**IN THE SUPREME COURT OF FLORIDA**

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| TAURUS HOLDINGS, INC., and TAURUS INTERNATIONAL MANUFACTURING, INC., | * | |
| Petitioners, | * | Case No.: SC04-771 |
| | * | Eleventh Circuit |
| vs. | * | Case No.: 03-14720 |
| | * | D.C. Docket |
| UNITED STATES FIDELITY AND GUARANTY COMPANY, PACIFIC INSURANCE COMPANY, LIMITED, FEDERAL INSURANCE COMPANY, GREAT NORTHERN INSURANCE COMPANY, and UNITED NATIONAL INSURANCE COMPANY, | * | No.: 01-02236-CV-AJ |
| Respondents. | * | |

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

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# INITIAL BRIEF OF PETITIONERS TAURUS HOLDINGS, INC. and TAURUS INTERNATIONAL MANUFACTURING, INC.

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## STATEMENT OF JURISDICTION

The Florida Supreme Court's jurisdiction arises upon certification from the United States Court of Appeals for the Eleventh Circuit under Rules 9.030(a)(2)(c) and 9.150, Fla. R. App. P.

## STATEMENT OF THE CERTIFIED ISSUE

> 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 THE CASE

### A. Course of Proceedings Below

This Certified Question arises out of Taurus' appeal to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in favor of Defendants-Appellees United States Fidelity and Guaranty Company ("USF&G"), Pacific Insurance Company ("Pacific"), Limited, Federal Insurance Company, Great Northern Insurance Company (together "FIC/GN"), and United National Insurance Company ("United") (collectively, the "Carriers") by the United States District Court for the Southern District of Florida.[1] [Doc.249; Doc.250]. After initially finding in favor or Taurus on the certified issue, the trial court later entered judgment for the Carriers, finding no duty to defend Taurus, because it concluded that the Products Hazard Exclusion contained in the relevant policies excluded coverage. [Doc.85; Doc.249].

Taurus is in the business of manufacturing, selling, and distributing firearms. [See Doc.38, Affidavit of David Blenker ("Blenker Aff."), ¶ 2]. The Carriers sold commercial general liability primary, umbrella and excess insurance policies to Taurus between 1991 and 2000 (collectively, the "Policies").[2] [See id. at ¶¶ 5-6]. At issue is whether Taurus Holdings, Inc.

[1] Nautilus Insurance Company and Fireman's Fund Insurance Company, both parties to the original Complaint, have been dismissed from this action, Fireman's Fund pursuant to a settlement agreement.

[2] Pacific Insurance Company and United National Insurance Company are excess carriers who are parties because of common contractual duties. If

and Taurus International Manufacturing, Inc. ("Taurus") are entitled to a defense in the thirty plus lawsuits filed against them by cities, states, and private individuals across the country (the "City Suits") in light of the presence of the Products Hazard Exclusion in the Policies. [See Doc.1].

Taurus filed its Complaint in the Circuit Court Of The Eleventh Judicial Circuit In And For Miami-Dade County, Florida on April 12, 2001. [Id.]. The Complaint sought declaratory judgments for defense costs and indemnity and asserted additional claims for breach of contract and litigation expenses against all of the Carriers. [Id.]. The Carriers subsequently removed the case to the United States District Court for the Southern District of Florida. [Id.].

On July 16, 2001, the Carriers filed motions to dismiss. [Doc. 9; Doc. 15; Doc. 17; Doc. 18] Taurus responded and filed its own Motion for Partial Summary Judgment, seeking a ruling as a matter of law that the City Suits were covered occurrences. [Doc. 27; Doc. 28]

On October 24, 2002, the District Court issued an Order denying the Carriers' motions to dismiss and granting Taurus' motion for partial summary judgment, except as to one underlying suit (the "October Order"). [Doc. 85] The October Order found that, pursuant to Florida law, the Products Hazard Exclusion (PHE) contained in the CGL policies did not bar coverage of the City Suits. [Id.]. The court held, "Florida law suggests that the underlying suits in this case do not fall within the ambit of the PHE clauses, and a reading of cases from other jurisdictions supports this conclusion. The insurers have failed to satisfy their burden of proving that the exclusionary clauses apply so as to foreclose a duty to defend." [October Order, p. 24].

On April 11, 2003, FIC/GN filed a Motion for Reconsideration, challenging the District Court's holding that the Products Hazard Exclusions contained in the insurance contracts did not apply to the City Suits, based on this Court's opinion in *Koikos v. Travelers Ins. Company*. [Doc. 162; Doc. 163] On August 14, 2003, the District Court reconsidered the October Order and, relying exclusively on *Koikos*, reversed itself and granted the Carriers'

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coverage is found, they would have a duty to defend if primary policies are exhausted.

motions to dismiss. [Doc.249]. The trial court entered final judgment in favor of the Carriers on August 14, 2003. [Id.]. Taurus timely filed its Notice of Appeal on September 10, 2003. [Doc. 250]. After briefing and oral argument, the Eleventh Circuit issued an opinion and certified the issue to this Court on April 29, 2004.

**B. Statement of the Facts**

Between 1991 and 1999, Taurus purchased and paid substantial premiums for commercial general liability insurance policies from the Carriers. [See Doc. 38, Affidavit of David Blenker ("Blenker Aff."), p.5, ¶¶5-6] All of the Polices were issued to Taurus in the State of Florida. [Id. at p.5, ¶6] Taurus International Manufacturing, Inc. resides in Florida and the parties agree that Florida law governs the adjudication of this case.

**A. The City Suits.**

Beginning in 1998, municipalities, states, private organizations and individuals began suing handgun manufacturers such as Taurus in a coordinated effort to put the handgun industry out of business. [Id. at p.6, ¶7] At the time the present action was filed, Taurus had been named as a defendant in over thirty such lawsuits. [Id. at p.7, ¶8][3]

The City Suits allege, among other things, negligence, negligent supervision, negligent marketing, negligent distribution, negligent advertising, negligent entrustment, public and private nuisance, failure to

[3] For copies of the City Suit complaints, see Doc. 11-13.

warn, false advertising, and unfair and deceptive trade practices. [See Dosc.11-13]. Each and every complaint includes at least one allegation of on-premises conduct of this type that is not based on a claim of defect in the product. [Id.]. Each of the City Suits alleges that Taurus is liable for some form of on-premises negligence that allegedly caused that public or private entity substantial monetary damages. [Id.]. The City Suits allege that Taurus has caused hundreds, if not thousands, of instances of bodily injury and property damage resulting in millions of dollars in resulting costs. [Id.].

