997), which conflicted with an earlier decision from the Fourth DCA, *Fla. Power & Light Co v. Penn Am. Ins.*

Co., 654 So.2d 276 (Fla. 4th DCA 1995).[2] The Court ultimately approved the Fourth DCA's decision and quashed the First DCA's decision. 707 So.2d at 737. The issue in both decisions was whether an entity qualified as an insured pursuant to an additional insured endorsement. The Court described and quoted from the Fourth DCA's *Florida Power & Light* decision at length:

> In Florida Power & Light, a contract between Florida Power and Light (FP&L) and Eastern Utility Construction, Inc. (Eastern), an independent contractor, for renovations to FP&L's substation required the contractor to purchase general liability insurance. The policy procured by the contractor defined "Persons or Entities Insured" as "any person, organization, trustee, or estate . . . but only with respect to operations by or on behalf of the Named Insured or to facilities used by the Named Insured." Thereafter, an employee of the contractor who was injured at the substation sued FP&L for its negligence related to his injury. The issue before the court was whether the personal injury claim came within the ambit of the definitional provision "but only with respect to operations by or on behalf of the Named Insured." In concluding that FP&L was an additional insured under the policy, the court stated:
>
> > In the instant case, the pertinent policy language merely reads "but only with respect to operations by or on behalf on the Named Insured," Eastern. No language in the provision requires fault on behalf of Eastern before FPL can be considered an additional insured. Thus, the language, similar to the language utilized in the cases discussed above, can only be considered ambiguous at best. The language that was employed by Penn America required only that FPL's liability arise out of the operations of Eastern. Obviously, Haywood's injuries and subsequent lawsuit arose out of some type of "operations" of Eastern as Haywood was an employee of Eastern working at the FPL substation. Therefore, because Penn America did not utilize specific language limiting coverage to the vicarious liability situation and because the language actually utilized is ambiguous at best, the "additional insured" provision must be

[2] 707 So.2d at 734.

> construed against Eastern and in favor of FPL, the insured. Consequently, the trial court erred in entering a summary judgment in favor of Penn America determining that FPL was not an additional insured under the policy.

707 So.2d at 735-36 (internal citations omitted)(emphasis added). The language at issue in *Florida Power & Light* is "but only with respect to." The insurance company argued that this meant "vicarious liability only." In rejecting the insurer's constrained construction, the Fourth DCA expressly equated "but only with respect to" as meaning "arising out of" ("The language that was employed by Penn America required only that FPL's liability arise out of the operations of Eastern"), and held it to be ambiguous. This Court expressly approved the Fourth DCA's decision. In doing so, the Court also relied on decisions from other jurisdictions:

> Several courts from other jurisdictions have interpreted "additional insured" policy provisions to reach the same result as Florida Power & Light in similar factual contexts. Thus, in *Casualty Insurance Co. v. Northbrook Property & Casualty Insurance Co.*, 150 Ill. App. 3d 472, 501 N.E.2d 812, 103 Ill. Dec. 495 (Ill. App. Ct. 1986), the language adding the additional insured read: "but only with respect to liability arising out of operations performed for the additional insured by the named insured." 501 N.E.2d at 814. The court held that because the policy language was not expressly limiting, the additional insured was entitled to coverage for its own negligence. *Accord Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co.*, 721 F. Supp. 740 (E.D. Pa. 1989) (holding that language providing coverage for liability "arising out of" operations performed for the additional insured was not limited to coverage for additional insured's vicarious liability); *Dayton Beach Park No. 1 Corp. v. National Union Fire Ins. Co.*, 175 A.D.2d 854, 573 N.Y.S.2d 700 (N.Y. App. Div. 1991) (holding that failure of parties to use specific limiting language provided additional insured with coverage for its own negligence).

