IN THE SUPREME COURT OF FLORIDA

Case No. SC04-771
Eleventh Circuit Case No. 03-14720
D.C. Docket No. 01-02236-CV-AJ
No. 03-14720-HH

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

Petitioners,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY; PACIFIC INSURANCE COMPANY, LIMITED; FEDERAL INSURANCE COMPANY; GREAT NORTHERN INSURANCE COMPANY; and UNITED NATIONAL INSURANCE COMPANY,

Respondents.

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

ANSWER BRIEF OF RESPONDENTS

Walter J. Andrews
Michael S. Levine
Amy K. Savage
SHAW PITTMAN, LLP
1650 Tysons Boulevard
McLean, VA 22102-4856
(703) 770-7613

Attorneys for Respondent
United States Fidelity and
Guaranty Company

Jonathan A. Constine
Douglas S. Crosno
Lori Piechura
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5870

Attorneys for Respondents
Federal Insurance Company and
Great Northern Insurance Company

Charles M.P. George
GEORGE, HARTZ, LUNDEEN, et al.
4800 LeJeune Road
Coral Gables, FL 33146
(305) 662-4800

Attorneys for Respondent
Pacific Insurance Company, Ltd.

Alyssa M. Campbell
WILLIAMS MONTGOMERY & JOHN, LTD.
20 N. Wacker Drive, Suite 2100
Chicago, IL 60606-3002
(312) 855-4875

Attorneys for Respondent
United National Insurance Company

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STATEMENT OF THE CASE

Respondents Federal Insurance Company, Great Northern Insurance Company, United States Fidelity and Guaranty Company, United National Insurance Company and Pacific Insurance Company issued commercial insurance policies (the "Policies") to the petitioner Taurus Holdings Inc. and Taurus Manufacturing Inc. (collectively "Taurus"), a gun manufacturer. The policies excluded coverage for claims "arising out of" Taurus' products. 1/

In the late 1990's, Taurus notified Federal Insurance Company ("Federal") and Great Northern Insurance Company ("Great Northern") of thirty lawsuits (the "Underlying Actions") filed against it seeking to recover damages for gun violence allegedly resulting from Taurus' negligent design, distribution and marketing of its guns. Taurus then filed this action, asserting that the Policies issued by Federal and Great Northern and other defendant insurers require those insurers to pay the cost of defense and indemnification incurred in the Underlying Actions. [Doc. 1] 2/.

On July 16, 2001, Federal filed a motion to dismiss Taurus' Complaint, or in the alternative for summary judgment, arguing that coverage was barred because the claims in the Underlying Actions arose out of Taurus' firearms products. [Doc. 9]. The Motion was joined by the other defendants. [Doc. 15, 18,

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1/ The other respondents, USF&G, Pacific and United National, have joined in this brief. For simplicity, and because all pertinent policy language is substantially the same, this brief highlights the Federal and Great Northern policies. However, the arguments apply for all respondents.

2/ Citations are to Document Number and Page Number of the record from the District Court, which was forwarded to the Court by the Eleventh Circuit.

19]. Taurus opposed the motion and filed a motion for partial summary judgment, arguing that the gun-related injuries did not arise out of its products, but instead arose out of Taurus' negligent marketing and distribution of those firearms. [Doc. 27].

By order dated October 24, 2002, the District Court denied the insurers' motion to dismiss, and granted Taurus' motion for partial summary judgment. [Doc. 85]. On April 11, 2003, Federal and Great Northern filed a motion to reconsider the October 24, 2002 order based in part on a subsequent ruling by the Florida Supreme Court, Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003). [Doc. 162-163]. The District Court granted the motion, finding that the Koikos decision "goes directly to the heart of the issues in dispute in this case" [Doc. 249 at 4.] and dismissed Taurus' complaint by order dated August 14, 2003.

Taurus appealed that decision. After briefing and oral argument, the Eleventh Circuit certified the following issue to this Court on April 29, 2004:

> Does a "products-completed operations hazard" exclusion in a commercial general liability policy of insurance bar coverage and therefore eliminate an insurer's duty to defend the insured gun manufacturer in suits alleging 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 based on the insured's on-premises business practices?

STATEMENT OF FACTS

I. THE POLICIES

Federal and Great Northern issued commercial insurance policies to Taurus (the "Policies") effective May 30, 1994 through May 30, 1995, and May 30,

1995 through May 30, 1996, respectively. [See Doc. 13, Exs. 31, 32.] The Policies afforded commercial general liability coverage which provided that Federal (or Great Northern) would pay "damages the insured becomes legally obligated to pay by reason of liability imposed by law or assumed under an **insured contract** for **bodily injury** or **property damage** to which this insurance applies caused by an **occurrence**; or **personal injury** or **advertising injury**." [Id., Ex. 31 at p. 5].

Under the Policies, Federal and Great Northern had "the right and duty to defend any **insured** against any **suit** seeking damages for **bodily injury**, **property damage**, **advertising injury**, or **personal injury**. However, we will have no duty to defend any **insured** against any **suit** seeking damages to which this insurance does not apply." [Id., Ex. 32 at 7].3/

"**Bodily injury**" was generally defined as including physical injury, sickness or disease, while "**property damage**" included "physical injury to tangible property . . . or loss of use of tangible property that is not physically injured." [Id., Ex. 31 at 11, 15; Ex. 32 at 17, 22]. The Policies defined "**advertising injury**" as "injury, other than **bodily injury** or **personal injury** arising solely out of" libel, slander, invasion of privacy or copyright infringement "committed in the course of **advertising** . . . goods, products or services." [See, e.g., id., Ex. 32 at 17]. "**Personal injury**" was defined as "injury, other than **bodily injury**, arising out of" false arrest, malicious prosecution, wrongful eviction, slander, libel, violation of

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3/ The 1994-95 Policy uses similar, but not identical language. See Doc. 13, Ex. 31, at 6. In addition, the other applicable policies at issue in this appeal contain similar language. [See, e.g., Doc. 15, Ex. 1, Form CG00010196, Section I – Coverages].

privacy rights or discrimination "committed in the course of [the insured's] business." [Id., Ex. 32 at 20-21].

Another term defined in the Policies was the "**Products–Completed Operations Hazard**," defined in pertinent part as "all **bodily injury** and **property damage** occurring away from premises you own or rent and arising out of **your product** . . . ." [Id., Ex. 31 at 14; Ex. 32 at 21]. "**Your product**" included "any goods or products . . . manufactured, sold, handled, distributed or disposed of by . . . you," including "warranties or representations made at any time with respect to the fitness, quality, durability, performance or use" of **your product**. [Id., Ex. 32 at 22].

The Policies did not afford coverage for the "**Products-Completed Operations Hazard**." Rather, the Policies stated that "[t]his insurance does not apply to **bodily injury** or **property damage** included within the **products-completed operations hazard**." [Id., Ex. 32, at 5]. 4/

II. THE UNDERLYING ACTION COMPLAINTS

At the time that this coverage action commenced, Taurus had notified Federal and Great Northern of thirty lawsuits (the "Underlying Actions") filed against it and other gun manufacturers (as well as gun dealers and gun industry trade associations) – twenty three filed by municipal governments throughout the

4/ The 1994-95 Policy uses similar, but not identical language. [See Doc. 13, Ex. 31, amendment dated May 30, 1994]. Taurus concedes that the language of the Products-Completed Operations Hazard is substantially the same for all of the applicable policies at issue in this appeal.

United States and seven private suits. [Doc. 1, Ex. B, ¶¶ 25-36]. 5/ The actions sought relief for the gun violence allegedly inflicted upon their communities as a result of the manner in which guns are designed, distributed and marketed by the defendants. As Taurus alleged in its Complaint, the plaintiffs in the Underlying Actions "seek to recover the expenses allegedly incurred . . . in treating and caring for people who have suffered injuries caused by handguns." [Id. ¶ 29] (emphasis added).

The Underlying Action Complaints asserted three types of claims against Taurus, all of which arise from Taurus' sale and manufacture of handguns.

First, the municipalities asserted products liability claims for failure of gun manufacturers to make guns safe and to prevent foreseeable misuse. The plaintiffs alleged that Taurus' products (and those of its co-defendants) were inherently unsafe because they can be fired by anyone who gains access to them. The following allegations are typical:

> Defendants' handguns are inherently and unreasonably dangerous in that they enable any person who gains access to them -- including, but not limited to, children and adolescents, who cannot properly handle them or understand their risks -- to fire them, even though it was and is feasible to design handguns which do not fire when handled by unauthorized and/or unintended users.

5/ According to Taurus' complaint, the "causes of action and theories of liability contained in [the private suit] complaints are similar to those alleged by the City Suits." [Doc. 1, Ex. B, ¶35].

[Doc. 11, Ex. 3 at 13; see also Doc. 11, Ex. 11 ¶ 30, Ex. 10 ¶ 31; Doc. 12, Ex. 17 ¶ 6, Ex. 21 ¶ 21].

The Underlying Actions also alleged that Taurus and its co-defendants failed to provide appropriate warnings about the dangers of their guns, including the failure to warn that "a round of ammunition may be housed in the firing chamber even though the weapon appears to be unloaded." [Doc. 11, Ex. 3 at 15 ; see also Doc. 11, Ex. 11 ¶ 32, Ex. 10, ¶ 31; Doc. 12, Ex. 17 ¶ 6].

Based upon these factual allegations, the Underlying Actions asserted claims of strict liability for unreasonably dangerous products, negligence, negligent design, and inadequate warning. [Doc. 11, Ex. 2 ¶¶ 85-116, Ex. 3 at 20-23 and at 30-32, Ex. 11 ¶¶ 62-84, Ex. 10 ¶¶ 85-108; Doc. 12, Ex. 16 ¶¶ 99-121, Ex. 17 ¶¶ 14-16, Ex. 21, ¶¶ 71-85, 91-96].

The second general basis for liability was negligent distribution of guns. Some Underlying Action Complaints alleged that Taurus and its co-defendants designed, manufactured and marketed guns in excess of the demand that might be expected from legitimate consumers thereby guaranteeing that the surplus will enter the illegal firearms market. One complaint explained:

> For many years, defendants knew or should have known that they were producing and selling substantially more firearms than could be justified by the legitimate gun market, and that a substantial portion of their guns would end up in the hands of criminals and other irresponsible persons.

[Doc. 11, Ex. 10, ¶ 70; see also Doc. 11, Ex. 9 ¶ 35, Ex. 4 ¶ 25, Ex. 5 ¶ 93].

