IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONERS TAURUS HOLDINGS, INC. and TAURUS INTERNATIONAL MANUFACTURING, INC.

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I. INTRODUCTION

Taurus asks that this Court retain the meaning that this state has given the products hazard exclusion for at least the last 23 years, a meaning that courts outside Florida have recognized as the Florida rule, and a meaning that comports with most other states that have addressed the issue. There is no valid reason to overturn the Florida precedents. To the contrary, affirming the *Gaskins* interpretation of the exclusion serves the important policy of avoiding gaps in insurance coverage. Finally, even if this Court is uncertain about the meaning or import of *Gaskins*, the exclusion should be interpreted in favor of the insured because the phrase "arising out of" is uncertain and subject to varying reasonable interpretations.

II. THIS COURT SHOULD CONFIRM THAT THE PRODUCTS HAZARD EXCLUSION EXCLUDES ONLY DEFECTIVE PRODUCT CLAIMS IN FLORIDA.

A. The Interpretation Of The Exclusion In Gaskins And Its Progeny Is A Clear One.

The Carriers argue that because Taurus' guns caused the bodily injuries complained of in the City Suits, the injuries "arose out of" the product, and the exclusion applies. *Florida Farm Bureau v. Gaskins,* 405 So.2d 1013 (Fla. 1st DCA 1981) flatly rejects that contention. In *Gaskins,* the insured's product plainly was the immediate cause of the injury complained of. Nevertheless, because the product performed as intended and the alleged negligence did not affect the quality of the product, the *Gaskins* court held that the herbicide was only the incidental instrumentality through which the damage was done. *Id.* at 1015. The injury "arose out of" the on-premises negligence rather than the product. Hence, the exclusion did not apply. *Id.*

Attempting to blunt the impact of *Gaskins*, the Carriers distort the holding in *Associated Electric and Gas Insurance Services Ltd. v. Houston Oil and Gas Company*, 552 So.2d 1110 (Fla. 3rd DCA 1989) ("*AEGIS*"). That court did not limit *Gaskins*, nor could it. The *AEGIS* court was interpreting products hazard *coverage* rather than the products hazard *exclusion* at issue in *Gaskins*. Nevertheless, the *AEGIS* court's interpretation is completely consistent with *Gaskins*. Citing *Aetna Cas. & Surety Co. v. Richmond*, 76 Cal. App. 3d 645, 655, 143 Cal. Rptr. 75, 81 (1977), it held, "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.'" 552 So.2d at 1112.[1]

The Carriers make only passing reference to *Florida Farm Bureau Mutual Ins. Co. v. James*, 608 So.2d 931 (Fla. 4th DCA 1992), because they cannot make it fit their argument. The *James* court applied the *Gaskins* rule. (As in *Gaskins*, the court did so without relying on the ambiguity doctrine or other rules of construction.) The Carriers focus on the fact that the *James* court found that the exclusion applied and denied coverage. That, however, is irrelevant. The significance of *James* is the court's holding that *had the underlying plaintiff alleged negligent delivery* in lieu of or in addition to the product defect claim, *the exclusion would not have applied*. *Id*. at 932.

The *Gaskins* line of cases has been good law after 23 years. Numerous jurisdictions recognize them as Florida's adoption of the black letter rule- the exclusion only applies to claims of defective products. *See, e.g., Brewer v. Home Ins. Co.*, 147 Ariz. 427, 430, 710 P.2d 1082, 1085 (Ariz. Ct. App. 1985); *Pennsylvania Gen. Ins. Co. v. Kielon*, 492 N.Y.S.2d 502, 503 (N.Y. App. Div. 1985); *American Trailer Service v. The Home Insurance Company*, 361 N.W.2d 918, 920-21 (Minn. Ct. App. 1985); *Hartford Mutual Ins. Co. v. Moorehead*, 578 A.2d 492, 496 (Pa. Sup. Ct. 1990). Moreover, the Carriers should not now be allowed to change the rules of the game when they have written and sold policies for the last two decades against the backdrop of clear black-letter law as announced in *Gaskins* and its progeny.

