IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2524

MARIA N. GARCIA,

Appellant,

vs.

FEDERAL INSURANCE COMPANY,

Appellee.

INITIAL BRIEF OF APPELLANT

ON QUESTIONS CERTIFIED FROM
THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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INTRODUCTION

This brief is filed on behalf of Maria N. Garcia, who was the plaintiff before the United States District Court for the Southern District of Florida (Case No. 05-20708-CV-PCH) and the appellant in the United States Court of Appeals, Eleventh Circuit (Case No. 05-14720). Ms. Garcia will be referred to as "Garcia." Federal Insurance Company, which was the defendant before the District Court for the Southern District of Florida and the appellee in the Eleventh Circuit, will be referred to as "Federal." Shortened forms of other names will be handled parenthetically.

This case is before this Court on questions certified by the Eleventh Circuit pursuant to Art. V, § 3(b)(6), Fla. Const. The citations to the record (R-___) are to the Record and Docket Entries in the District Court for the Southern District of Florida. The Eleventh Circuit has transmitted that record to this Court. References to the Eleventh Circuit's certification order are cited CO-__.

STATEMENT OF THE CASE AND THE FACTS

Garcia worked as a caregiver and housekeeper for Laura Anderson ("Anderson"), who needed assistance because of her poor health. (CO-2.) Garcia's duties included running errands for Anderson, for which Garcia used a 1994 Volvo owned by Harry Mark Vieth ("Vieth"), Anderson's son-in-law. (CO-2.) On April 18, 2003, while using the Volvo with the permission of Vieth and

Anderson, Garcia pulled up in front of a Publix supermarket where a pedestrian, Gail Archer ("Archer"), was withdrawing cash from an ATM. (CO-2.) When Garcia tried to stop the Volvo, her foot slipped off the brake pedal, and the car struck Archer, causing catastrophic injuries. (CO-2.)

On February 24, 2004, Archer filed suit in the Circuit Court for Miami-Dade County against Vieth, Anderson and Garcia, among others (the "Archer Suit").[1] (CO-2.) The complaint alleged, *inter alia*, direct liability on the part of both Garcia and Anderson:

> In addition to Defendant Garcia's negligent operation of the car, Defendant[s] Vieth, Anderson and Defendant Garcia negligently failed to maintain the car in ways that include but are not limited to allowing the brake pedal to become worn down [to] the bare metal so that the operator's foot would be allowed to slip off and prevent braking under foreseeable circumstances. Defendants Garcia, Vieth and Anderson also failed to adequately maintain the vehicle so as to keep it in a safe condition.

(R1-10A-4.)

Anderson was the named insured under a "Masterpiece" personal liability policy (the "Policy") issued by Federal. (R1-10B-1-70.) The Policy expressly covers "damages a covered person is legally obligated to pay for personal injury or property damage which takes place any time during the policy period… caused by an occurrence." (R1-10B-44.) A covered person, in turn, is defined to include

[1] *Archer v. Vieth*, No. 04-04327-CA24 (Fla. 11th Cir. Ct.).

"you or a family member; any other person … with respect to liability because of acts or omissions of you or a family member; or any combination of the above." (R1-10B-44.) The Policy also imposes on Federal the duty to "defend a covered person against any suit seeking covered damages for personal injury or property damage." (R1-10B-45.)

Anderson tendered the Archer Suit to Federal, which settled the claims against Anderson and procured a release for itself. (CO-3.) Federal made no effort, however, to defend Garcia or to include her in the settlement release. (R1-1-5.) Instead, Federal asserted that Garcia is not a "covered person" under the Policy. (R1-10.) Ultimately, a $7 million judgment was entered against Garcia. (CO-3.)

On March 10, 2005, Garcia filed a complaint for Declaratory Relief and Damages in the United States District Court for the Southern District of Florida, based on Federal's failures to defend and indemnify her. (R1-1.) On May 18, 2005, Federal responded by filing a Motion to Dismiss the Complaint pursuant to FED. R. CIV. P. 12(b)(6). (R1-10.) The District Court issued a Final Order of Dismissal on June 20, 2005, holding that "Garcia is not a "covered person" under the Policy. (R1-22.) Garcia appealed, and the United States Court of Appeals, Eleventh Circuit, heard oral argument on June 8, 2006.

QUESTIONS CERTIFIED

On December 26, 2006, the Eleventh Circuit issued an opinion, per curiam, deferring its decision on Garcia's appeal pending the certification of two questions to this Court:

> 1. Is an insurance policy that defines a covered person as "any other person with respect to liability because of acts or omissions" of the insured ambiguous?
>
> 2. Does an insurance policy providing coverage for an additional insured "with respect to liability because of acts or omissions" of the named insured limit coverage to instances in which the additional insured is vicariously liable for acts of the named insured?