Other complaints alleged that Taurus was aware that the guns it manufactured and sold would fall into the hands of criminals but took no action to prevent it. [See, e.g., id., Ex. 3 at 33-35; Doc. 12, Ex. 12 ¶ 71, Ex. 21 ¶ 31, Ex. 16 ¶ 89]. As a result, the municipalities allegedly spent substantial amounts on health

care and public safety in response to handgun violence. [See Doc. 11, Ex. 3 at 38, Ex. 11 ¶¶ 86-87; Doc. 12, Ex. 21 ¶ 52, Ex. 16 ¶¶ 149-50]. Based upon these allegations, the underlying plaintiffs asserted claims for nuisance and unjust enrichment. [See, Doc. 11, Ex. 3 at 27-29, 38-39, Ex. 4 ¶¶ 74-82, Ex. 5 ¶¶ 141-50, Ex. 9 ¶¶ 53-74, 83-95, Ex. 10 ¶¶ 117-34, 150-59; Doc. 12, Ex. 21 ¶¶ 53-70, 97-104, Ex. 22 ¶¶ 120-27, Ex. 12 ¶¶ 101-07, Ex. 16 ¶¶ 132-57].

The final basis asserted for liability in the Underlying Action Complaints was deceptive marketing and advertising of Taurus' products. As alleged in one complaint,

> To increase sales and profits, Defendants . . . have falsely and deceptively claimed through advertising and promotion of their handguns that the ownership and possession of handguns in the home increases one's security. . . . Research demonstrates that, to the contrary, handguns actually increase the risk and incidence of homicide, suicide and intentional and unintentional injuries to gun owners and their families and friends. [Doc. 11, Ex. 5 ¶ 135].

Thus, the municipalities asserted that Taurus and its co-defendants violated applicable state unfair and deceptive trade practices statutes, [See id., Ex. 3 at 23-26, Ex. 10 ¶¶ 109-16, Ex. 5 ¶¶ 151-66, Ex. 4 ¶¶ 83-85], resulting in "adverse consequences such as death or serious bodily injury" from handguns. [Id., Ex. 10 ¶ 113-14 and Ex. 3 at 24].

The Underlying Actions alleged that as a result of Taurus' conduct in manufacturing, marketing and selling guns, the municipalities have suffered and continue to "suffer irreparable harm, and . . . incur financial damages, including significant expenses for additional police protection, overtime, emergency services, pension benefits, health care, social services and other necessary facilities and

services." [Doc. 11, Ex. 10 at 6; see also Doc. 11, Ex. 2 at 2-4, Ex. 3 at 3, Ex. 4 ¶ 74, Ex. 5 ¶ 141, Ex. 11 ¶ 4; Doc. 12, Ex. 21, ¶ 52, Ex. 17 ¶ 10, Ex. 16 ¶ 5, Ex. 12 ¶ 8]. They also alleged that the municipalities sustained a loss of economic development and consequent tax revenue as a result of that conduct. [Doc. 11, Ex. 10 at 6; see also Doc. 11, Ex. 3 at 3, Ex. 11 ¶ 4; Doc. 12, Ex. 21 ¶ 52, Ex. 17 ¶ 10, Ex. 16 ¶ 5].

SUMMARY OF ARGUMENT

The Policies exclude coverage for the "**Products-Completed Operations Hazard**," which is defined as all "**bodily injury**" and "**property damage**" (1) occurring away from premises Taurus owns or rents and (2) arising out of Taurus' product. The first prong of the exclusion is clearly met; the Underlying Action Complaints involve no allegations of "**bodily injury**" or "**property damage**" on Taurus' premises. Furthermore, the second prong is clearly met; any claims against Taurus for "**bodily injury**" alleged in the Underlying Action Complaints (there is no "**property damage**") arise out of Taurus' "products" -- firearms manufactured by Taurus.

Applying the plain language of the Products-Completed Operations Hazard exclusion to the facts of this case, the District Court found that there was no coverage for, and no duty to defend, the Underlying Actions. Given the clear and unambiguous language of the Policies, the District Court could have reached no other conclusion. In fact, the only other decisions to address this issue, from the First and Fourth Circuits, reached the precisely same result, which is also supported by this Court's recent ruling in the case of Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003).

The only argument advanced by Taurus is that the application of the Products-Completed Operations Hazard should be limited to claims that arise out

of "defective" products. However, Taurus' position is without merit, and is contrary to the plain language of the exclusion. The Products-Completed Operations Hazard exclusion applies to any claim arising out of Taurus' "products," without the limitation to "defective" products that Taurus seeks judicially to impose. When, as is the case here, the terms of an insurance contract are clear, Florida law requires that they be enforced as written. Accordingly, the Court should answer the Eleventh Circuit's Certified Question in the affirmative, and conclude that coverage for the Underlying Actions is barred by the Products-Completed Operations Hazard exclusion.

STANDARD OF REVIEW

The certified question involves the interpretation of an insurance contract, which is a pure question of law, subject to de novo review. Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 734-35 (Fla. 2002).

ARGUMENT

I. THE PRODUCTS EXCLUSION BARS COVERAGE FOR THE UNDERLYING ACTIONS

The question before this Court is simple, and the answer plain. The question is: does a claim against a gun manufacturer for bodily injuries suffered by persons shot with the manufacturer's guns constitute a claim for "bodily injury . . . arising out of" its "product"? The plain answer is: of course it does.

That is the only question at issue here. The policies only provide coverage for claims for "bodily injury," and there is no dispute that the "bodily injury" claims for which Taurus seeks coverage resulted from injuries inflicted by its guns. Taurus acknowledged that very fact in the instant appeal: "Taurus concedes that people using guns caused the injuries about which the underlying plaintiffs complain." Taurus' 11th Circuit Brief at 17 (emphasis added). Since

there is no coverage for "bodily injury" arising from Taurus' products, and there is no dispute that the alleged "bodily injury" on which the claims against Taurus is based was inflicted by Taurus' guns, then it is obvious that the "bodily injury" is not covered.

This conclusion is not novel, but is rather compelled by insurance contract construction principles adopted in multiple decisions of this Court. Those principles – particularly the maxim that plain and unambiguous policy language must be applied as written – support the position adopted by the federal trial court, and require that the certified question be answered in the affirmative.

A. Under Florida Law, The Plain Language of the Policy Governs Interpretation of the Policy

The existence of a duty to defend under Florida law "depends solely on the facts and legal theories alleged in the pleadings and claims against the insured." Lawyers Title Ins. Corp. v. JDC (Am.) Corp., 52 F.3d 1575, 1580 (11th Cir. 1995)(citing National Union Fire Ins. Co. v. Lenox Liquors Ins. Co., 358 So. 2d 533, 536 (Fla. 1977)). Furthermore, an insurer is relieved of its duty to defend "[i]f the alleged facts and legal theories do not fall within a policy's coverage." Lawyers Title, 52 F.3d at 1584.

To determine whether a claim "fall[s] within a policy's coverage," id., "the guiding principle that this Court has consistently applied [is] that insurance contracts must be construed in accordance with the plain language of the policy." Swire Pacific Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003). "Where 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." Alligator Enters., Inc. v. General Agent's Ins. Co., 773 So. 2d 94, 95 (Fla. 5th DCA 2000). Although exclusionary clauses in insurance policies "which are ambiguous or otherwise susceptible to more than one meaning must be

construed in favor of the insured," this rule applies "'[o]nly when a genuine inconsistency, uncertainty, or ambiguity in the meaning remains after resort to the ordinary rules of construction.'" State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986)(citation omitted).

As this Court recently held:

> [I]t is only where courts first determine that policy language is ambiguous that contractual language is to be construed in favor of the insured. When an insurance contract is not ambiguous, it must be given effect as written.

Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 735 (Fla. 2002). 6/

The exclusion at issue here, which provides that coverage will not exist for any claim for "**bodily injury** . . . arising out of **your product**," is plain and unambiguous. Applying that clear language to the allegations of the Underlying Actions allows only one conclusion: coverage for the claims against Taurus is barred by the Products-Completed Operations Hazard exclusion as a matter of law.

B. The Plain Language of the Policy Bars Coverage for the Underlying Actions

The Products-Completed Operations Hazard is defined as "all **bodily injury** and **property damage** occurring away from premises you own or rent and arising out of **your product** or **your work**." [See, e.g. Doc. 13, Ex. 32 at 21].

6/ See also Bradley v. Associates Discount Corp., 58 So. 2d 857, 858-59 (Fla. 1952) ("We cannot stretch the rule of strict construction of insurance contracts in favor of the insured to mean that where the language is plain and unambiguous it may be given an added meaning.")

This coverage dispute focuses on the second part of the definition: whether the alleged "**bodily injury**" arose out of Taurus' product. 7/ Under that definition, there is no doubt that the Underlying Complaints fall within the Products-Completed Operations Hazard.

1. Any Alleged "Bodily Injury" Arose Out of Taurus' Product

The phrase at issue has three components. The first, "**bodily injury**," is not in dispute; the "**bodily injury**" at issue is injury suffered by persons shot with Taurus' guns. Indeed, if the Underlying Complaints did not allege "**bodily injury**," the exclusion would be irrelevant, because Taurus would have no coverage in the first place. 8/ Nor can there be any dispute as to the meaning of the second component, "**your product**," which the Policy defines as "any goods or products . . . manufactured, sold, handled, distributed or disposed of by . . . you," i.e., Taurus. The term clearly includes all guns manufactured or sold by Taurus.

The third component, the phrase "arising out of," is similarly clear. Under Florida law, the term "arising out of" is "broader in meaning than the term 'caused by' and means 'originating from,' 'having its origin in,' 'growing out of,'

7/ Taurus conceded below and does not dispute here that the alleged "**bodily injury**" occurred away from its premises.

8/ The carriers also maintain that the Underlying Action Complaints filed by the municipalities do not even allege any claims for "**bodily injury**" within the meaning of the Policies, but instead seek only reimbursement for economic loss, which is not covered by the Policies. Nothing in this brief should be considered an acknowledgement that any "**bodily injury**" is alleged. However, to the extent that the Underlying Actions actually do allege such "**bodily injury**," coverage is clearly barred pursuant to the Products-Completed Operations Hazard exclusion for the reasons discussed below.