B. The *Gaskins* Interpretation Of The Products Exclusion Is The Majority Rule.

1. The Carriers' Attempts to Distinguish Cases of the Majority are Specious.

In a further attempt to blur what is a bright line rule, the Carriers, including the amicus parties, draw strained and frivolous distinctions about the holdings in other states that have adopted the product defect rule. The Carriers cite *Lessak v. Metropolitan Cas. Ins. Co.*, 151 N.E.2d 730 (Ohio 1958) to support their contention that some undefined subset of these cases involve different policy language than the policy at bar. This argument is terribly misleading. *Lessak* is only the first in a line of several Ohio cases that apply the exclusion only to defective product claims. Some of these decisions address policy language similar to that in the present case. *See e.g. Royal Plastics, Inc. v. State Auto. Mut. Ins. Co.*, 650 N.E.2d 180 (Ohio Ct. App. 1994).

The Carriers also claim that some of the cases comprising the majority rule rely on insurance principles rejected in Florida. They attempt to discount *McGinnis v. Fidelity & Casualty Co.*, 276 Cal. App. 2d 15, 80 Cal. Rptr. 482 (Cal. Ct.App. 1969), by arguing that the opinion refers to the "objective of the drafters" while Florida does not recognize the reasonable expectations rule. In reality, however, prior to discussing the objective of the drafters, that court first concluded that the exclusion applied only to defective product cases. *Id.* at 17-18, 80 Cal. Rptr. at 484. Moreover, California cases subsequent to *McGinnis* followed the majority rule without reliance on the reasonable expectations rule. *See Richmond*, 76 Cal. App.3d 645, 143 Cal. Rptr. 75 (1977). California remains firmly in the majority on this issue.

The amicus argument that these decisions should be distinguished because they involve gun dealers rather than manufacturers is a distinction without a difference. The negligent distribution and marketing claims at issue here are the same whether leveled at the manufacturer or at the distributor.

The amicus' bold assertion that it knows of no gun liability cases where the court did not apply the products hazard exclusion to allegations of negligence (Amicus Brief at 12) is simply false and is

contradicted late in the Amicus Brief itself (page 15). In this regard, Taurus has **never** argued that the exclusion cannot apply any time negligence is alleged. The question is what type of negligence is alleged. Taurus simply argues (and current Florida law holds) that only when the negligence involves the quality of the product, i.e. when it is a products liability case, does the products hazard exclusion apply. The amicus' tactic of setting up a straw man to knock it down is sophistry.

The fact remains that the majority of jurisdictions that have considered the issue have established a bright line rule that the exclusion only applies to claims of defective products. They have done so in a variety of factual situations involving a variety of products, including handguns, BB guns and gun powder.

2. The Carriers Have Exaggerated the Number of Jurisdictions in the Minority.

The Carriers' argument that the jurisdictions are basically split equally on the question of how the exclusion should be interpreted is based on double-counting and other erroneous counting. For example, the Carriers cite *Hagen Supply Corp. v. Iowa Nat'l Mut. Ins. Co.*, 331 F.2d 199 (8th Cir. 1964) as support for their minority interpretation of the products hazard exclusion. *Hagen* has effectively been overruled, however. *Hagen* is based on Minnesota law and the Minnesota Supreme Court adopted the majority rule 20 years later, explicitly relying on *Gaskins*. *See American Trailer Service v. The Home Insurance Company*, 361 N.W.2d 918 (Minn. Ct. App. 1985) (products exclusion did not apply because no illegal sale or defective product had been alleged).

Similarly, the Carriers cite *Eon Labs Manufacturing, Inc. v. Reliance Insurance Co.*, 756 A.2d 889 (Del. 2000), noting it is a decision of the Delaware Supreme Court and thus implying Delaware law is in their camp. However, the *Eon Labs* decision explicitly applied either Illinois and/or New York law. *Id*. at 892. Illinois and New York are both among the jurisdictions that have interpreted the exclusion contrary to the majority approach and have been counted as such. Finally, some of the cases on which the Carriers rely are federal court decisions attempting to decipher what the

governing state's law would be without guidance from that state's courts.