(CO-12.)

The Eleventh Circuit wrote that it seeks clarification from this Court for a number of reasons:

1. The pertinent policy language in the case upon which Federal and the District Court primarily rely, *Consolidation Coal Co. v. Liberty Mutual Insurance Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), is different and "arguabl[y] ... can be distinguished from the language in the instant case." (CO-11.) The language at issue in *Consolidation Coal* contained limiting language that is absent from the Federal policy.

2. While Federal and the District Court assert that this Court's decision in *Container Corp. of America v. Maryland Casualty Co.*, 707 So. 2d 733 (Fla. 1998) adopted the reasoning of *Consolidation Coal*, there actually was "limited

discussion of *Consolidation Coal* in the Florida Supreme Court's decision in *Container*." (CO-11.)

3. After the District Court's order, this Court decided *Taurus Holdings, Inc. v. United States Fidelity & Guaranty Co.*, 913 So. 2d 528 (Fla. 2005), whose methods of construction as well as interpretation of the phrase "arising out of" might "provide the best guide for interpreting the policy" and might bolster Garcia's argument that "'because of' can support liability in instances other than vicarious liability." (CO-7, 9, 11.)

> Given the differences between the two clauses, and the limited discussion of *Consolidation Coal* in the Florida Supreme Court's decision in *Container*, there appears to be some ambiguity regarding the proper interpretation of Federal's Policy. For this reason, along with the Florida Supreme Court's decision in *Taurus*, we are unsure as to what interpretation Florida courts would consider appropriate in the instant case.

(CO-11.)

STANDARD OF REVIEW

"The question of the extent of coverage under the insurance policy in this case [a case before this Court on a certified question] is a question of law and is therefore subject to plenary review." *Coleman v. Fla. Ins. Guar. Ass'n*, 517 So. 2d 686, 690 (Fla. 1988).

SUMMARY OF THE ARGUMENT

The determinative issue in this case is whether Garcia, a housekeeper hired

by a named insured, qualifies as a covered person and thus is insured under a personal liability policy, where a third party claims personal injuries arising in part out of the negligence of both the housekeeper and the named insured, and where the policy language does not expressly restrict coverage to those vicariously liable for a named insured's negligence.

The Federal Policy, by its own terms, covers not only the named insured but also anyone who incurs liability "because of" the acts or omissions of the named insured. When Garcia incurred liability because of an automobile accident attributable to both her negligence and the named insured's, Federal refused to provide coverage for Garcia, maintaining that "because of" means "solely because of vicarious liability for." Florida law decided before and since the Order of Dismissal was entered in this case, however, establishes that this is not the only – and not even the best – construction of this language, and that Garcia is in fact a "covered person" under the Policy.

Federal's policy language, on its face, does not limit coverage to cases of vicarious liability but includes situations where the named insured's fault is in part a cause of liability. The Federal provision lacks the limiting language that many, if not most, other carriers employ when their intent is to attempt to restrict coverage to vicarious liability. Further, courts around the country have held that – even with clearer, more restrictive language employing the words "only" or "solely" – the

policies as a matter of law provide coverage for persons in Garcia's situation.

Some two months after the Order of Dismissal, this Court interpreted "arising out of" policy language closely analogous to the "because of" provision at issue here as a broad phrase that requires a relational link far looser than legal or proximate cause. Rather, the Court held, the phrase should be read to include those whose liability merely "has a connection with" the acts or omissions of the named insured. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528 (Fla. 2005). Under such a construction, Garcia clearly is a covered person.

Further, the two cases relied on by Federal and the trial court actually support the position that Garcia is a covered person under the Policy. In one of the cases (*Container Corp.*), this Court held that a purported additional insured's coverage under a liability policy was ***not*** limited to situations of vicarious liability for the named insured's acts or omissions. In the other case (*Consolidation Coal*), a District Court in Pennsylvania adopted a rationale that, under Florida law, would have compelled the conclusion that Garcia is a covered person.

Federal's policy language is at best ambiguous, requiring Florida courts to construe it in favor of coverage. The very fact that various appeals courts have interpreted the provision in contrary ways is sufficient under Florida law to establish that the language is ambiguous.

Finally, Federal at the very least had – and breached – a duty to defend Garcia, because the underlying complaint alleges facts that potentially bring the suit within policy coverage. Under Florida law, Federal had such a duty even if the allegations in the complaint turned out to be incorrect or meritless.