Taurus has asked its general liability insurance carriers to honor their policies and contribute to the defense of the City Suits. [Id. at p.9, ¶9] Each Carrier has explicitly rejected Taurus' request and this lawsuit resulted. [Id. at p.9, ¶10]

**B. The Policies.**

The pertinent provisions of the Policies, given the issue on appeal, is the Products Hazard Exclusion ("PHE"). The definition of the PHE provided in the Federal Insurance Company/Chubb Policy 3532-82-82 ("the FIC Policy") is identical or substantially similar to the definitions of PHE provided in the other policies issued by FIC and the policies issued by the other Defendants. The FIC Policy defines the excluded hazard as:

***Definition of "Products-Completed Operations Hazard":***
**Products-completed operations hazard** includes all **bodily injury** and **property damage** occurring away from premises you own or rent and arising out of **your product** or **your work** except:

- products that are still in your physical possession; or
- work that has not yet been completed or abandoned

[See Doc. 31, Tab 4; Doc. 33, Tabs 3-4]

The FIC Policy defines "**Your product**" as follows:

> [A]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
> 1. you;
> 2. other trading under your name; or
> 3. a person or organization whose business or assets you have acquired.

[See Doc. 31, Tab 2; Doc. 33, Tabs 3-4].

## STANDARD OF REVIEW

The certified question involves the interpretation of an insurance contract, which is a pure issue of law. No deference is due to the federal district court's ruling on the motion to dismiss. In federal courts, the interpretation of an insurance contract is a legal issue, subject to de novo review. *LaFarge Corp. v. Traveler's Indemnity Co.*, 118 F.3d 1511, 1514 (11th Cir. 1997).

Florida courts apply the same standard. *Steuart Petroleum Co. v. Certain Underwriters at Lloyds*, 696 So.2d 376, 379 (Fla. 1st DCA 1997), rev. dism., 701 So. 2d 867 (Fla. 1997) (appellate court is on equal footing with trial court).

## SUMMARY OF THE ARGUMENT

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?

The answer under Florida law is and should be: no, it does not.

The application of the Products Hazard Exclusion under Florida law is a question of first impression for this Court. The current law of Florida, at least until this Court speaks to the issue, is expressed by *Florida Farm Bureau v. Gaskins*. 405 So.2d 1013 (Fla. 1st DCA 1981). The Products Hazard Exclusion only excludes coverage for claims that arise out of injury caused by a defective product, a product that fails to perform as intended. Allegations of on-premises negligence, independent of a claim of defect in the product, fall outside of the Exclusion. Therefore, claims of negligent distribution, marketing, sales, supervision, entrustment, advertising, and other allegations of on-premises negligence require the insurer to provide a defense.

This interpretation of the Products Hazard Exclusion is consistent with the interpretation of the PHE adopted by a majority of the jurisdictions to address this issue. Jurisdictions throughout the nation apply the exact same black-letter "product defect" rule to a wide array of fact scenarios, including situations very similar to the previous case.

Confirming the *Gaskins* interpretation of the PHE would make sound public policy. Affirming the *Gaskins* "product defect" rule would be consistent with the majority of jurisdictions to address the issue, lend uniformity to policy interpretation, prevent gaps in coverage, and continue Florida's approach to insurance policy construction.

Furthermore, any reliance the Carriers or the trial court below placed on this Court's decision in *Koikos v. Travelers Insurance Company* is misplaced. *See,* 849 So.2d 263 (Fla. 2003). That holding does not address Florida's interpretation of the Products Hazard Exclusion. The case addresses a different type of policy term, different policy language, and does not even address the basic concept at work in the Products Hazard Exclusion. This Court's decision in *Koikos* was not a disapproval or abrogation of the rule in *Gaskins*. If anything, this Court's underlying analysis in *Koikos* supports the *Gaskins* court's decision that the Products Hazard Exclusion should be limited to claims of product defect.

According to Florida law, if the underlying complaints, fairly read, contain any allegations that could fall within the scope of coverage, the insurer is obliged to defend the entire action. *Psychiatric Associates v. St. Paul Fire & Marine Insurance Co.*, 647 So.2d 134, 137 (Fla. 1st DCA 1994). In the present case, as reflected in the certified question, the underlying complaints allege numerous counts of on-premises negligence that constitute covered occurrences, allegations that are not based on defective products claims. Because the Products Hazard Exclusion only appropriately applies to claims of defective products, such allegations of on-premises negligence fall outside of the Products Hazard Exclusion. Therefore, any underlying complaint that includes an allegation of on-premises negligence is covered and the Carriers must provide a defense.

If this Court does apply the *Gaskins* rule to the present case, the Carriers are obligated to defend Taurus for those underlying complaints that contain allegations of on-premises negligence.

## ARGUMENT AND CITATION OF AUTHORITY

### I. THE *GASKINS* DECISION REPRESENTS THE CURRENT FLORIDA INTERPRETATION OF THE PRODUCTS HAZARD EXCLUSION.

Absent any interdistrict conflict or contrary Florida Supreme Court ruling, Florida District Court of Appeals opinions are the law of Florida. *See Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992); *Stanfill v. State*, 384 So.2d 141, 143 (Fla.

1980). Until this Court speaks to the issue, the interpretation of the Products Hazard Exclusion announced in *Florida Farm Bureau Mutual Insurance Company v. Gaskins*, 405 So.2d at 1013, represents the Florida rule.

According to *Gaskins*, the Products Hazard Exclusion applies only to allegations of damage or injury caused by a defect in the quality of the product, i.e. where the product allegedly fails to function as intended and thereby causes injury. The Products Hazard Exclusion does not apply where the complaint alleges that the insured's on-premises negligence, rather than a defect in the product, caused the injury or damages at issue. An injury caused by negligence separate from a defect in the product does not "arise out of" the insured's product and falls outside of the Products Hazard Exclusion.

Courts in Florida and elsewhere recognize the *Gaskins* decision as Florida's interpretation of the Products Hazard Exclusion. The Carriers' attempts to limit or distort the meaning of *Gaskins* and its Florida progeny are specious.