3. The Few Cases The Carriers Rely On Are Inapposite.

The federal court decisions the Carriers rely on so heavily, *Beretta U.S.A. Corp. v. Federal Insurance Company*, 17 Fed. Appx. 250, 2001 WL 1019745 (4th Cir. 2001), *Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Ins. Co.*, 220 F.3d 1 (1st Cir. 2000), and *Massachusetts Bay Insurance Company v. Bushmaster Firearms, Inc.*, 2004 WL 1570099 (D. Me. 2004), are federal court decisions that attempt to divine other states' insurance law and should be given little attention. Moreover, Florida insurance law is different from that of Maryland and Massachusetts.

The *Brazas* court admitted it lacked guidance from Massachusetts case law. The federal district court in *Bushmaster* addressed the applicability of the exclusion in eight words, cited no Maine case law on point, and instead merely parroted the analysis of the *Brazas* opinion. The *Beretta* court relied on the interpretation of a different provision, not the exclusion at issue. The speculation by these federal courts about how three other states would interpret the products hazard exclusion should play no role in answering the certified question.

Furthermore, the laws of these states concerning insurance policy interpretation differ from Florida law. For example, Florida law directs courts to look at the underlying theories of liability pled; Maryland law forbids such an inquiry. Florida law requires that courts examine both the facts and the theories of liability presented in the underlying complaint. *See Irvine v. Prudential Property and Casualty Insurance Co.*, 630 So.2d 579, 579-80 (Fla. 3rd DCA 1993). In contrast, under the Maryland law applied in *Beretta*, theories of liability are irrelevant. While Florida law evinces a public policy favoring coverage and reads policy exclusions strictly and ambiguous provisions in favor of the insured, *see Demshar v. AAACon Auto Transport, Inc.*, 337 So.2d 963, 965 (Fla. 1976), Maryland law has no such policies.

Massachusetts law is also different from Florida law. For example, Massachusetts law dictates that courts should <u>not</u> consider the specific theories of liability alleged in the [underlying] complaint."

Brazas, 220 F.3d at 7. Second, while Florida rejects the reasonable expectations rule, Massachusetts embraces it. This distinction is especially important because this principle influenced the *Brazas* decision:

> Nor are we sure that in the context of Brazas' actual business as a distributor, rather than a manufacturer, a reasonable insured would read the exclusion to refer to defective products. Consequently, we are convinced that the exclusion clause does not limit itself to injuries that arise out of defective products. *Id*. at 6.

In sum, none of the conclusions contained in *Beretta*, *Brazas*, or *Bushmaster* should influence this Court's answer to the certified question.

III. ADOPTING THE *GASKINS* INTERPRETATION OF THE PRODUCTS HAZARD EXCLUSION AVOIDS GAPS IN COVERAGE.

As stated, one of the reasons courts interpret the products hazard exclusion to apply only to defective product claims is to avoid gaps in coverage. *See, e.g. Buckeye Union Ins. Co. v. Liberty*, 17 Ohio.App.3d 127, 135, 477 N.E.2d 1236 (1984). Florida law also disfavors gaps in insurance coverage, *see, e.g., Farrer v. U.S. Fidelity & Guaranty Co.*, 809 So.2d 85, 94 (Fla. 4th DCA 2002) ("a comprehensive general liability policy should be construed as leaving no gap in coverage between it and an automobile policy"); *Allstate Insurance Company v. Safer*, 317 F.Supp.2d 1345, 1354 (M.D. Fla. 2004) (public policy discouraged gaps in coverage between automobile and CGL coverage). The products hazard exclusion should be read to keep products liability and CGL policies as mirror images, to prevent gaps in insurance coverage. Confirming the *Gaskins* rule accomplishes this worthy result.