For these reasons, the first certified question – is the policy language ambiguous? – must be answered in the affirmative, while the answer to the second – is coverage limited to instances of vicarious liability? – is "no."

ARGUMENT

I. THE POLICY LANGUAGE, ON ITS FACE AND UNDER WELL-ESTABLISHED CASE LAW, DOES NOT RESTRICT COVERAGE TO VICARIOUS LIABILITY

A. The contract, as written, includes Garcia as a covered person

The Policy covers "damages a covered person is legally obligated to pay for personal injury or property damage which takes place any time during the policy period… caused by an occurrence." Under the Policy, Federal also promises to "defend a covered person against any suit seeking covered damages for personal injury or property damage." The Policy defines a "covered person" as "you or a family member; any other person or organization with respect to liability because of acts or omissions of you or a family member; or any combination of the above." As noted above, the Archer Complaint alleges direct negligence by Garcia and direct negligence by Anderson.

On its face, the language of the policy definition does not limit coverage to situations where the additional insured's liability is based solely on his or her vicarious responsibility for the negligence of the named insured. Nowhere in the provision is the phrase "vicarious liability" or its equivalent found. Nowhere does the provision employ a restrictive term such as "only" or "solely," even though many insurers' policies do, as discussed below.

Having failed to expressly exclude persons in Garcia's foreseeable position, Federal now wants the courts to rewrite the policy language so as to limit the definition of "covered person" to those who are blameless but vicariously liable for the negligence of the named insured. As this Court's decision in *Taurus* shows, rewriting insurance policies is something Florida courts will not do. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528 (Fla. 2005). In *Taurus*, the Court re-emphasized its long-held position "that insurance contracts are interpreted according to the plain language of the policy" and "that courts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Id.* at 532 (punctuation adapted).

The Court further stressed that the actual language of the policy is what counts: "in interpreting policies, the language is key," *id.* at 535; "the language of the policy is the most important factor," *id.* at 537. The Court expressly declined

"to read into the text a requirement that is simply not there." [2] *Id*. Here, the language Federal seeks to enforce is simply not there.

B. Federal chose not to include restrictive language used by other insurers

While Federal is attempting now to pencil in limitations, in part by relying on cases involving better policy language, other insurers have in fact relied on clearer language when their intent was to restrict the applicability of a "covered person" provision.[3] Every case Federal has cited on the vicarious liability issue involved policy language that contains the limiting phrase "but only" or "only if" – restrictive terms that are absent in the Federal provision. [4] Moreover, two of the cases cited by Federal – *Acceptance Insurance Co. v. Syufy Enterprises,* 81 Cal. Rptr. 2d 557 (Cal. Ct. App. 1999) and *Merchants Insurance Co. of New Hampshire, Inc. v. United States Fidelity & Guaranty Co.*, 143 F.3d 5 (1st Cir. 1998) – hold that, *even with the more restrictive "but only" language,* the policies

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[2] In *Taurus*, 913 So.2d at 537, the court specifically commented on the absence of a single word – "defective" – as informing its interpretative holding.

[3] See Attachment "A" for representative cases where insurers defined a "covered person" or "insured person" as "any other person or organization ***but only*** with respect to his or its liability because of acts or omissions of an insured." A good example is *Consolidated Coal*, a case this Court referred to in *Container Corp*. as having clearer language.

[4] See Attachment "B" for an enumeration of those cases.

at issue do not limit additional-insured coverage to situations where the additional insured is vicariously liable for acts or omissions of the named insured. These cases serve to confirm that clearer language was available to Federal, had Federal chosen to adopt it. As this Court wrote in *Auto-Owners Insurance Co. v. Anderson,* 756 So. 2d 29 (Fla. 2000):