**A. *Gaskins***

Gaskins, a chemical supply company, sold and delivered to one of its customers, a tobacco farmer, an herbicide instead of the insecticide that the farmer ordered. 405 So.2d. at 1014. The farmer used the herbicide and completely

destroyed his tobacco crop. *Id.* Gaskins carried a general liability policy that contained a products hazard exclusion. *Id.*

The insurer, Farm Bureau, contended that the exclusion applied and relieved it from coverage. *Id*. Farm Bureau argued that the damages to the tobacco "arose out of" the product, the herbicide, and that the exclusion should therefore cut off coverage. After all, it was undisputed that the poisonous product caused the crops to die. Gaskins, on the other hand, argued that the tort occurred "on premises" when his employees sold and incorrectly delivered the wrong product to the tobacco farmer. *Id.* The trial court agreed with Gaskins and found that the liability and damage to the crop arose out of the on-premises negligence, the sale and misdelivery, not the product itself. *Id.*

The First DCA also concluded that the insured's liability and the claimant's damages arose out of the insured's on-premises negligence in delivering the wrong product and not out of the product delivered. *Id.* The product delivered performed exactly as it was intended. The court found that the insured's on-premises negligence occurred when its employees failed to notice that they were delivering the wrong product to the customer. The herbicide delivered, the court found, was not the proximate cause of the damage. *Id.* The herbicide was merely the incidental instrumentality through which the damage was done. *Id.* at 1015. The

proximate cause of the damage was the insured's negligence in delivering the wrong product to the customer and the insured's liability arose out of the accident which occurred at the time of the negligent misdelivery. *Id.* "It should be clear that appellee's [Gaskins] liability would not be within the products hazard exclusion because it did not arise out of products." *Id.* at 1014-1015.

Accordingly, when allegations of on-premises negligence, such as failing to inspect the product being delivered, are sufficiently separate from a defect in the quality of the product, the damage "arises out of" the negligence, and not the product. In other words, where the product functions as intended, the damage does not arise out of the product and the Products Hazard Exclusion does not exclude coverage.

Subsequent Florida cases confirm this is the Florida rule on the subject and *Gaskins* has been recognized in other states as establishing Florida's interpretation of the Products Hazard Exclusion, as shown below.

**B. *Gaskins'* Progeny.**

Both the Third and the Fourth District Courts of Appeal for Florida acknowledge that the rule announced in *Gaskins*, by the First DCA, represents the Florida rule. These later two DCA decisions rely on the *Gaskins* interpretation of the Products Hazard Exclusion.

The Third DCA's decision in *Associated Electric and Gas Insurance Services Ltd. v. Houston Oil and Gas Company,* 552 So.2d 1110 (Fla. 3rd DCA 1989) ("*AEGIS*"), relies on and is consistent with *Gaskins*. While the *AEGIS* case concerned different types of coverage provisions and not the Products Hazard Exclusion per se, the court's analysis still relied on the *Gaskins* approach to interpret the products hazard. The Carriers' arguments that *AEGIS* somehow limits or redefines the *Gaskins* ruling are meritless.

In *AEGIS*, a subsidiary of the insured filled cylinders with propane gas and loaded them onto a customer's van. *Id*. at 1111. The tanks leaked and caused a fire and explosion. *Id.* The claimant alleged that one of the cylinders was defective. He also claimed numerous counts of on-premises negligence caused the damages. *Id.* The jury found that the insured supplied a defective tank. *Id*. at 1112.

In the coverage action between the primary and excess carriers, the trial court had to determine whether the events of the accident fell under general liability coverage or products hazard coverage in order to apportion indemnification obligations. The excess insurance carrier, AEGIS, argued that the injuries contained in the underlying suit were caused by on-premises negligence. *Id.* Houston, the primary liability carrier, argued that the liability resulted from a

products hazard or completed operation and was therefore only covered under the products and completed operations coverage. *Id.* The trial court concluded that the liability resulted from a completed operation. *Id.* at 113. The appellate court agreed. *Id*.

*AEGIS*, while not interpreting the Products Hazard Exclusion per se, further confirms that "injuries arising out of your product" means a defect in the product proximately caused the injury. The Carriers have argued that *AEGIS* adopts a broader interpretation of the Products Hazard Exclusion, receding from *Gaskins*. In a rather distorted reading of *AEGIS*, the Carriers have contended that the exclusion applies unless the alleged negligence (marketing, sale, distribution, supervision) is "sufficiently removed from the product to negate the product liability exclusionary clause." *See* Carriers' Appellee Brief in the Eleventh Circuit, pp. 17-18. They have argued that only negligence "wholly unrelated to the product" will escape the Exclusion. *Id.* In their Eleventh Circuit brief, the Carriers cited to page 1112 of the *AEGIS* opinion to support this argument, *see id*. at p.17, but the *AEGIS* court held no such thing. Nor did it advocate that this extreme divergence from *Gaskins* should be the rule in Florida.

Instead, the *AEGIS* court held, consistent with *Gaskins*, that the Products Hazard and Completed Operations coverage applied in *AEGIS* because the alleged

negligence (improper filling, inspection, storage, or handling of the tank) impacted the quality of the product, resulting in a defective product, the leaking tank. *AEGIS, citing Aetna Cas. & Surety Co. v. Richmond*, 76 Cal. App. 3d 645, 655, 143 Cal. Rptr. 75, 81 (1977). The Products Hazard coverage would not apply where the negligent service of the insured constituted an act sufficiently removed from the quality of the product in question. *Id.* at 1112. *AEGIS* cites with approval language from a California case stating, "only where negligent service of the insured constitutes an act sufficiently removed from the quality of the product in question will it escape the exclusionary clause." *Id.* (citations removed, emphasis added).

The California case cited by the *AEGIS* court is *Aetna Casualty & Surety Company v. Richmond,* 76 Cal. App. 645, 143 Cal.Rptr. 75 (1977). This citation further signals the Third DCA's adoption of the *Gaskins* rule because it is one of the cases showing that California has adopted the same rule (which, as Petitioners will show, is the rule adopted by the majority of states that have considered the issue).

In *Richmond,* a ski shop sold a pair of skis to a customer. *Id.* at 648. The shop adjusted the binders to fit the customer's boots but did so incorrectly so that, when the customer fell while skiing, the defective binders caused severe injuries to

her legs. *Id.* The customer alleged that the shop's negligence in adjusting the binders proximately caused her injuries. *Id.* The *Richmond* court discussed the earlier California appellate courts that adopted the majority rule and concluded that the negligence in adjusting the binders was not a proximate cause separate from the quality of the product. *Id.* at 655 (citing *Cravens, Dargan & Co. v. Pacific Indem. Co.*, 29 Cal. App. 3d 594, 105 Cal. Rptr. 607 (1972); *McGinnis v. Fidelity & Cas. Co.*, 276 Ca. App. 2d 15, 80 Cal. Rptr. 482 (1969)). Since the negligent service contributed to the quality of the product, rendering it defective, the negligence was not sufficiently removed from the quality of the product to escape the exclusion. This holding reiterates the principle underlying the holding in *Gaskins*.

Moreover, the Carriers' argument that *AEGIS* interpreted *Gaskins* to be limited to claims "wholly unrelated to the product" is a nonsensical argument. In *Gaskins* itself, the damage is clearly related to the product. The insured delivered the wrong product and the damage and the resulting claims of liability plainly related to the product. As the *Gaskins* Court noted, that product killed the crops. The claim in *Gaskins* did not fall under the products hazard exclusion because, while the claim did relate to the product, it was not a claim of defect in the <u>quality</u> of the product. *AEGIS* confirms that the relevant question is whether the claim relates to the *quality* of the product. *See, e.g.*, 552 So.2d at 1112.