'flowing from,' 'incident to' or 'having a connection with.'" Hagen v. Aetna Cas. & Sur. Co., 675 So. 2d 963, 965 (Fla. 5th DCA 1996) (citation omitted); see also Ohio Cas. Ins. Co. v. Continental Cas. Co., 279 F. Supp. 2d 1281, 1284-86 (S.D. Fla. 2003); Alligator Enter., 773 So. 2d at 95; see also Allstate Ins. Co. v. Safer, 317 F.Supp.2d 1345 (M.D. Fla. 2004) (collecting Florida cases). Furthermore, the term "arising out of," whether used in an exclusion or a coverage provision, does not require that there be a "proximate causation" between the product and the injury; a simple "but for" causation is enough. Hagen, 675 So. 2d at 967-68 (citing Atkins v. Bellefonte Ins. Co., 342 So. 2d 837 (Fla. 3d DCA 1977); Garango v. Liberty Mut. Ins. Co., 384 So. 2d 220 (Fla. 3d DCA 1980)). In other words, the phrase "arising out of" merely requires that there be "some causal connection, or relationship." Heritage Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 657 So. 2d 925, 927 (Fla. 3d DCA 1995); cf. Race v. Nationwide Mut. Fire Ins. Co., 542 So. 2d 347, 349 (Fla. 1989) (phrase "arising out of" as used in an automoblie policy "'only requires that some form of causal relationship exist between the insured vehicle and the accident'"); Strother v. Morrison Cafeteria, 383 So. 2d 623, 627-28 (Fla. 1980) (holding phrase "arising out of . . . employment" to be "'satisfied by a showing of causal connection between work and injury'").

Those Florida District Courts of Appeal that have addressed the issue have uniformly held that the phrase "arising out of" is unambiguous. ,See, e.g., American Surety and Cas. Co. v. Lake Jackson Pizza, Inc., 788 So. 2d 1096, 1099-1100 (Fla. 1st DCA 2001); Hagen, 675 So. 2d at 966 (5th DCA); Cesarini v. American Druggist Ins. Co., 463 So. 2d 451, 452 (Fla. 2d DCA 1985); see also Ohio Cas. Ins. Co. v. Continental Cas. Co., 279 F. Supp. 2d 1281, 1284-86 (S.D. Fla. 2003) ("the language 'arising out of' is not ambiguous" under Florida law).

Similarly, the vast majority of jurisdictions outside of Florida have also concluded that the phrase "arising out of" is unambiguous, and interpreted in a

broad, comprehensive manner. See, e.g., Beretta U.S.A. Corp. v. Federal Ins. Co., 17 Fed.Appx. 250 (4th Cir. 2001); Brazas Sporting Arms, Inc. v. American Empire Surplu Lines Ins. Co., 220 F.3d 1 (1st Cir. 2000); American States Ins. Co. v. Bailey, 133 F. 3d 363, 370 (5th Cir. 1998); Broderick Inv. Co. v. Hartford Acc. & Indem. Co., 954 F. 2d 601, 607 (10th Cir. 1992); Madison Construction Co. v. Harleysville Mut. Ins. Co., 735 A. 2d 100, 110 (Pa. 1999); Bagley v. Monticello Ins. Co., 720 N.E. 2d 813, 816 (Mass. 1999); Mass. Transit Admin. v. CSX Transp., Inc., 708 A. 2d 298, 306-07 (Md. 1998); American Motorists Ins. Co. v. L-C-A Sales, 713 A.2d 1007, 1013 (N.J. 1998); Mount Vernon Fire Ins. Co. v. Creative Housing Ltd., 668 N.E.2d 404, 405 (N.Y. 1996).

In fact, under general insurance law principles, the meaning of "arising out of" is well settled, and "is considered to mean 'flowing from' or 'having its origin in,' indicating that there only need be a causal connection." 7 Lee R. Russ and Thomas F. Segalla, Couch on Insurance 3d § 101:54 (2003); see also 6B John Alan Appleman & Jean Appleman, Insurance Law & Practice § 4317, at 360 (Rev. ed. 1979) (same).

2. The Amicus Brief Does Not Establish that the Phrase "Arising Out of" is Ambiguous

Taurus itself does not dispute the broad, comprehensive meaning of the operative phrase "arising out of," nor could it. However, in an amicus brief submitted to the Court on September 10, 2004, the United Policyholders ("UP") asserts that the phrase is ambiguous. UP primarily relies on two cases, Container Corp. of America v. Maryland Cas. Co., 707 So.2d 733 (Fla. 1998) and Westmoreland v. Lumbermens Mut. Cas. Co., 704 So.2d 176 (Fla. 4th DCA 1997). Neither case is applicable here, and neither case advances to position of Taurus (or UP) one bit.

Significantly, the policy at issue in Container Corp. did not even contain the phrase “arising out of,” nor did the Court express any opinion at all as to the meaning of that language, much less claim that it was somehow ambiguous. Instead, Container Corp. involved the entirely distinct issue of whether coverage under a contractor’s liability insurance policy listing a plant owner as an additional insured was limited to the plant owner’s vicarious liability, or whether it also covered the plant owner’s own negligence. 704 So.2d at 736. The Court found that the policy did provide coverage for the plant owner’s negligence, because the policy did not contain any “limiting language” that restricted coverage to vicarious liability. Id. Thus, since the plant owner was named as an additional insured on the policy, it received the full benefit of the liability coverage obtained. Id.

Container Corp. is plainly inapposite, and it is not clear why UP even cites to it. To the extent it has any application here at all, Container Corp. actually contradicts the position taken by UP – holding, for example, that the lack of a definition of a phrase in an insurance policy does not mean that the term is ambiguous. Id. at 736. UP, in contravention of this principle, claims that the phrase “arising out of” should be deemed ambiguous because it is not defined in the policies.

Furthermore, although the Container Corp. decision itself did not define or analyze the meaning of the phrase “arising out of,” several of the cases cited in that opinion did. Significantly, those cases, which are actually cited in UP’s brief, support the carriers’ position that the phrase “arising out of” has a broad, comprehensive meaning. See, e.g. Cas. Ins. Co. v. Northbrook Property Cas. Ins. Co., 501 N.E.2d 812 (Ill. App. 1986) (Under Illinois law, the phrase “‘[a]rising out of’ has been held to mean ‘originating from,' 'having originated in,' ‘growing out of’ and ‘flowing from.’”); 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).

The second case cited by UP, Westmoreland, also provides no help to UP (or Taurus). While the Fourth Appellate District in Westmoreland suggested that the phrase "arising out of" might be ambiguous in certain circumstances, every other Florida District, as well as the overwhelming majority of courts outside of Florida, has held the phrase "arising out of" to be unambiguous. Moreover, Westmoreland has subsequently been limited to its facts even in the Fourth District. Other Fourth District courts have subsequently ruled that the phrase "arising out of" is unambiguous, notwithstanding Westmoreland, "because in Westmoreland the ambiguity arose out of more than the words 'arising out of.'" Bombolis v. Continental Cas. Co., 740 So. 2d 1229, 1230 (Fla. 4th DCA 1999).

Ironically, the case that UP cites as evidence of Westmoreland's purported vitality, Farrer v. United States Fidelity & Guar. Co., 809 So.2d 85 (Fla. 4th DCA 2002), actually advances the carriers' position. In Farrer, the court concluded that an exclusion for bodily injury "arising out of" a motor vehicle did not apply to a claim resulting from a sexual assault that occurred in the insured's car, because "the automobile did not itself produce the injury." Id. at 95. By contrast, here it is Taurus' guns which "produce[d] the injur[ies][]" for which the municipalities seek recompense from Taurus. Thus, even under the Farrer standard, the Underlying Action injuries clearly "arise out of" Taurus' firearms products. Nothing in Farrer suggests that the phrase "arising out of" is not broad enough to support the proposition that the "**bodily injury**" incurred by being shot with a handgun "arises out of" that product.

UP next cites a handful of cases from other jurisdictions which purportedly found the term "arising out of" to be ambiguous in certain circumstances, and claims that this existence of this supposedly contrary authority

is evidence of ambiguity. Those few cases involve circumstances not at issue here, and are clearly contrary to the vast majority of case law on this issue. Furthermore, under Florida law, evidence of contrary authority is not considered to be evidence of ambiguity. See, e.g. Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., 636 So. 2d 700, 703 (Fla. 1993) (surveying conflicting case law on the pollution exclusion, and concluding that although "[t]here is substantial support for both parties' positions" the exclusion was still nevertheless unambiguous).

But more importantly, UP's efforts to limit the construction and application of the phrase "arising out of" misses the point entirely. Simply put,under any reasonable construction of the phrase "arising out of," the claims against Taurus "arise out of" its product. At a minimum, "arising out of" connotes some "causal connection, or relationship." Heritage Mut. Ins. Co., 657 So.2d at 927. Indeed, even the Westmoreland court conceded that the phrase "conveys the thought that something is traced backwards to a specified point or thing," and held that, at the very least, it would include "legal, or proximate causation." Id. at 180, 181-82.

Here, it is indisputable that there is at least some "causal connection, or relationship" between the "**bodily injury**" allegedly caused by Taurus in the Underlying Actions and Taurus' "product," firearms. Each Underlying Action Complaint identifies Taurus as a company that "manufacture[s], distribute[s] or sell[s] firearms." 9/ Each of the claims in those complaints was based upon Taurus' alleged misconduct in those manufacturing and selling activities, either by

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9/ See, e.g., Doc. 11, Ex. 4 at ¶ 7, Ex. 5 at ¶¶ 29, 57, Ex. 9 at ¶ 4, Ex. 10 at ¶ 18; Doc. 12, Ex. 21 at ¶ 5, Ex. 22 at ¶¶ 17, 41, Ex. 12 at ¶¶ 11, 35, Ex. 16 at § III and ¶ 35.

negligently manufacturing the guns without adequate safety features, by manufacturing and selling guns in excess of demand, or by marketing its guns in a dangerous manner. 10/ In every case, the alleged negligence or improper marketing allegedly resulted in injury inflicted by Taurus' guns. Applying the unambiguous language of the exclusion, such injuries "arose out of [Taurus'] **product**."

Because the Underlying Action Complaints allege injuries arising out of firearms manufactured by Taurus, the allegations in those complaints fall within the Products-Completed Operations Hazard, for which coverage is excluded. Since the Underlying Actions are not covered under the Policies, the insurers had no duty to defend or indemnify Taurus as a matter of law. 11/

10/ See supra pp. 5-8. Of course, there are other defendants in the Underlying Actions against whom claims are made based on those defendants' manufacture or sale of guns. The "**bodily injury**" (if any) at issue in the claims against Taurus, however, would have been inflicted by guns sold or manufactured by Taurus. Taurus has never contended otherwise.