The Carriers contend that their interpretation of the exclusion does not create gaps in coverage between the CGL and products liability policies, and that Taurus is proposing overlapping coverage because products hazard coverage encompasses more than claims of product defect. This argument is erroneous and ignores current Florida law.

The Carriers need look no further than the thoroughly discussed *AEGIS* case to ascertain the way in which Florida interprets products hazard coverage. In that case, the court had to determine

whether claims arising out of defective gas tanks fell within the insured's products hazard policy or its general liability policy. 552 So.2d at 1111. Although considering the coverage provision, the court looked to interpretations of the products hazard exclusion and adopted the *Richmond* and *Gaskins* interpretation. The Court found that since the defective tank caused the injuries claimed, the products hazard policy covered the loss. *Id.* at 1112. Under that analysis, if no defect had been found, the claim would have fallen outside of products hazard coverage. *See also Copeland v. Celotex Corp.*, 447 So.2d 908 (Fla. 3rd DCA 1984).

The Carriers cite no Florida law and instead rely on *Abbott v. Meacock*, 155 Ariz. 260, 746 P.2d 1 (Ariz. App. Ct. 1987) to contend that "products hazard" coverage extends to non-defective products. The *Abbott* case, however, actually supports Taurus' argument. The court observed that the determination of whether the products liability exclusion applies is identical to determining whether products liability coverage applies; the two are mirror images of one another. *Id.* at 262, 746 P.2d at 3. The Court applied the same approach to the meaning of products hazard found in *Gaskins* and its progeny, i.e. since the alleged negligence affected the <u>quality of the product</u>, the product allegedly did not perform as expected and was defective. *Id.* The claim was covered by the products liability coverage held by the insured and excluded by the CGL policy containing the products liability exclusion. *Id.* (As discussed in Taurus' prior brief, Arizona adheres to the majority rule limiting the products hazard exclusion to claims of defective products.)

Moreover, the Carriers' reliance on one Illinois case ignores the numerous other jurisdictions (again, the majority to have considered the issue) that hold that products hazard coverage applies only to defective product claims. *Advanced Refrigeration and Appliance Co. v. Insurance Co. of North America*, 349 N.Y.S.2d 195, 197 (N.Y. App. Div. 1973) ("Products liability coverage applies only when bodily injury or property damage results from a defect in a product"); *Finn v. Employers' Liability Assur. Corp.*, 141 So.2d 852, 877 (La. Ct. App. 1962); *Fibreboard Corp. v. Hartford Accident & Indemnity Co.*, 20 Cal.Rptr.2d 376, 382 (Cal. Ct. App. 1993). Hence, Couch recognizes that most policies of products liability insurance require that a <u>product defect</u> result in an

accident for coverage to apply. *Couch on Insurance*, LEE RUSS, § 130:5 (3rd ed. 2003).

If products liability insurance covers only defective product allegations, and if the Carriers' interpretation of the PHE is adopted, then allegations of on premises negligence by manufacturers that have no impact on the quality of the product yet are tangentially related to the product will go uncovered. The most cautious insured, one who bought both policies, would still find a gap in coverage.

In this regard, despite pointing out that Florida does not adhere to the "reasonable expectations rule," the Carriers dedicate the final pages of their brief to arguing that since Taurus allegedly paid less for its insurance coverage, Taurus should not have expected coverage for the underlying suits. This argument contravenes Florida law, common sense, and good policy.

AEGIS and the other cases show there is no overlapping coverage. Taurus is simply asking that its general liability carriers provide coverage for allegations of injury allegedly resulting from on-premises negligence – negligent marketing, sales and distributions that are not based on claims of defective products. Moreover, the Carriers have written CGL policies in Florida since at least 1981. They sold policies containing products hazard exclusions against the backdrop of *Gaskins* and its progeny, decisions that courts across the country and the insurance law commentators have easily understood. Reading the policies, both the Carriers and Taurus would have concluded that under Florida law the products hazard exclusion barred only defective products claims. This is what Taurus purchased and what the Carriers underwrote. [2]