That the *Gaskins* decision has set forth Florida's interpretation of the Products Hazard Exclusion is confirmed in the later ruling of the Fourth District Court of Appeals in *Florida Farm Bureau Mutual Insurance Company v. James*, 608 So.2d 931 (Fla. 4th DCA 1992). The *James* court also concluded that the Products Hazard Exclusion does not absolve the insurer from its duty to defend where the complaint alleges on-premises negligence, such as negligent delivery, caused the underlying plaintiff's damages, even though the product delivered was the immediate cause of injury. *Id.* The Court joined the First DCA in interpreting the Products Hazard Exclusion to apply only to allegations of defective products.

In *James*, the insured, Old South Mills ("Old South"), sold feed to the James farm which, when fed to the swine herd, killed much of the herd. *Id.* at 931. James sued Old South, alleging that it supplied the farm with defective feed. *Id.* Florida Farm Bureau, Old South's insurer, refused to defend the feed store based on the policy's products hazard exclusion because the complaint alleged only that a defective product caused the damage. *Id*. at 932. The policies in *James* and *Gaskins* were identical. *Lefebvre v. James*, 697 So.2d 918, 919 (Fla. 4th DCA 1997). At trial, James abandoned the defective product theory and argued for the first time that Old South's negligent delivery of the wrong type of feed damaged his herd. 608 So.2d at 932. The jury returned a verdict in favor of the plaintiff,

James. *Id.*

James then sued Florida Farm Bureau alleging breach of its duty to defend. *Id.* The trial court in the coverage case relied on *Gaskins* to find that the insurer breached its duty. *Id.* Because the complaint initially alleged only a "product defect" theory, and the carrier was not on notice of the new allegations, the appellate court reversed, holding that the Products Hazard Exclusion applied. Importantly, however, the Fourth District Court of Appeals acknowledged that *Gaskins* would have required coverage had the complaint alleged the negligent delivery of the wrong product instead of, or in addition to, the defective product claim. *Id*. at 932.

*James* confirms that *Gaskins* represents the current Florida rule for interpreting the Products Hazard Exclusion. In *James,* both the trial court and the district court of appeals recognized that allegations of negligent delivery fall outside of the Products Hazard Exclusion, and that the exclusion applies only to defective product cases. Under those holdings, a complaint including such a negligence theory does not trigger the Exclusion and a defense is required. In fact, in the subsequent attorney malpractice action against James' attorney, the trial court found as a matter of law that the policy would have covered an underlying

verdict for negligent delivery because the Exclusion would not have applied. *Lefebvre*, 697 So.2d at 919.

Courts in other states throughout the nation have treated the *Gaskins* opinion as the definitive statement of how Florida interprets the Products Hazard Exclusion and have relied on the *Gaskins* decision when interpreting the Products Hazard Exclusion. One New York appellate court, while discussing the majority rule, cited *Gaskins* for the argument that "PHE applies only to defective products." *Pennsylvania Gen. Ins. Co. v. Kielon*, 492 N.Y.S.2d 502, 503 (App. Div. 1985). Likewise, concluding that the Products Hazard Exclusion applies only in the case of a product defect, the court in *Hartford Mutual Ins. Co. v. Moorehead*, 578 A.2d 492, 496 (Pa. Sup. Ct. 1990), cites *Gaskins* as an example of the "numerous courts in other jurisdictions [that] have reached similar conclusions in interpreting the language of the common "Products Hazard" exclusion found herein." Similarly, the Court of Appeals of Arizona analyzed *Gaskins* and concluded that the claims of negligence failed to fall within the Products Hazard Exclusion because they were unrelated to a product defect. *Brewer v. Home Ins. Co.*, 147 Ariz. 427, 430, 710 P.2d 1082, 1085 (Ariz. Ct. App. 1985). The Minnesota Supreme Court in *American Trailer Service v. The Home Insurance Company*, 361 N.W.2d 918, 920-21 (Minn. Ct. App. 1985), similarly cited *Gaskins* at length as support for its

conclusion that the Products Hazard Exclusion did not exclude a claim of liability stemming from negligent failure to provide assembly instructions.

Numerous courts recognize *Gaskins* as the Florida rule. As discussed in the next section, Florida lines up with the majority of courts to have considered this issue. This Court should confirm Florida's place in the majority.

## II. THE *GASKINS* RULING IS CONSISTENT WITH THE MAJORITY OF JURISDICTIONS THAT HAVE INTERPRETED THE PRODUCTS HAZARD EXCLUSION.

The majority of jurisdictions to address the Products Hazard Exclusion interpret the exclusion as *Gaskins* did. The majority limits the exclusion to defective product claims. Contrary to the Insurers argument, these majority cases are by no means limited to their facts. These cases arise out of and examine a wide variety of factual scenarios and reiterate a black-letter rule that the PHE applies to product defect claims only. In many cases, in fact, the courts rely on each other as support for adopting the majority "product defect" rule. Several of these cases examine nearly identical fact patterns to the case at bar and find the exclusion inapplicable.

We have already seen that Pennsylvania and Arizona have also adopted this majority interpretation of the Products Hazard Exclusion. As another example, Indiana has been found to endorse the majority rule. In *Nautilus Insurance Co. v.*

*Don's Guns & Galleries, Inc.*, No. IP 99-0735-c-Y/G, 2000 WL 34251061 (S.D. Ind. Jan. 26, 2000), one of the most recent cases to address the issues, the United States District Court for the Southern District of Indiana applied Indiana law to a dispute about the Products Hazard Exclusion. The case involved a firearms dealer sued by a man with suicidal tendencies who later harmed himself with the firearm he bought from Don's. *Id*. at *1. Nautilus, the insurance company that issued a commercial line policy to the store, claimed that no coverage was due, in part relying on the Products Hazard Exclusion. *Id*. at *2. The court held that the exclusion "does not apply to a situation where an insured is alleged to be negligent for selling a 'non-defective' good to an incompetent person. *Id.* Generally, the Products Hazard Exclusion applies only when the injury is caused by a defective product placed into the stream of commerce." *Id.* at *4 (*citing B & R Farm Services, Inc. v. Farm Bureau Mutual Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985)).