11/ UP also claims that the carriers have advanced different interpretations of the phrase "arising out of" in previous cases. However, positions advanced by other counsel representing the carriers in other cases involving different facts and different policies governed by different substantive law, are completely irrelevant, and would provide little guidance to the Court here. In fact, most courts which have considered this issue have not only ruled that such evidence is inadmissible and useless, but have barred discovery on the issue of prior litigation positions altogether. See, e.g., Fidelity & Deposit Co. v. McCulloch, 168 F.R.D. 516, 525-26 (E.D. Pa. 1996); AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 823-24 n.9 (1990).

II. TAURUS' COVERAGE POSITION IS CONTRARY TO THE LANGUAGE OF THE POLICY AND IS INCONSISTENT WITH FLORIDA LAW

It would seem self-evident that a suit against a gun manufacturer for injuries caused by its guns "arises out of" its products. Moreover, Taurus does not offer any reasoned explanation as to how the bodily injury alleged in the Underlying Actions fails to arise out of it handguns.

Because Taurus cannot win if the plain language of the Policy is followed, Taurus asks this Court to rewrite the Policies by adding an additional requirement not present in the Policy language itself -- that the injury must have resulted from "defective products" (not merely "products," as the Policy language states) for the exclusion to apply. In that regard, Taurus relies primarily on a single Florida intermediate appellate court decision, Florida Farm Bureau Mutual Ins. Co. v. Gaskins, 405 So. 2d 1013 (Fla. 1st DCA 1981), which it claims supports its contention that the products exclusion is limited to defective products claims.

However, as will be discussed in more detail below, the Gaskins case is distinguishable on a number of grounds, and would not dictate the result Taurus seeks in this case even if it were the governing law. But the fact is, Gaskins does not control here – this Court is not obligated to follow it even if it supported the result Taurus seeks.

Taurus' attempt to steer the Court away from the plain language of the Policies is directly contrary to prior decisions of this Court, which requires that a court apply the language of an insurance policy as it is written. Here, the word "defective" simply does not appear in the language of the Products-Completed Operations Hazard, and a reviewing court may not rewrite the terms of the Policies to include that limitation. Accordingly, Florida precedent dictates that the exclusion applies to the claims against Taurus in the Underlying Actions.

A. Gaskins is Inapplicable

Taurus' argument stands or falls on its assertion that a single 23 year-old intermediate appellate court decision – Florida Farm Bureau Mutual Insurance Co. v. Gaskins, 405 So. 2d 1013 (Fla. 1st DCA 1981) – establishes that, under Florida law, the Products-Completed Operations Hazard exclusion is limited to defective products. As noted above, Taurus' coverage position is contradicted by the plain language of the policy, which unambiguously states that coverage is barred for any claims for "**bodily injury**" or "**property damage**" that arise out of Taurus' products, whether or not those products are alleged to be defective. Moreover, the Gaskins case in inapplicable here for several reasons.

In Gaskins, the insured sought coverage for its liability for damage that resulted when an employee sold an herbicide, instead of the requested insecticide, which destroyed the crop. Id. at 1014. The insured vendor's insurance policy contained an exclusion for liability arising out of the "handling or use of" the insured's product, but only if the "accident" causing the damage occurred off the insured's premises and after the insured relinquished possession of the product. Id. In finding that the exclusion did not apply, the court reasoned that the "accident" occurred on the insured's premises when its employee sold the wrong product. Id. Thus, the court held that the exclusion did not apply because the product was "merely the incidental instrumentality through which the damage was done," since the insured's actual liability stemmed from "the accident which occurred at the time of the negligent misdelivery." Id. at 1015 (emphasis added).

Gaskins is distinguishable. First, the court applied language that appears to have been substantially different from the products exclusions in the Policies sold to Taurus. While the language of the exclusion in Gaskins is not quoted in the opinion, the court describes it as excluding "liability ar[i]s[ing] out of . . . the handling or use of" the insured's product. Id. at 1014 (emphasis added).

In contrast, the Policies here exclude coverage for "**bodily injury**" arising out of . . . [Taurus'] **products**." That distinction is critical, because the latter focuses on the cause of the claimant's "injury," not the cause of the insured's "liability." Here, there is no question that the "bodily injury" incurred by a person shot by a handgun "arises out of" that gun, regardless of the source of the "liability." 12/

Second, Gaskins has subsequently been limited to situations in which an insured negligently provides a "*service* wholly unrelated to the product." Associated Elec. & Gas Ins. Serv., Ltd. v. Houston Oil & Gas Co., 552 So. 2d 1110, 1112 (Fla. 3d DCA 1989) (emphasis in original). For example, in AEGIS, the insured gas company, like Taurus, relied on Gaskins and argued that the products exclusion in its policy, which excluded claims for damage "arising out of" the insured's product, did not apply to a claim for negligence in the sale and loading of propane gas tanks that exploded. Id. at 1111. The court concluded that the insured "receives no benefit from Gaskins" because the insured did not provide "a service which is severable from the product." Id. at 112. For example, the negligent inspection of the cylinders "prior to the sale of the propane gas is inextricably connected to the sale of the gas." Id. Therefore, the acts of negligence committed by the insured were not "sufficiently removed from the product to negate the policy's product liability exclusionary clause" because the actions it performed were a "concomitant of the sale of the gas." Id.

12/ It is also possible, of course, that the products exclusion in Gaskins did refer to "injury," but the court either misread it or misinterpreted it as referring to "liability." If that were the case, the Gaskins court's conclusion would be based on an incorrect premise and should be rejected for that reason.

Similarly, Taurus' alleged misconduct in the Underlying Actions, including its alleged negligent over-distribution of its handguns, is not "sufficiently removed from the product to negate the policy's product liability exclusionary clause." Instead, like the insured in AEGIS, Taurus' negligence is "inextricably connected" to its product. And, unlike the insured in Gaskins, Taurus does not provide a service to its customers that is "wholly unrelated" to its product.

Taurus did not inadvertently misdeliver an otherwise harmless product or "incidental instrumentality." Rather, to the extent that the Underlying Actions allege "**bodily injury**," claims against Taurus, that injury is the direct result of being shot by guns manufactured and sold by Taurus. The risk allegedly created by Taurus' "negligent marketing" of guns was that these dangerous weapons would fall into the hands of criminals and irresponsible users, resulting in the very gunshot injuries for which the underlying plaintiffs seek to recover.

The Gaskins holding is distinguishable on a more fundamental level as well. Gaskins involved the application of the products exclusion to a case seeking damages for injured plants after the sale to a single buyer of an herbicide instead of the insecticide that he had ordered. It is hard to think of two types of lawsuits more different than the suit at issue in Gaskins and the suits for which Taurus seeks coverage: mass, nationwide tort litigation against gun manufacturers alleging that their guns were used to shoot innocent people.

Because Gaskins is the thin reed on which Taurus' argument is based, Taurus seeks to enhance its importance by arguing that Gaskins "represents the Florida rule." But the fact remains that since Gaskins was decided, not a single Florida court has relied on that decision as a basis for granting coverage. In addition to Gaskins and AEGIS, Taurus cites one other case, Florida Farm Bureau v. James, 608 So. 2d 931 (Fla. 4th DCA 1992), which it claims stands for the proposition that a products exclusion is inapplicable where the insured's on-

premises negligence, rather than its product, is alleged to be the proximate cause of injury. James, however, simply reaffirmed the general rule, established by AEGIS, that Gaskins is limited to situations in which the insured accidentally misdelivers an otherwise harmless product. 608 So. 2d at 932. Moreover, the James court actually found that the underlying claim was within the products exclusion. Taurus has failed to cite a single Florida case that relies on Gaskins as a basis for not applying the products exclusion.

Despite Taurus' attempt to use Gaskins, a case involving different policy language and different facts, to avoid the products exclusion, the fact remains that the claims against Taurus seek recompense because people were shot with its guns. Whether the theory of liability is that the guns themselves were defective, or that Taurus was negligent in distributing its dangerous products, the plain language of the products exclusion bars coverage for those claims.

B. Taurus' Interpretation of the Policy is Contrary to Florida Law

Gaskins is inapplicable, and does not advance Taurus' coverage position in this case. However, even if Gaskins did support the broad principle for which Taurus cites it – that the products exclusion is limited to claims for "defective" products" – the fact remains that this Court is not bound by decisions of the District Courts of Appeal. This Court is normally bound, however, by its own prior decisions. Those decisions, including ones in the twenty-three years since Gaskins case was decided, make clear that Taurus is wrong.

1. Taurus' Argument is Inconsistent with Florida "Plain Language" Principle, Particularly as Applied in Deni Associates v. State Farm Fire & Casualty

As described above, this Court has long adhered to the principle that the language of an insurance policy must be applied as it is written. See supra at pp. 10-11. Paradigmatic of this approach is this Court's decision in Deni Assocs.

of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135 (Fla. 1998), a case which rejected the same type of argument Taurus advances here.

In Deni, this Court considered an exclusion for bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants" as applied to two lawsuits, one for inhalation of ammonia fumes after it was spilled when moving into a building, and another for being splashed with insecticide. Id. at 1137. Like Taurus, the insureds in Deni attempted to limit the application of the exclusion, arguing that it only applied to claims for "environmental or industrial" pollution. Id. at 1137-38.

That contention was soundly rejected by this Court. Quoting a Maryland decision on that issue, the Court explained:

> Quite apart from the problems inherent in determining what may or may not be "industry-related," we are required to state the obvious – nowhere in this exclusion does the word "industry" or "industrial" appear. There simply is no such limitation.

Id. at 1138-39 (emphasis added) (quotation and citation omitted). Thus, this Court explained that where coverage has been excluded by clear policy language, "[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." Id. at 1139.