Casualty Insurance Co. v. Northbrook Property & Casualty Insurance Co., 501 N.E.2d 812 (Ill. App. Ct. 1986) expressly holds that "arising out of" is ambiguous. *Id.* at 814. *Philadelphia Electric Co. v. Nationwide Mutual Insurance Co.*, 721 F. Supp. 740 (E.D. Pa. 1989) and *Dayton Beach Park No. 1 Corp. v. National Union Fire Insurance Co.*, 573 N.Y.S.2d 700 (N.Y. App. Div. 1991) both rejected the insurer's proposed meaning of "arising out of."

The suggestion that this Court in *Koikos v. Travelers Insurance Co.*, 849 So. 2d 263 (Fla. 2003) determined that "arising out of" is unambiguous is misplaced. In *Koikos* the Court was asked to construe a limits of liability provision that stated:

> [T]he "Each Occurrence Limit [of $500,000] is the most we will pay for damages and medical expenses because of all "bodily injury" or "property damage" arising out of any one occurrence.

849 So.2d at 266. To answer the certified question regarding the number of "occurrences," the Court had to construe "occurrence," a term defined by the Travelers policy to include an "accident," an undefined term. The only determination of ambiguity in *Koikos* is that "accident" is ambiguous and, construed broadly in favor of coverage, includes, in addition to "accidental events," "injuries or damage neither expected nor intended from the standpoint of the insured." 849 So.2d at 267. This determination led to a rejection of Travelers' argument that there was only one occurrence and therefore only one "Each Occurrence Limit." Instead, the Court held that there were two "occurrences" and

thus two "Each Occurrence Limits" applied. Although Travelers' limits of liability provision contains the phrase "arising out of," the Court simply had no need to address its meaning. Indeed, in determining that "accident"—a very common term that, at first blush, is arguably unambiguous—is indeed ambiguous, the Court's decision in *Koikos* is wholly consistent with the determination that "arising out of" is also ambiguous.

In *Westmoreland*, the Court is again confronted with an "arising out of" decision from the Fourth DCA. In *Westmoreland,* the Fourth DCA, in an exhaustively thorough analysis, again held that an insurance policy's undefined use of "arising out of" is ambiguous. *Westmoreland* has been met with disagreement, much of it from the First DCA. In *American Surety & Casualty Co. v. Lake Jackson Pizza, Inc.*, 788 So.2d 1096 (Fla. 1st DCA 2001), as it did in *Container Corp.*, a decision ultimately quashed by this Court, the First DCA registered its disagreement with the Fourth DCA. There, the First DCA determined that "arising out of" was not ambiguous. The First DCA instead relied on decisions from the Fifth DCA, *Hagen v. Aetna Cas. & Sur. Co.*, 675 So.2d 963 (Fla. 5th DCA), and the Second DCA, *Cesarini v. Am. Druggist Ins. Co.*, 463 So.2d 451 (Fla. 2d DCA 1985). In applying a broad construction of "arising out of" as used in an exclusion, the Fifth DCA in *Hagen* relied on *National Indemnity Co. v. Corbo*, 248 So. 2d 238 (Fla. 3d DCA 1971), perhaps the earliest Florida decision cited for

construction of "arising out of." *Corbo* is significant in two respects. First, "arising out of" was first construed as used in an insuring provision. Second, it was the insurer which argued for a narrow construction of "arising out of"—specifically, that it meant "proximately caused by." Since *Westmoreland*, the Second DCA has expressly stated that it has not had the opportunity to address the concurrent cause rule adopted in *Westmoreland*. *Muzzio v. Auto-Owners Ins. Co.*, 799 So. 2d 272, 275 (Fla. 2d DCA 2001).