As discussed above, Pennsylvania adopted the majority "product defect" rule in *Hartford Mutual Ins. Co. v. Moorehead,* 396 Pa. Super. 234, 236, 578 A.2d 492, 493 (Pa. Sup. Ct. 1990). The insured sold the claimant a pair of old whiskey barrels and set of sulfur strips for use in making wine. *Id.* The sulfur strips were to be lit on fire for the purpose of killing bacteria in the barrels. *Id.* When the

claimant lit these strips and placed them into the old whiskey barrels, he ignited the old alcohol fumes and caused an explosion. *Id.* The complaint alleged acts of negligence against the insured seller of the barrels and strips. *Id.* at 243, 578 A.2d at 497. Applying Pennsylvania law, the court concluded, "[A]lleged negligence which does not involve the sale of a defective product is of a type which 'occurs occasionally in the course of business and is a risk for which businesses buy general coverage.'" *Id.* at 242, 578 A.2d at 496. The Products Hazard Exclusion applies only when a defective product, rather than a service, is the alleged cause in fact of damages to a third person. *Id.* Significantly, the Pennsylvania Supreme Court relied on the *Gaskins* decision in reaching its holding.

Texas is also solidly in the majority, as shown in *Colony Ins. Co. v. H.R.K., Inc.*, 728 S.W.2d 848 (Tex. Ct. App. 1987), in which the court confronted facts and a definition of the Products Hazard Exclusion nearly identical to those in the present case. The insured sold a handgun to a mentally unstable person who later killed himself with it. *Id.* at 849. In the wrongful death action that followed, the claimant alleged that the insured gun shop was negligent in the sale of the weapon when it should have known that the gun would be used to hurt the purchaser himself or others. *Id.* The court determined that coverage existed for such claims because they alleged that the on-premises negligence of the insured in its

distribution practice proximately caused the injury, not a defect in the product. *Id.* at 851. This interpretation is the same analysis advanced in *Gaskins*. *See also Gordon Yates Building Supplies v. Fidelity And Casualty Company of New York*, 543 S.W.2d 709 (Tex.Civ.App., Fort Worth, 1976) (Texas appellate court finding "products hazard" exclusion applies only if the injury is caused by a "defective product").

Arizona law, as discussed by the Court of Appeals of Arizona in *Brewer v. Home Ins. Co.*, 147 Ariz. 427, 710 P.2d 1082 (1985), applies the majority rule as well. Brewer suffered personal injuries when the metal trash pipe he was installing collapsed. *Id*. at 428, 710 P.2d at 1083. The insured, Capital, sold Brewer's employer the fabricated steel and design specifications for the trash pipe. *Id.* Brewer sued Capital for failing to provide him adequate installation advice, which, he claimed, would have prevented the collapse. *Id*. While the court found that the injuries arose out of the insured's product, it did so because the "design services of the insured were so intrinsically bound up in the sale of the fabricated steel itself that they were part of the product within the meaning of the products hazard exclusion." *Id*. at 429, 710 P.2d at 1084. The trash pipe did not perform as expected; the court found, it collapsed because of defective design. *Id*. at 430, 710 P.2d at 430. Because a defective product proximately caused the damage and

created the insured's liability, the Products Hazard Exclusion precluded coverage. This is fully in keeping with the principles of *Gaskins*.

The Ohio Supreme Court's decision of *Lessak v. Metropolitan Cas. Ins. Co.*, 168 Ohio St. 153, 151 N.E.2d 730 (1958), shows that Ohio subscribes to the majority rule. In *Lessak*, the insured, a hardware store, sold BBs to a minor in violation of state law, and the minor was injured. *Id.* at 154, 151 N.E.2d at 732. The court refused to apply the products exclusion to those facts because the injuries arose out of the negligent sale of the BBs to the minor and not out of some defect in the product. *Id.* at 159, 151 N.E.2d at 734-735. The product functioned properly but, through the insured's negligence, it made its way into the hands of someone unfit to possess it. Hence, just as in *Gaskins*, although the product was the immediate cause of the injury, the court found the negligent sale, and not the product, was the legal cause of the resulting injury.

Although the language of the Products Hazard Exclusion in *Lessak* is not identical to the policy language before this Court, *Lessak* established what has been recognized in Ohio to be a black-letter rule. This black-letter rule was later applied to a more modern version of the Products Hazard Exclusion in *Buckeye Union Insurance Co. v. Liberty Solvents and Chemicals Co., Inc.*, 17 Ohio.App.3d 127, 477 N.E.2d 1227 (1984).

*Buckeye* involved a coverage dispute in which an insurer refused to defend or indemnify the insured who faced claims relating to the cleanup of a waste facility. *Id*. Among other assertions, the insurer claimed that the Products Hazard Exclusion barred coverage. *Id.* at 135, 477 N.E.2d at 1236. In *Buckeye*, much like in *Gaskins*, the court held that "there must be a defective condition in the product itself which proximately causes the damage before the product hazard exclusion will preclude coverage." *Id.*

Arkansas also adheres to the majority "product defect" rule. In *Farm Bureau Mutual Insurance Company of Arkansas, Inc. v. Lyon*, 258 Ark. 802, 528 S.W.2d 932 (1975), the insured sold gunpowder to several minors who later sustained severe injuries when using it. The Arkansas Supreme Court, citing *Lessak*, found that the Products Hazard Exclusion did not apply because the negligent sale of the gunpowder was "the proximate cause of the accident and of appellee's injuries (not a defective product—nor completed operations away from the premises of the insured)." *Id*. at 811, 528 S.W.2d at 937. *See also McGinnis v. Fidelity and Casualty Company of New York,* 276 Cal.App.2d 15, 18, 80 Cal.Rptr. 482, 484 (1969) (where gunpowder sold to minor, California court held, "The injury, here, was not caused by a defective product. The powder did exactly what

it was designed to do, and what everyone expected it to do; it exploded when detonated…his [insured's] negligence was a proximate cause of the accident.").[4]

The same product defect rule governs in Louisiana. In *Cooling v. United State Fidelity And Guaranty Company*, 269 So.2d 294 (La.App. 3rd Cir. 1972), a Louisiana appeals court considered a dispute over coverage for claims alleging that a negligent failure to warn of the need for certain safety devices on a diesel engine resulted in injuries. Adopting the defect rule, the court found that the alleged negligence "wherein there is neither a defective product sold nor faulty workmanship involved, is of a nature other than either sale or service…It is rather in the nature of a general risk of doing business which is the sort of risk which motivated Cooling to buy comprehensive liability insurance." *Id*. at 297.

Louisiana further confirms its adherence to the majority in *ADA Resources, Inc. v. Don Chamblin & Associates, Inc*., 361 So.2d 1339 (La.App. 3rd Cir. 1978). In *ADA Resources,* the insured delivered the wrong cross-over joint for use during the digging of a well. *Id.* at 1340-41. The underlying claimant alleged negligent inspection and delivery. *Id.* at 1341. The appellate court held that coverage was not excluded by the products hazard exclusion as interpreted by Louisiana because

[4] Although McGinnis relies in part on the "reasonable expectations" rule, a legal principle not adopted by Florida courts, the California court only references the rule after conducting an analysis identical to, and reaching the same conclusion as, Gaskins.

this negligence was in the nature of a general risk of doing business which comprehensive general liability policies seek to cover. *Id.* at 1344.