That principle – that Florida courts will not rewrite policy language to add to or vary policy terms – requires that Taurus' argument be rejected. Taurus contends that the term "products" means only "defective products," when (to quote Deni) "'there simply is no such limitation.'" Id. On the contrary, the term "**your product**" is expressly defined to mean "any goods or products . . . manufactured, sold, handled, distributed or disposed of by" Taurus. [Doc 13, Ex. 32 at 22] (emphasis added). The word "any" preceding "goods or products" is inconsistent with limiting the scope of the exclusion to only "defective" goods or products. See

Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928, 929 (Fla. 1995) ("the words 'any person' . . . are precise and their meaning unequivocal" and include "all persons"); Wilson v. Crews, 160 Fla. 169, 176-77, 34 So. 2d 114, 119 (1948) ("the word 'any' . . . means one or all, one or more, indiscriminately of the total number"); see also State v. Mark Marks, P.A., 698 So.2d 533, 540-41 (Fla. 1997) ("the term 'any person' is clear and unequivocal" and is "intended to prevent all persons, not just those with a contract with the insurer, from committing insurance fraud").

"Insurance contracts must be read in light of the skill and experience of ordinary people, and be given their everyday meaning as understood by the '[person] on the street.'" Mason v Florida Sheriff's Self Ins. Fund, 699 So. 2d 268, 270 (Fla. 5th DCA 1997) (citation omitted); see also Thomas v. Prudential Property & Cas., 673 So. 2d 141, 142 (Fla. 5th DCA 1996) (same). "While it is true that an ambiguity may exist in an insurance policy when the terms of the contract are subject to different interpretations, the courts are not permitted to put strain and unnatural construction on the terms of the policy in order to create uncertainty or ambiguity." Federated Mut. Ins. Co. v. Germany, 712 So. 2d 1245, 1248 (Fla. 5th DCA 1998).

To an "ordinary person" giving the products exclusion its "everyday meaning," a claim against a gun manufacturer alleging that its conduct caused thousands (or millions) of people to be shot with its guns involves injury arising out of that gun maker's product. Whether the guns manufactured by Taurus were defective, no insured or insurer could reasonably believe that a policy that excludes coverage for injuries arising from a gun manufacturer's products would cover the types of claims at issue in the Underlying Actions. To hold that a products exclusion does not apply to such claims would be to put a "strain[ed] and unnatural construction" on the plain language of the exclusion. Germany, 712 So. 2d at 1248.

Accordingly, the Court should simply apply the products exclusion as it is written, and hold that coverage is barred as a matter of law.

2. Taurus' Argument is Inconsistent with this Court's Holding in Koikos v. Travelers Ins. Co.

Taurus' argument is premised on the notion that the injuries "arose from" Taurus' allegedly negligent boardroom activities rather than the guns it manufactured. That contention is baseless, since boardroom negligence could not have caused shooting injuries without the guns themselves. Moreover, Taurus' contention is inconsistent with this Court's ruling last year in Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003). Koikos made clear that when a claim is asserted as the result of a shooting incident, the causal connection between the gun and the injury is direct and immediate, regardless of the legal theory involved. Thus, even when the claim is premised on a theory of pre-existing negligence, it is the gun, not the negligence, which causes the "**bodily injury**."

Koikos involved the shooting of two customers at a restaurant. The underlying suit alleged that the restaurant owner had negligently failed to provide security. The owner then sued its insurer, seeking a determination that the two shootings were separate occurrences under the policy. This Court concluded that, using a "cause" analysis, there were two occurrences, because the "cause" of the bodily injury in each case was the shooting of the customer, not the insured's separate acts of negligence in failing to provide security.

While the precise coverage issue — the number of occurrences – was not the same as the issue in this case, the reasoning of the Court directly supports the insurers' position here. The policy in Koikos provided that the insurer would pay for damages because of bodily injury "arising out of any one occurrence." In applying this language to the gunshot injuries at issue, this Court reasoned that:

> It is the act that causes the damage, which is neither expected nor intended from the standpoint of the insured, that constitutes the "occurrence." The insured's alleged negligence is not the "occurrence"; the insured's alleged negligence is the basis upon which the insured is being sued by the injured party. Focusing on the immediate cause – that is the act that causes the damage -- rather than the underlying tort – that is the insured's negligence – is also consistent with the interpretation of other forms of insurance policies. [Citation omitted].
>
> . . .
>
> Reading the relevant policy terms together, Travelers has entered into a contract with Koikos to pay those sums that Koikos becomes legally obligated to pay as damages because of "bodily injury," caused by an "occurrence" (i.e., an accident) that takes place in the coverage territory, during the policy period. The accident -- the event that was neither expected nor intended from Koikos's standpoint -- was the shooting incident and not Koikos's own failure to provide security. Although Koikos's alleged negligence in failing to provide security is the basis for which liability is sought to be imposed, it was the shooting that gave rise to the injuries that were neither expected nor intended from the insured's standpoint.

Id. at 271 (emphasis added).

This Court's choice of words – "it was the shooting that gave rise to the injuries" – parallels the language used in the Products-Completed Operations Hazard exclusions – "bodily injury . . . arising out of [the insured's] product." Moreover, the holding in Koikos makes clear that the causal connection between Taurus' product – its guns – and the bodily injuries at issue in the Underlying Actions is as close as it can possibly be. Indeed, in Koikos the Court specifically found that the shooting of the gun was "the immediate cause" of the injury; thus, "it was the shooting that gave rise to the injuries." Id. at 271 (emphasis added). It

follows, a fortiori, that the connection between the instrument of the shooting – the gun – and the injury suffered is at least as "immediate," if not even closer.

In light of Koikos, the shooting injuries that form the basis for the claims against Taurus in the Underlying Actions unquestionably "arise out of" Taurus' handgun products, since those guns "gave rise" (in this Court's words) to the bodily injuries suffered. Thus, there can be no dispute that the Products-Completed Operations Hazard exclusions bar coverage.

Taurus nonetheless argues that Koikos is distinguishable on two grounds: (1) the decision involves a different provision from the one at issue here and (2) the decision involved a coverage provision rather than an exclusion. Petitioners' Brief at 38-42. Neither argument has merit.

While Koikos addressed the number of "occurrences," the language of the "occurrence" provision – and this Court's reasoning in interpreting it – are directly applicable. The language of the "occurrence" provision, as set forth in the Koikos opinion, is as follows: "Each Occurrence Limit 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." Id. at 266. (emphasis added). Thus, in order to ascertain the number of occurrences, the Court had to determine what was the "occurrence" that the "'bodily injury' or 'property damage' ar[ose] out of." The Court held that the injuries "arose out of the shootings," not the pre-existing negligence: "it was the shooting that gave rise to the injuries." Id. at 271 (emphasis added).

Thus, it is simply untrue to say – as Taurus does – that in determining that the shooting was the "occurrence," the Court did not address the meaning of the phrase "arising out of." Further, it is inconsistent with Koikos for Taurus to argue that the injuries in the Underlying Actions "arise out of" its on-premises negligence, rather than from the shootings involved (and thus, its guns). Just as the

underlying claim in Koikos involved "'bodily injuries' arising out of [the shootings]," the Underlying Actions here are for "'bodily injuries' arising out of" shootings made with Taurus' guns, its "product."

Taurus' second basis for distinguishing Koikos – that it involved a coverage provision rather than an exclusion – also lacks merit. Taurus argues that the Court was interpreting the policy at issue broadly in favor of the insured, while coverage exclusions such as the Products-Completed Operations Hazard must be interpreted strictly against insurers. However, that rule of construction does not apply when the policy language is plain and unambiguous. See Siegle, 819 So. 2d at 735.

Significantly, this Court's decision in Koikos was not based on a finding that the policy language was ambiguous and had to be construed against the insurer; instead, the Court concluded that, under the plain and unambiguous language of the policy, it was the shooting that gave rise to the injuries. Id. at 271. Only after concluding that "it was the shooting that gave rise to the injuries" did the Court then state – as an alternative ground – that "even if we accepted Travelers' construction of the policy as a reasonable interpretation, the insurance policy would be considered ambiguous." Id. (emphasis added). Thus, the Court made clear that, in the first instance, there is no ambiguity.

Further, Taurus' reliance on such canons of insurance policy construction simply misses the point. As already noted, regardless of how broadly or narrowly the operative phrase "arising out of" is interpreted, it fundamentally connotes "some causal connection, or relationship." Heritage Mut. Ins. Co., 657 So. 2d at 927; see also Strother, 383 So. 2d at 627-28. In light of Koikos, the bodily injury claims alleged in the Underlying Actions clearly satisfy this standard. If, as this Court held in Koikos, the shooting of a gun is "the immediate cause" of a gunshot injury, because it "was the shooting that gave rise to the injuries," then the

"causal connection" between Taurus' guns and the persons shot with them cannot be disputed. Similarly, because here the linkage between the shootings (and hence Taurus' guns) and the injuries is as close at it could possibly be, even under the most narrow construction of the phrase "arising out of," coverage is barred.

III. IN IDENTICAL CIRCUMSTANCES, THE FIRST AND FOURTH CIRCUITS HAVE CONCLUDED THAT THE PRODUCT EXCLUSION BARS COVERAGE

The only courts to have considered the issue – the United States Courts of Appeals for the First and Fourth Circuits (and the district courts affirmed by them) and the United States District Court for the District of Maine – have held that coverage for gun manufacturer litigation is barred by the products exclusion. Of course, this Court is no more bound to follow those federal decisions than it is required to follow the holding in Gaskins. Nonetheless, those federal courts applied interpretative principles similar to those that govern here, to facts essentially identical to those at issue here, and uniformly reached the same conclusion that the carriers have advanced here. This Court should adopt the sound rationale of those courts, and hold that coverage here is barred by the plain and unambiguous language of the Policies.

A. The Brazas , Beretta and Bushmaster Cases Support the Insurers' Denial of Coverage

Applying interpretive principles similar to those adopted in Florida, the First Circuit Court of Appeals in Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Ins. Co., 220 F.3d 1, 10 (1st Cir. 2000), and the Fourth Circuit in Beretta U.S.A. Corp. v. Federal Insurance Co., 17 Fed. Appx. 250 (4th Cir. 2001), as well as the United States District Court for the District of Maine in Mass. Bay Ins. Co. et al. v. Bushmaster Firearms, Inc., 324 F.Supp.2d 110 (D. Me.

2004), agreed with district court holdings that claims against a firearms distributor like those at issue here fell within the products exclusion.

The insured in Brazas, a firearms distributor, sought a declaratory judgment that its insurer was required to provide a defense to a lawsuit alleging that gun dealers and manufacturers "knowingly produced and distributed handguns in excess of the reasonable demand by responsible consumers in the lawful national handgun market, . . . and supplied an unlawful national market in firearms, the source of the handguns that killed and wounded plaintiffs and their loved ones." Id. at 3 (citation omitted). The insurer denied coverage on the ground that the claims fell within the products exclusion, which barred coverage for bodily injury "arising out of" the insured's product. Id. at 6-7. As here, the insured argued that the exclusion did not apply, because the claims against it involved boardroom negligence in its distribution practices, and so did not "arise out of" its product. Id. The court, applying Massachusetts law, disagreed.