Any suggestion that the Fourth DCA has abandoned *Westmoreland* and changed its mind on the ambiguity of "arising out of" is misplaced. *Bombolis v. Continental Casualty Co., Inc.*, 740 So.2d 1229 (Fla. 4th DCA 1999) is a three paragraph affirmance which purports to distinguish *Westmoreland* on the stated basis that "in *Westmoreland*, the ambiguity arose out of more than the words 'arising out of'." *Id.* at 1230. This incorrect statement has led one Federal District judge to leap to the conclusion that the Fourth DCA has "retreated" from the *Westmoreland* holding that "arising out of" is ambiguous. *Allstate Ins. Co. v. Safer*, 317 F.Supp.2d 1345, n.4 (M.D. Fla. 2004)(Corrigan, J.). No other court before or since has cited *Bombolis* for this proposition. Indeed, to do so would fly directly in the face of numerous other Fourth DCA decisions applying *Westmoreland*, including one that United States Fidelity & Guaranty Company, an insurer now before this Court, is personally familiar with. In *Farrer v. United*

States Fidelity & Guaranty Co., 809 So.2d 85 (Fla. 4th DCA 2002), decided three years after *Bombolis*, a passenger in the insured's taxi cab was sexually assaulted by the driver. The passenger sued the insured alleging negligent hiring and retention of the driver. The issue was whether the commercial general liability insurer's duty to defend was eliminated by an exclusion for bodily injury "arising out of" the ownership, maintenance, use or entrustment of an automobile. Acknowledging the phrase "arising out of" to be ambiguous, because it was used in an exclusion rather than an insuring agreement, it was to be strictly construed. In rejecting USF&G's argument that the exclusion eliminated its duty to defend, the court held:

> [I]t is clear that the sexual assault did not "arise out of" the use of the vehicle. While the assault occurred within the auto, it did not arise out of the inherent nature of the vehicle. More importantly, the automobile did not itself produce the injury.

809 So.2d at 95.

It is well-settled that conflicting opinions from other jurisdictions is evidence of ambiguity. *Sec. Ins. Co. v. Investors Diversified, Ltd.*, 407 So. 2d 314, 316 (Fla. 4th DCA 1981)("The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language."); *Prudential Ins. Co. v. Bellar*, 391 So. 2d 737 (Fla. 4th DCA 1980); *see also State*

Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc., 678 So.2d 397, 407-8 (Fla. 4th DCA 1996)(Klein, J., dissenting, Pariente, J. concurring); *New Castle County v. Nat'l Union Fire Ins. Co.*, 243 F.3d 744 (3rd Cir. 2001); *Am. Guar. & Liab. Ins. Co. v. The 1906 Co.*, 273 F.3d 605, 620 (5th Cir. 2001); *Am. Simmental Ass'n v. Coregis Ins. Co.*, 282 F.3d 582 (8th Cir. 2002); *Bankwest v. Fid. & Dep. Co. of Md.*, 63 F.3d 974, 978 (10th Cir. 1995); *Sunex Int'l, Inc. v. Travelers Indem. Co. of Ill.*, 185 F. Supp. 2d 614, 617 (D. S.C. 2002); *Wendell v. State Farm Mut. Auto. Ins. Co.*, 974 P.2d 623, 632 (Mont. 1999)("The fact that courts are split as to the meaning of "accident" further confirms our belief that the term is subject to more than one reasonable interpretation"); *Tata v. Nichols*, 848 S.W.2d 649, 650-51 (Tenn. 1993); *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926 (Ind. 1999).

Many other jurisdictions have in fact determined "arising out of" to be ambiguous. *See e.g. Aetna Cas. & Sur. Co. v. Ocean Accident & Guarantee Corp.*, 386 F.2d 413, 415 (3rd Cir. 1967)(Pennsylvania); *Liberty Mut. Ins. Co. v. Westfield Ins. Co.*, 703 N.E.2d 439, 443 (Ill. App. Ct. 1998); *Barga v. Ind. Farmers Mut. Ins. Group*, 687 N.E.2d 575, 578 (Ind. Ct. App. 1997); *Wendell v. State Farm Mut. Auto. Ins. Co.*, 974 P.2d 623, 638 (Mont. 1999); *Proutt v. Colo. Western Ins. Co.*, 246 F.3d 1150, 1160 (9th Cir. 2001); *Nat'l Union Fire Ins. Co. v. Caesars Palace Hotel & Casino*, 792 P.2d 1129 (Nev. 1990); *State Capital Ins. Co. v. Nationwide*