IV. FLORIDA LAW REQUIRES INTERPRETING THE PRODUCTS HAZARD EXCLUSION IN FAVOR OF COVERAGE.

If the Court is uncertain about the *Gaskins* reasoning, there is an independent legal basis for interpreting the exclusion in favor of coverage: the exclusionary language is susceptible to multiple reasonable interpretations. In *State Farm Fire and Casualty Company v. CTC Development Corporation*, 720 So.2d 1072, 1076 (Fla. 1998), the Court held that "[a]bsent any indication of a uniform agreement on a single accepted

definition of the term, where susceptible to varying interpretations, it should be construed in favor of the insured." "When 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 1076.

This Court applied this same principle in *Koikos v. Travelers Insurance Company*, 849 So.2d 263 (Fla. 2003). In this regard, it is ironic that the Carriers rely so heavily on *Koikos*, because this Court's reasoning favors Taurus and this Court found the definition of "occurrence" to be "susceptible to more than one reasonable interpretation," and hence construed the term 'occurrence' in favor of the insured. *Id.* at 269, 271, 272. The Court only later noted that even if it accepted Travelers' construction of the meaning of "occurrence" as a reasonable interpretation, "the insurance policy would have to be considered ambiguous because the relevant language would be susceptible to more than one reasonable interpretation." *Id.*

Taurus contends that "arising out of your product" means exactly what the *Gaskins* line of cases says it means in Florida. However, if this Court is uncertain about the meaning of *Gaskins*, it should consider the numerous reasonable interpretations of "arising out of your product," and construe the term in favor of coverage.

Webster's Dictionary defines "arise" to mean: 1) to get up: rise; 2) (a) to originate from a source, (b) to come into being or to attention; 3) Ascend. "To originate from a source," directs the court to the original or proximate cause, not the final step in causation. To interpret "arising out of" to focus on the initial cause is consistent with the interpretation by the *Gaskins* court and the other courts in the majority (none of which based their decisions on a finding of ambiguity). The court in *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 181 (Fla. 4th DCA 1997) found that the term "arising out of" had several reasonable meanings ranging from "appearance and origination to causation," and concluded that the language was therefore ambiguous.

The Carriers have cited other cases that have recognized the term "arising out of" can mean anything from "caused by" to "originating from," to "flowing from" or "incident to," to something as broad as "having a causal connection with." Those courts then adopted the broadest interpretation of

the provisions, in favor of the **insurer.** Doing so plainly violates the *CTC Development* rule.

The carriers' reliance on *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Company,* 711 So.2d 1135 (Fla. 1998), is also misplaced. The *Deni* court did not analyze the meaning of the phrase "arising out of your product." Moreover, that Court started its analysis by reviewing how other jurisdictions had resolved the question. It went with the majority interpretation.

Gaskins and the majority jurisdictions found the exclusion to be unambiguous and interpreted it to apply only to claims of product defects, an interpretation that favors the insured. The cases cited by the Carriers acknowledge the term has many varied meanings, yet also found the term to be unambiguous but in a way that favors the insurer. It is hard to conceive of a better case of a claim that is ambiguous or subject to different interpretations. Under this Court's jurisprudence, including *Koikos*, such clauses should be interpreted in favor of the insured.

VII. CONCLUSION.

The Court should answer the Certified Question, NO.

This _____ day of August, 2004.

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CERTIFICATE OF COMPLIANCE

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

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[1] The Carriers' loose reference to an earlier statement in the opinion, that the service must be "wholly unrelated to the product" in order to avoid the exclusion cannot possibly be the holding. Obviously that is not the meaning of *Gaskins* because the product *was* not removed from the injury; it was the direct cause.

[2] The fact that the *Gaskins* interpretation has governed Florida law for two decades, eviscerates the "sky will fall" argument by the Complex Insurance Claims Litigation Association. Contrary to their suggestion, such policies have been written for decades in Florida, under this interpretation of the exclusion, without threat to the insurance industry's existence.