As in Florida, Massachusetts law construes the term "arising out of" to mean "originating from," "growing out of," "flowing from" or "having a connection with." Id. at 7; see also Hagen, 675 So. 2d at 965 (same). Rejecting an argument that the product distribution practices of the insured broke the chain of causation between the injuries and the product, the First Circuit, echoing the rationale of the AEGIS court, found that the "two sources of injury are interdependent." Id. at 8. The marketing and distribution practices of Brazas and the later use of Brazas' firearms were not "separate and distinct," the court said, because "Brazas' conduct, along with the New York plaintiffs' claims, indisputably derived from firearms. In other words, the company, in distributing its firearms, is allegedly negligent precisely because it created the risk of the exact kind of injuries suffered by the New York plaintiffs." Id. The court held not only

that the injuries arose from the firearms, but also that the firearms were the "proximate cause of the plaintiffs' injuries." Id.

The court also concluded that it was irrelevant that that the insured's negligence was alleged to be the "proximate cause" of the injuries, because the fact that the claimants "contrived a theory of liability that targeted Brazas for its alleged participation in flooding the firearms market cannot affect the application of the exclusion provision." Id. at 7. The court instead held that the exclusion applied, since "[o]nly by a distortion of language and logic can [the insured] suggest that the injuries sued upon do not 'arise from' the distribution of Brazas products, off Brazas premises." Id. at 5 (quoting Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Ins. Co., 59 F. Supp. 2d 223, 226 (D. Mass. 1999)). 13/

Moreover, the insured in Brazas, just like Taurus, argued that the products exclusion only applied to "defective products" claims. The Brazas court rejected that argument. After noting that many courts had rejected the argument

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13/ Other courts, interpreting similarly worded exclusions, have likewise concluded that the theory of liability asserted in the underlying lawsuit is irrelevant for the purposes of determining whether the exclusion applies . See, e.g., National Electric Manufacturers Association v. Gulf Underwriters Insurance Company, 162 F.3d 821, 824-25 (4th Cir. 1998) (citing cases, and holding that"the style of the [underlying plaintiffs] claims is irrelevant to the issue of whether the claims fall within the ambit of the pollution exclusion;" rather, "all that matters is whether the injurious conditions about which the [underlying plaintiffs] complain arose from the dissemination of a pollutant"); Am. States Ins. Co. v. Skrobis Painting & Decorating, Inc., 513 N.W.2d 595, 698-99 (Wis. Ct. App. 1994) (exclusion for property damage "arising out of" the discharge of pollutants "does not depend on 'theories of liability' regarding whether, in some metaphysical sense, the property damage was caused by initial negligence, subsequent pollution, or both, but merely on the fact or 'occurrence' of property damage as a result of the pollution").

that the products exclusion is limited to claims of defective products, 220 F.3d at 5-6, the court explained:

> In order to limit the [products] exclusion provision to defective products, we would need to read into the text a requirement that is simply not there. . . . Where, as here, the language of the exclusion provision is unambiguous, the text should be given its plain meaning. In this case, the plain meaning of the exclusion is that it applies to all product-related injuries.

Id. at 6 (emphasis added).

Similarly, the Fourth Circuit affirmed a District Court's decision holding that this kind of gun manufacturer litigation is barred by the products exclusion. See Beretta, 17 Fed. Appx. at 252-54, aff'g 117 F. Supp. 2d 489 (D. Md. 2000). The Fourth Circuit's per curiam opinion cited Brazas and stated "[t]he district court agreed with the analysis made by the First Circuit [in Brazas]; we agree as well." Id. at 254. Significantly, the Beretta decision involved the same underlying lawsuits that are at issue here, and identical policy language. Just like Taurus, the policyholder in Beretta argued that the claims against it arose out of its negligent marketing, and not out of its firearms products. The Beretta court disagreed, finding that the products exclusion "applies irrespective of the theory of liability by which [the plaintiff] seeks redress for his injury," and holding that the claims in the underlying lawsuits necessarily "arose out of" the handguns manufactured and distributed by the insured. Id. at 254.

Similar to Taurus, the insured in Beretta also argued that the products exclusion, "by its plain meaning, applies only to injuries caused by defective products, in that a reasonably prudent layperson would believe an injury arises out

of a product only if a product defect causes the injury." 17 Fed. Appx. at 254. The court disagreed with the insured's analysis:

> In analyzing that contention, it is first necessary to examine the language of the policy itself. As noted, the [Exclusion] excludes coverage for all bodily injury . . . occurring away from premises you own or rent and arising out of your product. . . . Nothing in that language supports the proposition that the exclusion applies only to defective products.

Id. (emphasis added).

The decision by the majority in Beretta was further amplified by a concurring opinion authored by Chief Judge Wilkinson. Interpreting the same policy language at issue in this case, Judge Wilkinson noted that "if the adjective 'defective' had been used to modify the noun 'product,' the exclusion could likewise be interpreted in the manner that appellant suggests," because the "exclusion would then plainly be limited to traditional products liability suits. I do not believe, however, that courts possess the authority to add that word to the contract of insurance negotiated by the parties." Id. at 256 (emphasis added).

Of course, the principles cited by the First and Fourth Circuits in rejecting reliance on the "defective product" argument mirrors precisely the Florida insurance law principles cited above. Similar to Brazas and Beretta, the Florida Supreme Court recognizes that unambiguous policy language must be applied as written, and will not "place limitations upon the plain language of a policy exclusion simply because we think it should have been written that way." Deni, 711 So. 2d at 1139. And, as in Brazas and Beretta, the language of the Products-Completed Operations Hazard exclusion clearly applies to the claims against Taurus in the Underlying Actions.

Moreover, since this case was briefed before the 11th Circuit, the United States District Court for the District of Maine, in the Bushmaster case, also adopted the rationale of the Brazas and Beretta opinions, and held that the Products-Completed Operations Hazard exclusion applied to the same type of gun manufacturer litigation at issue in this coverage dispute. The insured in that case, Bushmaster, had manufactured the assault rifle used by John Allen Muhammad and Lee Boyd Malvo in the infamous "D.C. sniper" shootings. 324 F.Supp.2d at 111-12. Bushmaster was named as a defendant in a personal injury lawsuit brought by the victims of the shooting rampage. Id. As here, the suit against Bushmaster charged that the company had created a "public nuisance" by oversupplying the market with its firearms. Id.

Like Taurus, Bushmaster argued that the products exclusion was inapplicable because the claims against it involved boardroom negligence in its distribution practices, and also maintained that the exclusion was limited to defective product claims. Id. at 112-13. The court disagreed, and held that the products exclusion clearly applied. Despite the fact that the underlying suit alleged that the injuries were caused by Bushmaster's on-premises negligence in marketing and distributing its product, the court found that the exclusion still applied, because "Bushmaster's alleged misconduct is the method by which it distributed firearms and the cause of the Muhammad and Malvo victims' injuries is a firearm." Id. at 113 (emphasis added). Thus, the court concluded that although "Bushmaster makes a valiant attempt to escape this plain meaning of the insurance contracts, . . . it is ultimately unpersuasive. There is no ambiguity in the language. . . the exclusion is not limited to defective products, . . . and the damage to Muhammad's and Malvo's victims 'arise out of' Bushmaster's product, the assault rifle." Id. at 112-13.

As these cases show, there can be no doubt that any bodily injury claims against Taurus "arise out of" its product, and are thus excluded from coverage. This Court should joins the Beretta, Brazas and Bushmaster courts, and conclude that Taurus' coverage claims are meritless as a matter of law.

B. Beretta and Brazas are not Distinguishable

In its brief filed with this Court, Taurus omits any reference at all to the Beretta and Brazas case (as well as Bushmaster), the only cases that have actually applied the products exclusion to the gun manufacturer litigation at issue here. In its brief with the 11th Circuit, however, Taurus attempted to distinguish Beretta and Brazas from the instant dispute. Assuming Taurus will make the same attempt in its reply, that contention is meritless.

For example, Taurus argued that the Brazas opinion should be disregarded because Massachusetts courts interpret the phrase "arising out of" differently from Florida courts. That is not so; as discussed above, Florida and Massachusetts courts apply the phrase "arising out of" in the same manner. Both hold the phrase to require less than proximate cause, and to mean "originating from," "growing out of," or the like.

Taurus also claimed that "the *Brazas* holding should not be relied on because the underlying complaint alleged only a fraction of the on-premise negligence claims found in the City Suits." Taurus 11th Cir. Brief at 31. However, both this case and Brazas involve the same issue: does the insured's alleged negligence in connection with the marketing and distribution of its firearms fall within the scope of the products exclusion? Like Taurus, the insured in Brazas argued that injuries alleged in the underlying actions were "caused by the company's business management and strategy, thereby rendering the exclusion provision inapplicable." 220 F.3d at 5. The Brazas court rejected this argument,

finding that "only by a distortion of language and logic" could one conclude that the injuries did not "arise out of" the insured's firearm products. Id. at 5. 14/

Any renewed attempt by Taurus to distinguish Beretta would also lack merit. While Taurus tried to distinguish Beretta on the ground that Maryland law interprets the phrase "arising out of" differently than Florida, Maryland and Florida courts define the phrase "arising out of" in the same manner, as "originating from," "growing out of," "flowing from" or "having a connection with." Compare Northern Assurance Co. of Am. v. EDP Floors, Inc., 533 A.2d 682, 688 (Md. 1987), with Hagen, 675 So. 2d at 965.

Taurus also argued that Maryland law differs in that Maryland does not resolve doubts about ambiguous policy language in favor of coverage, and does not construe exclusions more strictly than coverage provisions. But Florida law only applies such rules of construction when policy language is actually ambiguous. See supra pp. 10-11; Siegle, 819 So. 2d at 735. Where a provision is unambiguous,

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14/ Taurus also argued that the "primary reason" for the Brazas holding was the court's conclusion that the insured could "not have reasonably expected to be covered for that type of claim because it was a distributor rather than a manufacturer." Taurus 11th Cir. Brief at 31. Taurus claimed that because Florida rejects the reasonable expectations rule, the holding of the Brazas should similarly be rejected.