Mut. Ins. Co., 350 S.E.2d 66, 74 (N.C. 1986). Alabama courts apply different constructions of "arising out of" depending on whether used in an insuring language versus an exclusion. *Compare Indus. Chems. & Fiberglass Corp. v. Hartford Acc. & Indem. Co.*, 475 So.2d 472 (Ala. 1985), *with State Farm Fire & Cas. Co. v. Erwin*, 393 So.2d 996 (Ala. 1981). Of course, many courts have determined "arising out of" to be unambiguous. *See, e.g., Eon Labs Mfg. v. Reliance Ins. Co.*, 756 A.2d 889 (Del. 2000); *O'Toole v. Brown*, 422 N.W.2d 350 (Neb. 1988); *Toll Bridge Auth. v. Aetna Ins. Co.*, 773 P.2d 906, 908 (Wash. Ct. App. 1989).

Neither this Court's holding in *Container Corp.*, nor the Fourth DCA's holding in *Westmoreland* can be limited to their specific policy provisions. An undefined term used more than once in the policy which requires different constructions to provide meaning is ambiguous. *United States Fire Ins. Co. v. Fleekop*, 682 So.2d 620 (Fla. 3d DCA 1996). In other words, because "arising out of" is ambiguous in one part of a policy, it is ambiguous throughout the policy.

In *Ohio Casualty Insurance Co. v. Continental Casualty Co.*, 279 F.Supp.2d 1281 (S.D. Fla. 2003), Ohio Casualty Insurance Company, relying on *Westmoreland*, argued that "arising out of" was ambiguous. Judge Ryskamp of the Southern District rejected Ohio Casualty's argument and declined to follow *Westmoreland*. However, Judge Hurley of the same court has expressly agreed

with *Westmoreland. Fid. & Cas. Co. of N. Y. v. Lodwick*, 126 F.Supp.2d 1375, 1380 (S.D. Fla. 2000). In the instant case, Judge Jordan of the Southern District initially held that "arising out of" was ambiguous, but ten months later decided that this Court had decided otherwise. Obviously, where reasonably intelligent persons honestly differ as to its meaning, a policy term is ambiguous. *See Coregis Ins. Co. v. McCollum*, 961 F.Supp. 1572, 1579 (M.D. Fla. 1997).

When it has suited its purpose to defeat coverage, Federal Insurance Company, one of the insurers currently before the Court, has in fact invoked *Westmoreland* in arguing for a more restrictive construction of "arising out of" where used in an exclusion. *See Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800 (10th Cir. 1998). When seeking to avoid liability under an insuring provision, United States Fidelity & Guaranty Company, another insurer currently before the Court, has argued that "arising out of" means proximately caused. *Merchs. Ins. Co. of N.H., Inc. v. United States Fid. & Guar. Co.*, 143 F.3d 5 (1st Cir. 1998). When it furthers its objective of recovering from another insurer, St. Paul Fire & Marine Insurance Company had no problem arguing that "arising out of" is ambiguous. *See St. Paul Fire & Marine Ins. Co. v. Ins. Co. of N. Am.*, 501 F.Supp. 136, 138 (W.D. Va. 1980)("St. Paul argues that the phrase "arising out of" is ambiguous"). St. Paul Fire and Marine Insurance Company and United States

Fidelity and Guaranty Company are both subsidiaries of The St. Paul Travelers Companies, Inc.[3]