Numerous other states have adopted the rule that the Products Hazard Exclusion applies only to allegations of a product defect. Idaho (*Chancler v. American Hardware Mutual Insurance Company*, 109 Idaho 841, 712 P.2d 542 (1985) (Idaho court concludes that the products hazard exclusion cannot bar a negligence claim)), Minnesota (*American Trailer Service v. The Home Insurance Company*, 361 N.W.2d 918 (Minn. Ct. App. 1985) (Court of Appeals of Minnesota held products exclusion did not apply because, "no illegal sale or defective product has been alleged, only negligence in provision of instructions)), New Jersey (*Viger v. Commercial Insurance Company of Newark, New Jersey*, 707 F.2d 769 (3d Cir. 1983) ("When the alleged failure to warn is unrelated to the sale of a defective product, the 'products hazard' and 'completed operations' exclusions are inapplicable")), and Tennessee (*General Ins. Co. of America v. Crawford*, 635 S.W.2d 98 (Tenn. 1982) (Products hazard exclusion not applicable to claim of negligent sale of liquor to minor involved in accident because, under Tennessee law, 'products hazard' exclusion pertains to that area of tort law known as 'products liability;' the intended reference is to some defect or imperfection in the product itself)) all apply the product defect rule.

In sum, the majority of courts to address this issue have concluded that claims of negligence do not fall within the Products Hazard Exclusion where the negligence is separate from a defect in the quality of the product. As shown above, this is the rule of law in at least twelve jurisdictions, in addition to Florida: Pennsylvania, Ohio, Arizona, Texas, Tennessee, Minnesota, Arkansas, Louisiana, California, Idaho, New Jersey, and Indiana. Florida's rule, as announced in *Gaskins*, fits firmly within this majority.

Throughout this litigation, the Carriers have argued that the *Gaskins* rule is specific to its facts and amounts to an outlier in the larger scheme of insurance law. Nothing could be further from the truth. The rule announced in *Gaskins,* reiterated by the Third and Fourth Florida DCAs, is black-letter insurance law that courts throughout the nation have applied to the Products Hazard Exclusion in a variety of contexts, from BBs to barrels, swine feed to trash pipes. They all rely on the same rule and underlying principles of public policy. Perhaps if a single case, in a single jurisdiction, applied the "product defect" rule, the Carriers' contention that the rule is fact-specific might hold water. However, given the numerous courts in numerous jurisdictions that have applied the same approach found in *Gaskins* to the interpretation of the Products Hazard Exclusion, and the broad language of these decisions, the Carriers' argument fails. The *Gaskins* rule is the same as the

rule applied in this majority of other jurisdictions.

## III. THE *GASKINS* RULE REFLECTS SOUND PUBLIC POLICY AND IS CONSISTENT WITH FLORIDA'S CONSTRUCTION OF INSURANCE POLICIES.

In adopting the majority "product defect" rule, numerous courts and commentators have relied upon public policy rationales. Both courts and treatises have noted that the majority rule prevents gaps in coverage and allows CGL policies and products liability coverage to provide "mirror image" protection. Like these jurisdictions, Florida law favors policy interpretations that avoid gaps in coverage, a stance fully embodied by the *Gaskins* decision. Further, the "product defect" rule fits squarely with Florida's general principles of insurance law, which favor coverage and construe ambiguities in favor of the insured.

### A. The Gaskins Rule Requires a Product Defect to Trigger Coverage.

As the court in *Cooling v. United States Fidelity and Guaranty Co.*, 269 So.2d 294, 297 (La. Ct. App. 1972), notes, negligence claims, such as a failure to warn, are in the nature of a general risk for which companies buy CGL policies. These companies may purchase products liability insurance to insure against allegations of product defect – the allegations excluded from CGL coverage under the majority's reading of the Products Hazard Exclusion. The majority rule thus allows companies to purchase complete coverage and prevents coverage gaps that

would arise from interpreting the exclusion to be broader than those claims covered by products liability policies.

Several courts in the majority, when adopting or applying the "product defect" rule, have cited a desire for cohesion among complementary insurance policies. The Ohio court in *Buckeye Union,* 17 Ohio.App.3d at 135, 477 N.E.2d at 1236, holds that, "[I]n accordance with established principles of products liability, there must be a defective condition in the product itself which proximately causes the damage before the product hazard exclusion will preclude coverage." The *Buckeye Union* court explicitly ties its interpretation of the exclusion to its interpretation of products liability coverage, finding that "[u]nless it is shown that the damages were caused by the insured's product, products liability principles, and therefore, the products hazard exclusion, does not apply to exclude coverage." *Id*.

Other courts similarly suggest the importance of linking products liability coverage with the interpretation of the Products Hazard Exclusion. For example, the Court of Appeals of Arizona in *Brewer* noted, "Brewer is correct in suggesting that the purpose of the products hazard exclusion is to exempt products liability claims made against the insured from general liability coverage." 147 Ariz. at 429, 710 P.2d at 1084. Similarly, the court in *General Ins. Co. of America v. Crawford,*

635 S.W.2d 98, 101 (Tenn. 1982), noted that "there is substantial authority to the effect that a 'products hazard' exclusion pertains to that area of tort law known as 'products liability,' and that the intended policy reference is to some defect or imperfection in the product itself, or to some warranty or representation concerning the product."

A leading insurance treatise further advocates interpreting the Products Hazard Exclusion as the mirror image of products hazard coverage provision. The spectrum of liability insurance available to corporations producing goods for sale consists, in relevant part, of the CGL policy and the products liability policy (products hazard coverage). Discussing the latter, *Couch on Insurance,* LEE RUSS, Couch on Insurance § 130:5 (3rd ed. 2003), notes, "Most policies of products liability insurance require that a product defect result in an accident in order for coverage to apply, either by explicitly requiring that there be an "accident," or by requiring that there be an "occurrence," which is then defined as an accident." *Couch* also notes that products liability coverage is also known as products hazard coverage and is often purchased precisely because CGL policies often exclude products liability claims from the ambit of their coverage. *Id*. at § 130:1. Hence, the typical products liability policy should be read as the mirror image of the Products Hazard Exclusion, and vice versa. The products policy should cover that

which is excluded by the CGL policy (product defect claims). The relevant portions of the CGL policy should not exclude more than the products liability policy covers.