While Taurus is correct that Florida rejects the reasonable expectations rule, see Deni, 711 So. 2d at 1139, that is not a basis for distinguishing Brazas. On the contrary, the Brazas court declined the insured's request that it apply the "reasonable expectations" test, stating that "we may not read into the [exclusion] a condition or language that is not present." 220 F. 3d at 6. Instead, the Brazas court found that the product exclusion was unambiguous, and applied it without consideration for the "reasonable expectations" of the insured. Id.

courts in both Maryland and Florida apply the policy as written, regardless of whether the term is found in an exclusion or a coverage provision. Alligator, 773 So. 2d at 95; Catalina Enterprises, Inc. Pension Trust v. Hartford Fire Ins. Co., 67 F.3d 63, 65 (4th Cir. 1995). The Beretta court specifically found that the language in the products exclusion was unambiguous. 17 Fed. Appx. at 255. Thus, any alleged differences in rules of construction between Maryland and Florida law are irrelevant. 15

Simply put, the courts in Brazas and Beretta, applying state law identical or substantially similar to Florida law, concluded that such claims do fall within the scope of the product exclusion. This Court should do the same, and answer the certified question in the affirmative.

IV. CASE LAW FROM OTHER JURISDICTIONS SUPPORTS THE CARRIERS' COVERAGE POSITION

Taurus repeatedly asserts that the "vast majority of jurisdictions" have limited the application of the products exclusion to defective products claims. Those cases do not help Taurus' cause. The only on-point decisions on record, by two United States Circuit Courts of Appeals (and the district courts they affirmed), as well as the United States District Court in Bushmaster, reject the notion that the

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15/ Taurus also claimed that "Florida upholds the duty to defend if the underlying factual allegations and theories 'fairly and potentially bring the suit within policy coverage," while Maryland law does not adhere to the potentiality rule. Taurus App. Brief at 32. That is incorrect. Maryland does recognize the "potentiality rule," a fact noted by the Maryland high court in Northern Assurance Co. of Am. v. EDP Floors, Inc., 533 A.2d 682 (Md. 1987), a case cited by Taurus in its brief with the 11th Circuit. See id. at 686; see also Brohawn v. Transamerica Ins. Co., 347 A.2d 842, 850 (Md. 1975).

products exclusion is limited to "defective" product claims. As also noted above, the opinions in the Brazas , Beretta and Bushmaster cases are particularly persuasive and compelling, not only because they involved the same policy language and same lawsuits as are at issue here, but also because those courts were applying the very same interpretive principles applied in Florida.

Contrary to Taurus' assertion that the "vast majority" of cases limit the application of the products exclusion to defective product claims, numerous courts have applied the plain language of the products exclusion, and have refused to limit it to defective products. Further, the cases cited by Taurus are distinguishable or otherwise inapplicable under the legal principles and precedent at issue here. 16/

16/ UP makes the rather curious argument that the Products Exclusion, which excludes coverage for any claim for "**bodily injury** . . . arising out of **your product**," would somehow not apply to the defective design claims alleged against Taurus in the Underlying Actions. UP Br. at 16-17. Specifically, UP claims that because the term "**your product**" is defined to mean any products "manufactured, sold, handled, distributed or disposed of" by the insured, but not a product "designed" by the insured, the exclusion would be inapplicable to claims for design defects. This argument makes little sense. Obviously, a product which Taurus – a gun manufacturer –is alleged to have defectively "designed" is still a product that Taurus would have necessarily "manufactured, sold, handled, distributed or disposed of." Moreover, even if amicus' argument had any merit, it should not be considered because such argument has been waived here. Taurus itself concedes that traditional product liability causes of action, such as negligent design claims, would fall within the scope of the Products Exclusion. See Petitioner's Br. at 25-32.

A. A Substantial Body of Case Law Supports the Insurers' Position

In addition to Brazas, Beretta, and Bushmaster, numerous other courts have rejected the very argument advanced by Taurus in this case, and have refused to limit the products hazard exclusion to defective product claims.

For example, the Delaware Supreme Court, in Eon Labs Manufacturing, Inc. v. Reliance Insurance Co., 756 A.2d 889 (Del. 2000), considered the application of a products exclusion to the kind of mass-tort litigation for which Taurus now seeks coverage. In that case the insured, Eon, manufactured phentermine, one of the components of fen-phen. Users of fen-phen sued Eon, along with other manufacturers of the components of fen-phen, alleging that they were negligent in the design, manufacture, marketing and sale of their drugs, and asserted claims based on warranty, misrepresentation, failure to warn, fraud, conspiracy and concerted action. Id. at 890. Eon's insurer, Reliance, denied coverage under a products exclusion identical to the one at issue here.

Applying "general insurance contract principles," Id. at 892, the Delaware Supreme Court squarely rejected the notion (advanced by Eon) that "the law requires that there be a defect in phentermine itself for the products hazard exclusion to apply." Id. at 893. The court explained, in language that is particularly apt here:

> We agree, as did the Superior Court, with Reliance's contention that had not Eon manufactured, promoted and sold phentermine it would not have been sued. We hold that if there is some meaningful linkage between the product and the third party claim, the "arising out of" language unambiguously applies. That is plainly true here. Those suits all involved some meaningful linkage to Eon's drug, phentermine.

Id. at 894. Similarly, there is unquestionably a "meaningful linkage" between the "bodily injuries" alleged in the Underlying Actions here and the guns inflicting those injuries.

Many other courts have rejected Taurus' position as well. See Hagen Supply Corp. v. Iowa Nat'l Mut. Ins. Co., 331 F.2d 199, 201-03 (8th Cir. 1964) (applying products-hazard to sale of non-defective tear gas to minor); Pennsylvania Gen. Ins. Co. v. Kielon, 492 N.Y.S.2d 502, 503-04 (N.Y. App. Div. 1985) (applying products hazard exclusion to sale of non-defective gunpowder to minors); Tiano v. Aetna Cas. & Sur. Co., 301 N.W.2d 476, 480 (Mich. Ct. App. 1980) (rejecting argument that "products hazard exclusion only applies when the product is defectively made"); Fred Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co., 281 N.W.2d 539, 543-44 (Neb. 1979) (products hazard exclusion applies to claim of negligent delivery of wrong product); Cobbins v. General Accident Fire & Life Assuarance Corp., 290 N.E.2d 873, 877 (Ill. 1972) (noting that "the definition of the 'products' hazard does not permit the interpretation that it applies only to the typical product-liability or defective-product case"); Dickert v. Allstate Ins. Co., 175 S.E.2d 98, 99 (Ga. Ct. App. 1970) (exclusion applies to claim of improper installation of non-defective dishwasher); Loveman, Joseph & Loeb v. New Amsterdam Cas. Co., 173 So. 7, 10 (Ala. 1937) (products hazard applies to negligent sale of product).

Thus, the relevant legal authority favors the plain language reading of the Products-Completed Operations Hazard advanced by the carriers, and does not limit its applicability to defective product claims.

B. The Case Law on Which Taurus Relies is Distinguishable or Inapplicable

Taurus has cited a number of cases which it contends stand for the proposition that the term "products" means "defective products," claiming that that

position is supported by "the vast majority" of cases. A closer examination of the cases cited by Taurus, however, demonstrates that virtually all of those decisions involve either materially different policy language, insurance construction principles that have been expressly rejected in Florida, a complete failure to analyze the language of the exclusion, or distinguishable facts.

Many of the cases relied upon by Taurus are based upon policy language materially different from that at issue here. For example, Lessak v. Metropolitan Cas. Ins. Co., 151 N.E.2d 730, 733 (Ohio 1958), involved an exclusion applicable to damages arising from "[t]he handling or use of [or] the existence of any condition in" a product, not the broad language "arising out of **your product**" at issue here. Clearly, an exclusion limited to damages arising out of the "handling or use" of a product, or a "condition in" a product, is more limited than an unqualified exclusion covering any damages arising out of a product. Other cases by Taurus also involve policies with substantially different language. See, e.g.,Farm Bureau Mut. Ins. Co. of Ark. v. Lyon, 528 S.W.2d 932, 933 (Ark. 1975) (policy did not include "arising out of" language").

Further, the cases cited by Taurus that do involve similar policy language either ignore that language altogether, or expressly contravene that language by relying on the purported "objective" of the exclusion. For example, in Colony Insurance Co. v. H.R.K., Inc., 728 S.W.2d 848 (Tex. Ct. App. 1987), the court provided no reasoned basis or analysis for limiting the products hazard exclusion to defective products. Instead, the court simply declared that the products exclusion "[i]n general, . . . applies only if the injury is caused by a 'defective product.'" Id. at 851 (citations omitted); see also Hartford Mut. Ins. Co. v. Moorhead, 578 A.2d 492, 495-96 (Pa. Super. Ct. 1990) (stating that "'it is more preferable . . . to define the products hazard in terms of products liability law,'" without analyzing the policy language); General Ins. Co. v. Crawford, 635 S.W.2d

98, 101 (Tenn. 1982) (conclusorily stating the products hazard exclusion "pertains to that area of tort law known as 'products liability'" without addressing the policy language); Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 477 N.E.2d 1227, 1236 (Ohio Ct. App. 1984) (stating that "[p]roducts hazard protection is synonymous with products liability protection" without analyzing policy language); Chancler v. American Hardware Mut. Ins. Co., 712 P.2d 542, 546 (Idaho 1986) (basing decision on what products hazard exclusion was "intended" to do); Cooling v. USF&G, 269 So. 2d 294 (La. Ct. App. 1973) (failing to quote or analyze the language of the products hazard); ADA Resources, Inc. v. Don Chamblin & Assocs, Inc., 361 So. 2d 1339, 1341 (La. Ct. App. 1978) (relying upon Cooling without analysis); Gordon Yates Building Supplies, Inc. v. Fidelity and Cas. Co., 543 S.W.2d 709, 714 (Tex. App. 1976) (simply quoting Lessak -- which applied different policy language-- for the proposition that "[i]n general, the products hazard exception applies only if the injury is caused by a defective product" without analyzing the language of the policy).

McGinnis v. Fidelity & Casualty Co.., 80 Cal. Rptr. 482 (Ct. App. 1969), another case relied upon by Taurus, is illustrative of the approach in some of the cases cited by Taurus. In McGinnis, the court held that the products exclusion "must be interpreted in light of the objective" intended by the drafters, and concluded that the objective was to apply it to defective products. Id. at 484. That approach –- looking to the intent of an exclusion even when its language is unambiguous -- is precisely the approach rejected by Florida law. As Taurus itself has recognized, this Court has rejected the reasonable expectations doctrine:

> To apply the [reasonable expectations] doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged . . . Construing insurance policies upon

> a determination as to whether the insured's subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.