2. Where undefined in an insurance policy exclusion, "arising out of" means "proximately caused by."

It is undisputed that ambiguous insurance policy language is to be construed in favor of coverage. *See Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 267 (Fla. 2003). Construed in favor of coverage, where used undefined in an exclusion, "arising out of" means "proximately caused by." *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 181 (Fla. 4th DCA 1997). *Westmoreland* differs from its earlier decision in *Florida Power & Light*, in that, rather than insuring language, as here, the court was faced with the use of "arising out of" in an exclusion. The Fourth DCA, following the undisputed rule of construing insurance policy ambiguities in favor of the insured, held that, where used undefined in an exclusion, "arising out of" meant "proximately caused by." Other jurisdictions have similarly construed "arising out of" in exclusionary language as meaning proximately caused by. *See Conestoga Servs. Corp. v. Executive Risk Indem., Inc.*, 312 F.3d 976 (9th Cir. 2002); *Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Cos.*, 246 F.3d 1132 (8th Cir. 2001); *Kalell v. Mut. Fire & Auto. Ins.*

[3] *See* Form 10-Q Quarterly Report of The St. Paul Travelers Companies, Inc. for the quarterly period ending June 30, 2004, filed with the United States Securities and Exchange Commission on August 9, 2004.

Co., 471 N.W.2d 865 (Iowa 1991); *Tacker v. Am. Family Mut. Ins. Co.*, 530 N.W.2d 674 (Iowa 1995); *Grinnell Mut. Reins. Co. v. Ctr. Mut. Ins. Co.*, 658 N.W.2d 363 (N.D. 2003); *State Farm Mut. Auto. Ins. Co. v. Roberts*, 697 A.2d 667 (Vt. 1997).

3. Regardless of how the Court answers the certified question, the insurers' duty to defend is not eliminated.

Even assuming the validity of the constrained construction argued by the insurers, because the disputed exclusion does not apply to all of the claims asserted against the policyholder in the underlying complaints, the insurers' duty to defend is not eliminated. Once again, the exclusion states in pertinent part:

> This insurance does not apply to "bodily injury" or "property damage" included within the "products-completed operations hazard."
>
> * * *
>
> "Products-completed operations hazard":
>
> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product"
>
> * * *
>
> "Your product" means:
>
> a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by [You].
>
> * * *
>
> "Your product" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

b. The providing of or failure to provide warnings or instructions.

The end result here is that the policy does not apply to "bodily injury" arising out of a product (1) manufactured, (2) sold, (3) handled, (4) distributed or (5) disposed of, by the policyholder. Indeed, the underlying complaints allege that the policyholder negligently manufactured or sold a product. However, the complaints also allege, in the alternative, that the policyholder negligently designed its product. Because the definition of "your product" does not include a product designed by the policyholder, the exclusion clearly does not eliminate the insurers' duty to defend the design claims. It is undisputed that, if an insurer has a duty to defend any part of the underlying complaint, it must defend the entire complaint. *Garden Sanctuary, Inc. v. Ins. Co. of N. Am.*, 292 So.2d 75 (Fla. 2d DCA 1974). It is equally undisputed that the insurers cannot rely on any evidence extrinsic to the underlying complaints, i.e., that the policyholder in fact manufactured or sold the product, to deny a defense. *See Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So.2d 533, 536 (Fla.1977); *State Farm Fire & Cas. Co. v. Higgins*, 788 So.2d 992, 996 (Fla. 4th DCA 2001); *Irvine v. Prudential Prop. & Cas. Ins. Co.*, 630 So.2d 579 (Fla. 3d DCA 1993). Therefore, regardless of how this Court answers

the certified question, it should make clear that the exclusion does not eliminate the insurers' duty to defend.

Conclusion

U.P. respectfully requests the Court to (1) affirm the ambiguity of "arising of out" when used undefined in an insurance policy, (2) determine that, where used undefined in an exclusion, "arising out of" means proximately caused by, and (3) instruct the Eleventh Circuit that the exclusion does not eliminate the insurers' duty to defend.

Respectfully submitted,

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Certificate of Compliance

The undersigned certifies that this computer-generated brief complies with the font requirements of Rule 9.210(a)(2). Fla. R. App. P.

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