Florida law discourages reading an insurance policy in a way that results in a gap in coverage. For example, the Fourth DCA in *Farrer v. U.S. Fidelity & Guaranty Co.*, 809 So.2d 85, 94 (Fla. 4th DCA 2002), held that "a comprehensive general liability policy should be construed as leaving no gap in coverage between it and an automobile policy." Florida courts rely on this approach to encourage reading two forms of coverage consistently. The *Westmoreland* court wrote, "Unless the automobile and homeowners coverages are consistently construed, there could be a void or gap in the coverage between the two provisions. Thus if we were to accept the construction argued here by the insurer, the coverage would not be complementary: some homeowner's liability claims would be left undefended even though legally caused by an act of negligence not arising out of the use of an automobile." *Westmoreland v. Lumbermens Mutual Casualty Co.*, 704 So.2d 176, 183 (Fla. 4th DCA 1997).

The majority's "product defect" interpretation of the Products Hazard Exclusion allows CGL and products liability policies to coexist as mirror images and avoids gaps in coverage. The rule allows an insured the option to purchase

insurance to cover all losses, those stemming from other sources such as on-premises negligence and those due to product defects under the additional coverage. *See Cooling v. United States Fidelity and Guaranty Co.*, 269 So.2d 294, 297 (La. Ct. App. 1972) (noting that claims such as a failure to warn are in the nature of a general risk for which companies buy CGL policies). Reading the Products Hazard Exclusion more broadly to exclude claims beyond those caused by a product defect leaves a gap in coverage and, given that Products Hazard Exclusions are standard form in CGL policies and not a realistic subject of negotiation, leaves insureds without the option of purchasing complete protection.

By requiring there be a product defect in order to trigger the Products Hazard Exclusion in a CGL policy, *Gaskins* and the majority rule create a uniform, coherent landscape of insurance law. Defining "products hazard" the same exact way when it appears in an exclusion in a CGL policy or in a product liability policy allows companies to choose with added certainty which losses they want to cover. "Products 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.

### B. The *Gaskins* Rule Is Consistent With Florida's General Principles Of Insurance Contract Construction.

The *Gaskins* rule is consistent with Florida's general approach to the interpretation of insurance contracts and the desire to protect purchasers of insurance coverage. As discussed above, Florida law seeks to avoid gaps in coverage. Also, as the Court well knows, Florida law reads coverage provisions in insurance contracts broadly and exclusionary provisions narrowly, evincing a general policy favoring coverage. *See, e.g., Demshar v. AAACon Auto Transport, Inc.*, 337 So.2d 963, 965 (Fla. 1976). Florida law further provides that a court must construe ambiguities in an insurance contract in favor of providing maximum coverage to the insured. Therefore, ambiguities in exclusionary clauses are construed strictly against the insurer. *See Auto-Owners Insurance Company v. Anderson*, 756 So.2d 29, 34 (Fla. 2000); *Blue Cross and Blue Shield of Florida, Inc. v. Steck*, 778 So.2d 374, 376 (Fla. 2d DCA 2001).

Moreover, Florida courts generally favor compelling an insurance company to use clear language to ensure that the insured has an accurate understanding of what he is purchasing. In *Harnett v. Southern Ins. Co.*, 181 So.2d 524, 528 (Fla. 1965), this Court wrote:

> There is no reason why such policies cannot be phrased so that the average person can clearly understand what he is buying. And so long

> as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.

Although written in the context of an individual automobile insurance policy, this rule applies broadly and encourages insurance companies, the experts in these matters, to be clear and precise in their language by protecting the insured when the policy fails to provide such clarity.

Florida courts thus interpret insurance policies to favor coverage and favor the insured, broadening coverage provisions, narrowing exclusions, and generally construing ambiguities in favor of coverage. *See, e.g., Blue Cross*, 778 So.2d at 376; *Auto-Owners*, 756 So.2d at 34, and *Demshar*, 337 So.2d at 965. Florida law also disfavors decisions that result in coverage gaps. *See, e.g., Farrer*, 809 So.2d at 94. The *Gaskins* decision embraces these policies and reflects the general principles of insurance interpretation advocated in this Court's prior jurisprudence. The interpretation advanced by the Carriers weighs against coverage, leaves gaps in insurance coverage and harms insureds, and is counter to the well-established policies of this state.

## IV. THIS COURT'S DECISION IN *KOIKOS* DOES NOT CHANGE THE WAY FLORIDA INTERPRETS THE EXCLUSION.

The Carriers contend that when this court in *Koikos v. Travelers Ins. Co.*, 849 So.2d 263 (Fla. 2003), interpreted the meaning of "occurrence" in a coverage provision, it also discarded *Gaskins* and broadened the meaning of the Products Hazard Exclusion in Florida. No fair reading of *Koikos* supports that conclusion. Nothing in *Koikos* suggests that the parties, attorneys, the Eleventh Circuit or this Court ever contemplated *Gaskins* or the Products Hazard Exclusion when deciding *Koikos*. *Koikos* interpreted different policy language (a coverage provision) and examined the number of occurrences in a covered claim.

Moreover, the principles espoused in the *Koikos* opinion further bolster the *Gaskins* rule and support the trial court's original ruling that the Products Hazard Exclusion does not apply to the City Suits in the present case.

In *Koikos*, the insured was the owner of a restaurant at which an individual fired two shots that resulted in injuries to two men. *Id.* at 265. The victims of the shooting filed a suit against the owner for negligent failure to provide security and the owner brought an action to determine his insurer's liability. *Id.* The Eleventh Circuit Court of Appeals certified to this Court the question of whether, under Florida law, the incident constituted a single occurrence or multiple occurrences. *Id*. at 265-66. The Court adopted the "cause theory" and found that the shootings themselves, rather than the underlying tortious failure to secure, were the relevant

"occurrences" under the coverage provision at issue. *Id.* at 272. The Court concluded that the shooting of the two individuals constituted two separate occurrences for coverage purposes. *Id*. at 272.

This Court in *Koikos* defined the term "occurrence" to determine the number of covered occurrences in a case where coverage existed. *Id.* at 263. In contrast, in this case coverage rises or falls on the interpretation of a specific exclusion and the meaning of the phrase "arising out of your product." *Koikos* did not discuss, much less define, the exclusion anywhere in its opinion. Looking to the *Koikos* opinion for guidance in that regard is error pure and simple.