Deni, 711 So. 2d at 1140. Accordingly, the cases Taurus cites that either ignore the plain language or look to the "objective" of the Products-Completed Operations Hazard are inapposite, and are clearly contrary to Florida law.

In addition, Taurus simply misstates or overstates the holding in some of the cases upon which it relies. For example, Taurus relies upon Viger v. Commercial Insurance Co., 707 F.2d 769 (3d Cir. 1983), for the proposition that the Products-Completed Operations Hazard does not apply to negligent failure to warn claims. Viger, however, did not so hold; rather, the Viger court held that the products exclusion applied to a lawsuit based upon injuries caused by contaminated fish bought at the insured's retail shop and consumed away from the insured's premises. Id. at 772. Taurus's citation is to dicta only. Id. at 773. 17/

Similarly, Taurus cites Taurus cites Brewer v. Home Insurance Co., 710 P.2d 1082 (Ariz. Ct. App. 1985) for the general proposition that a products exclusion only applies if a defective product was the proximate cause of the damage and liability alleged in the lawsuit for which coverage is sought. However, the Brewer court expressly acknowledged cases in which the products exclusion was applied to exclude coverage for claims based upon products which worked as intended and stated that "[i]n this opinion, we need not address the breadth of the products hazard exclusion." Id. at 1087 (emphasis added).

17/ Taurus also erroneously states that the court in Viger was applying New Jersey law. Actually, the policy at issue in Viger was governed by the law of the Virgin Islands. See 707 F.2d 770-71 (insured is a Virgin Islands corporation).

In short, the cases on which Taurus relies are either distinguishable on the basis of the language of the clause at issue or the law applied, or simply do not stand for the proposition Taurus advances. They do not support Taurus' contention that the products exclusions at issue here are inapplicable.

C. There is No "Majority Rule" Supporting Taurus' Position

Taurus repeatedly characterizes its view that the products exclusion applies only to defective product claims as the "majority rule." That is incorrect.

By Taurus's own count, only twelve jurisdictions out of 50 states support this supposed "majority" rule. See Petitioners' Brief at 30. Even that number is overstated, because at least one of those decisions declined to take a position on the issue, and one was pure dicta, applying extra-territorial law. Other decisions, as noted above, involved policy language different from the exclusion at issue here.

In contrast, at least eleven other jurisdictions have adopted the contrary view – that the products exclusion is not limited to "defective" product claims. See supra 40-41. Thus, contrary to Taurus' claim of a "majority" view, the extant decisions are split on the issue, when stated in the abstract. 18/

But the issue cannot be stated in the abstract. The cases cited by Taurus all involve fact situations entirely different from those at issue here. Even

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18/ Taurus has contended that the carriers have "double-counted" by citing Eon Labs Manufacturing, Inc. v. Reliance Ins. Co., 756 A.2d 889 (Del. 2000), where, Taurus claims, the Delaware Supreme Court was actually applying Illinois and/or New York law. In Eon Labs, however, the Delaware Supreme Court made clear that it was not relying on the law of any particular jurisdiction, but was instead applying "general insurance contract principles." Id. at 892.

those courts that have held the products exclusion to be limited to defective products claims have not addressed its application where a gun manufacturer is sued in mass, nationwide tort litigation for the production, sale and distribution of the very guns which bear its name. Only two of the cases Taurus cites – H.R.K. and Nautilus Ins. Co. v. Don's Guns & Galleries, Inc., 2000 WL 34251061 (Jan. 26, 2000 S.D. Ind.) – even involved the sale of a gun, and both of those cases involved a one-time sale by a retailer to a mentally unstable person.

The only on-point decisions, involving the precise claims at issue in this case, are also the most recent decisions addressing this issue. Those decisions – the rulings in Brazas, Beretta and Bushmaster – have uniformly found that the exclusion applies to such claims. See supra at pp.30-36.

Similarly, the claims against Taurus in the Underlying Actions here are focused entirely on Taurus' manufacture and sale of its firearms products. They plainly fall within an exclusion for injuries arising out of Taurus' products.

V. TAURUS IMPROPERLY SEEKS TO CREATE PRODUCT HAZARD COVERAGE FOR WHICH IT DID NOT PAY ANY PREMIUM

In its brief before this Court, Taurus for the first time advances an additional argument in support of its coverage position. Citing a vague "public policy" rationale, Taurus asserts that limiting the application of the products exclusion to defective products claims "prevents gaps in coverage and allows CGL policies and product liability coverage to provide 'mirror image' protection." Petitioners' Brief at 31. Taurus asserts that the term "Product Hazard" "is widely read to involve a product defect regardless of whether it appears in an exclusion or coverage provision. Adopting a broader reading of 'products hazard' in the Products Hazard Exclusion and excluding more claims from CGL coverage would leave a gap in coverage where neither a CGL nor a products liability policy would

provide coverage, even for the cautious insured that purchased both." Id. at 35-36. However, Taurus' argument concerning this supposed "gap" in coverage between CGL policies and product liability coverage is simply wrong, and does not advance its coverage position one bit.

Taurus' position contains at least one obvious flaw. It assumes, without any substantiation, that so-called "product liability" insurance only provides coverage for defective product claims. 19/ That, however, is simply untrue. Indeed, the opposite is true, as several courts have held that "product hazard" coverage extends to "non-defective" product claims. See, e.g., Cobbins, 290 N.E.2d at 292 (claim arising out of sale of non-defective fireworks to 11 year old buyer fell within the "products-completed operations" coverage section of the policy form, which the insured chose not to purchase; court noted that "[t]he definition of the products hazard does not permit the interpretation that it applies only to the typical product-liability or defective product case.); Abbott v. Meacock, 746 P.2d 1 (Ariz. App. Ct. 1987) (product liability insurance covered any damage resulting when insured negligently installed tire too small for customer's tractor-trailer, even though tire was not defectively designed or manufactured); see also Eon Labs, 756 A.2d at 891-92, n. 11 (finding that a "non-defective" product claim fell within scope of product hazard exclusion, but also noting that the insured had

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19/ The closest Taurus comes to supporting this statement is the quotation from a secondary source, Couch on Insurance, stating that "[m]ost policies of products liability insurance require that a product defect result in an accident in order for coverage to apply." Couch on Insurance § 150:3 (3d ed. 2003). However, the statement in Couch is referring to the requirement of "an accident" as a trigger of coverage, not a general requirement that a "product defect" be involved. The section containing the sentence is titled "Product Caused Loss as 'Accident.'"

separate product liability insurance from another carrier which would provide coverage for the claim). Thus, contrary to what Taurus asserts, there is no "gap" in coverage, as so-called "product liability" insurance coverage extends to all claims "arising out of" an insured's product, including "non-defective" product claims.

The very availability of product liability insurance for this type of claim further demonstrates the weakness of Taurus' coverage position. The lower court in the Brazas case actually addressed that very issue. The insured in Brazas, like Taurus, argued that the court "should keep in mind the purpose of the insurance," and limit the application of the product exclusion in the CGL policy at issue to defective product claims. The court rejected that argument, however, noting that the insured had "purchased a relatively inexpensive basic general liability policy, making the decision not to purchase product liability insurance, which was available at a greater cost. Typically, such a general liability policy would cover a slip and fall or an injury from a collapsing cabinet. To the extent that the court should consider expectations regarding, or purposes of, the insurance, this factor appears to cut in favor of [the insurer]." 59 F.Supp.2d at 226 (emphasis added).

There is no question that Taurus could have purchased product liability insurance protection. In fact, the policies issued to Taurus included optional "product hazard" coverage, which Taurus could have purchased for an additional premium. 20/ Taurus chose not to purchase that coverage, instead buying "a relatively inexpensive basic general liability policy" without products

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20/ See, e.g. Doc. 13, Ex. 31, at 1 (Declarations Page of Policy showing that "Products-Completed Operations" coverage was available, but that Taurus did not purchase it).

hazard protection. Now, Taurus seeks to avoid the consequences of that decision, and asks this Court to rewrite the policies to include products hazard coverage for which it did not pay a premium. That is contrary to Florida law principles.

In the final analysis, this purported "gap" in coverage is simply irrelevant. Where coverage has been excluded by unambiguous policy language, judicial construction is at an end. See, e.g., Deni, 117 So. 2d at 1139. There is no basis under Florida law, whether designated as "public policy" or otherwise, for limiting the scope of a clearly-worded exclusion to avoid creating a hypothetical "gap" in coverage.

The bodily injury alleged in the Underlying Actions clearly "arises out of" Taurus' products. Accordingly, the Underlying Actions fall within the scope of the Products Complete Operations Hazard Exclusion, and the Court should therefore answer "yes" to the certified question.

CONCLUSION

The Court should answer "yes" to the certified question.

Respectfully submitted,

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Jonathan A. Constine
Douglas S. Crosno
Lori Piechura
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5870
Attorneys for Respondents
Federal Insurance Company and
Great Northern Insurance Company

Walter J. Andrews
Michael S. Levine
Amy K. Savage
SHAW PITTMAN, LLP
1650 Tysons Boulevard
McLean, VA 22102-4856
(703) 770-7613

Attorneys for Respondent
United States Fidelity and Guaranty
Company

Alyssa M. Campbell
WILLIAMS MONTGOMERY & JOHN,
LTD.
20 N. Wacker Drive, Suite 2100
Chicago, IL 60606-3002
(312) 855-4875

Attorneys for Respondent
United National Insurance Company

Charles M.P. George
GEORGE, HARTZ, LUNDEEN, et al.
4800 LeJeune Road
Coral Gables, FL 33146
(305) 662-4800

Attorneys for Respondent
Pacific Insurance Company, Ltd.

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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Jonathan A. Constine

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2004, a copy of the foregoing was served, by first-class U.S. mail, postage prepaid on the following:

John W. Harbin
Simon H. Bloom
Powell, Goldstein, Frazer & Murphy
191 Peachtree Street, N.E., 16th Floor
Atlanta, GA 30303

Counsel for Taurus

Christopher E. Knight
Fowler, White, et al.
Bank of America Tower, 17th Floor
100 SE Second Street
Miami, FL 33131

Counsel for Taurus

____
Jonathan A. Constine