The distinction between the present case and *Koikos* assumes even greater importance because Florida law is more demanding of insurers when interpreting exclusionary clauses than coverage provisions. Exclusionary clauses are always strictly construed. *See Kopelowitz v. Home Ins. Co.*, 977 F.Supp. 1179, 1185 (S.D. Fla. 1977) *(citing Indiana Ins. Co. v. Miguelarcaina,* 648 So.2d 821 (Fla. 3d DCA 1995); *Florida Farm Bureau v. Birge,* 659 So.2d 310 (Fla. 2d DCA 1994)). It is axiomatic that exclusionary clauses in an insurance policy are construed more strictly than coverage clauses. *See Kopelowitz*, 977 F.Supp. at 1185 (citing *Indiana Inc. Co. v. Miguelarcaina*, 648 So.2d 821 (Fla. 3d DCA 1995); *Florida Farm Bureau Ins. Co. v. Birge*, 659 So.2d 310 (Fla. 2d DCA 1994)). The Court,

therefore, interpreted the term in favor of the insured finding more coverage by finding multiple occurrences. The fact that the *Koikos* Court interpreted and applied a coverage provision when examining the meaning of "occurrence" and not an exclusion, let alone the exclusion in question in this case, warrants disregarding *Koikos* altogether. Notably, when the *Koikos* court does discuss other cases involving exclusion provisions, it highlights the use of interpretations which broaden coverage. 849 So.2d at 268.

If this Court's underlying analysis in *Koikos* is considered for what indirect light it may shine on the issue of policy interpretation, it supports the *Gaskins* interpretation of the Products Hazard Exclusion in favor of the insured. In *Koikos*, this Court did not find that the provision at issue had a single, defined meaning. To the contrary, the Court found that the policy left the term "accident" undefined and hence explicitly interpreted it in favor of the insured. The Court observed that "where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. In addition, where an insurer fails to define a term in a policy,… the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided." *Id.* at 265 (quoting *State Farm Fire & Cas. Co. v. CTC Development Corp.*, 720 So.2d 1072 (Fla. 1998)).

Importantly, the Court interpreted the term "accident" to favor the insured even before it made a determination as to whether the term was ambiguous. Only after electing a definition favoring coverage does the Court consider, apparently as an alternative, the ambiguity doctrine. The Court thus makes clear that terms susceptible of more than one meaning should be construed in favor of the insured, even where the uncertainty does not rise to the level of ambiguity.

After concluding that the acts of shooting constituted the occurrence(s), and not the allegations of negligence against the insured, the Court addressed the ambiguity doctrine. This Court held, "even if we accepted Travelers' construction of the policy as a reasonable interpretation, the insurance policy would be considered ambiguous because the relevant language would be susceptible to more than one reasonable interpretation—one providing coverage and the other limiting coverage." *Id*. at 273. The Court also noted that "ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Id.*

This Court concluded its answer to the certified question by reiterating the fact that the term "occurrence" is susceptible to more than one reasonable interpretation. *Id*. "Accordingly, we construe the term "occurrence" in Travelers' policy in favor of the insured." *Id*. The Court applied the Florida rules of policy

construction, resolving any doubts in the meaning of policy terms in favor of coverage. Using *Koikos* to interpret the Products Hazard Exclusion to deny Taurus a defense contravenes the policy preferences expressed in *Koikos* and implicitly overrules the Florida decisions interpreting the Products Hazard Exclusion. Relying on *Koikos* to upend *Gaskins*, in direct contradiction of this approach, would fly in the face of this Court's jurisprudence.

*Gaskins* is the current Florida law on the meaning of the Products Hazard Exclusion. If *Koikos* stood for the distorted meaning of Exclusion ascribed to it by the Carriers and trial court, it would mean that the *Koikos* Court overruled or disapproved of those District Court of Appeals opinions. The *Koikos* Court, not surprisingly, made no mention or intimation that it was disapproving, distinguishing, or abrogating the *Gaskins* line of cases. One would expect that if the Florida Supreme Court meant to overrule three separate District Courts of Appeal and announce a new tenet of insurance law in Florida, adopting a minority rule, it would have devoted some treatment to that principle in its thirteen-page opinion.

## V. IF GASKINS IS CONFIRMED AS FLORIDA'S INTERPRETATION OF THE PRODUCTS HAZARD EXCLUSION, THE EXCLUSION DOES NOT APPLY AND THE CARRIERS SHOULD PROVIDE A DEFENSE.

Under Florida law, "the duty to defend is broader than the duty to provide coverage and the insurer is required to defend even if the facts later show that there is no coverage. Any doubt about the duty to defend must be resolved in favor of the insured." *MCO Environmental, Inc. v. Agricultural Excess & Surplus Ins. Co.*, 689 So.2d 1114, 1115-16 (3rd DCA Fla. 1997); *see also Lawyers Title Insurance Corp. v JDC (America) Corp.*, 52 F3d 1575, 1580-81 (11th Cir. 1995).

The allegations in the complaint, even if later revealed to be false or appear fraudulent on their face, determine whether the insurer has a duty to defend. *See Kopelowitz*, 977 F.Supp.2d at 1185; *Irvine v. Prudential Property and Casualty Insurance Co.*, 630 So.2d 579, 579-80 (3rd DCA Fla. 1993).

If the complaint alleges facts that could bring the insured partially within coverage of the policy or if only portions of the complaint fall within the coverage and others fall outside of the policy, the insurer is obligated to defend the entire suit, including the claims that otherwise would not be covered. *See Mactown, Inc. v. Continental Insurance Co.*, 716 So.2d 289, 292 (3rd DCA Fla. 1998); *MCO Environmental, Inc. v. Agricultural Excess & Surplus Ins. Co.*, 689 So.2d 1114, 1115-16 (3rd DCA Fla. 1997); *Hawk Termite & Pest Control, Inc., v. Old Republic Insurance Company*, 596 So.2d 96, 97 (3rd DCA Fla. 1992). "Accordingly, if the complaint, fairly read, contains any allegations which could fall within the scope of

coverage, the insurer is obliged to defend the entire action." *Psychiatric Associates v. St. Paul Fire & Marine Insurance Co.*, 647 So.2d 134, 137 (1st DCA Fla. 1994).

Therefore, the Court need only conclude that a single claim in each of the 30 underlying complaints triggers coverage in order to find that the Defendants are obligated to provide a defense for each and every one of those actions. Each of the City Suits underlying this coverage dispute contains allegations of on-premises negligence that are not based on any product defect. Under the *Gaskins* interpretation, adopted by the majority of jurisdictions to have considered the issue, and supported by sound public policy, these allegations are not excluded from coverage by the Products Hazard Exclusion. The Carriers have a contractual duty to provide a defense to the City Suits – a duty Taurus asks this Court to confirm by answering the certified question in the negative and affirming the "product defect" rule as Florida law.

## CONCLUSION

The majority of jurisdictions to analyze the meaning of the Products Hazard Exclusion find it applies only to allegations of a product defect. The three Florida courts to address this question agree. The "product defect" approach to interpreting the exclusion is black-letter insurance law grounded in sound public policy. Taurus respectfully requests that this Court confirm that Florida law is

consistent with the majority interpretation of the Products Hazard Exclusion and answer the certified question in the negative.

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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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