> The lack of clarity as to the meaning of the Auto-Owners' [the insurer's] limitation of liability clause is even more apparent when compared with recent out-of-state cases that Auto-Owners actually cites in support of its position. In contrast to the clause drafted by Auto-Owners in this case, the limiting provisions of the insurance policies set forth in the recent reported decisions include an introductory qualifying clause that clearly and unambiguously explains that liability coverage is limited to a certain amount "regardless" of the number of vehicles involved in the accident.
>
> The presence of these qualifying clauses evidences an established custom in the insurance industry as to the language used by insurers in drafting clauses where the intent is to limit liability coverage to a single amount, even though multiple insured vehicles are involved in an accident. *See, e.g., National Merchandise Co. v. United Serv. Auto. Ass'n,* 400 So. 2d 526, 530 (Fla. 1st DCA 1981) (when a court interprets insurance policy language, the court may consider established custom and usage in the insurance industry). As these out-of-state cases demonstrate, when multiple insured vehicles are involved in a single accident, a limitation of liability can be achieved by the simple use of a qualifying clause. In contrast, the language in the Auto-Owners' policy does not contain a qualifying clause, nor does it otherwise clearly and unambiguously limit such liability. A comparison of the language in this policy with the language included in the policies of the out-of-state cases cited by Auto-Owners supports the conclusion that if Auto-Owners had intended to prevent stacking of coverages when more than one covered vehicle was involved in an accident, it could have indicated its intentions clearly and unambiguously by using the qualifying clause "regardless of the number of insured vehicles involved in the accident."

Anderson, 756 So. 2d at 36 (citations omitted). Here, the policy language in the cases cited by Federal supports the conclusion that if Federal had intended to limit coverage to instances of vicarious liability, it could have indicated its intentions clearly and unambiguously by using restrictive language.

C. Under *Taurus,* the policy language must be interpreted broadly in favor of coverage

Because Federal eschewed limiting language like that employed by other carriers, "covered person" must be read broadly in favor of coverage under Florida law to include those whose liability "has a connection with" the acts or omissions of the named insured. Read thusly, Garcia is unquestionably a covered person, as her liability is in part a result of Anderson's failure to maintain the car that Garcia was directed to drive.

The principle that coverage grants in insurance contracts are to be interpreted broadly in favor of coverage was reaffirmed by this Court in *Taurus.* "[T]he language of the policy should be liberally construed to effect broad coverage." *Taurus,* 913 So. 2d at 533. In *Taurus,* the Eleventh Circuit, by certified question, had asked this Court to construe the phrase "arising out of" in a policy provision that excluded coverage for "all bodily injury and property damage occurring away from premises you own or rent and arising out of your product."

The Court surveyed Florida and foreign decisions and concluded that the phrase unambiguously "means 'originating from,' 'having its origin in,' 'growing

out of,' 'flowing from,' 'incident to,' or 'having a connection with.'" *Id*. at 532-33 (citing *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963 (Fla. 5th DCA 1996); *National Indem. Co. v. Corbo*, 248 So. 2d 238 (Fla. 3d DCA 1971); *Allstate Ins. Co. v. Safer*, 317 F. Supp. 2d 1345 (M.D. Fla. 2004); *Ohio Cas. Ins. Co. v. Continental Cas. Co.*, 279 F. Supp. 2d 1281 (S.D. Fla. 2003); *American Sur. & Cas. Co. v. Lake Jackson Pizza, Inc.*, 788 So. 2d 1096 (Fla. 1st DCA 2001)). The Court further stated that two of its earlier decisions, *Race v. Nationwide Mutual Fire Insurance Co.*, 542 So. 2d 347 (Fla. 1989) and *Government Employees Insurance Co. v. Novak*, 453 So. 2d 1116 (Fla. 1984), stand for the proposition that the phrase "does not equate to proximate cause – at least in coverage provisions." *Taurus*, 913 So. 2d at 533.

Turning its analysis to foreign law, the Court cited more than a score of appellate decisions and treatises and concluded that "[m]ost other jurisdictions interpret the phrase ... to encompass meaning broader than mere proximate cause." *Id*. at 535. "Therefore, the law in most other states is consistent with the broad interpretation of the phrase 'arising out of' in *Hagen* and other Florida cases." *Id*. at 536. Such an interpretation also is consistent with the Eleventh Circuit's recent decision in *Guideone Elite Insurance Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317 (11th Cir. 2005), in which the court wrote:

> The Florida courts have already defined and applied the term "arising out of" as "broader in meaning than the term 'caused by' and

> mean[ing] 'originating from,' 'having its origin in,' 'growing out of,' 'flowing from,' 'incident to,' or 'having connection with.'" ... This is consistent with the general consensus of other jurisdictions that the phrase "arising out of" requires some causal connection to the injuries suffered, but does not require proximate cause in the legal sense.

Id. at 1327 (citations omitted). Similarly, the former Fifth Circuit[5] held in *Red Ball Motor Freight, Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin*, 189 F.2d 374, 378 (5th Cir. 1951) that "arising out of" "are not words of narrow and specific limitation, but are broad, general, and comprehensive terms effecting broad coverage." *Accord St. Paul Fire & Marine Ins. Co. v. Thomas*, 273 So. 2d 117 (Fla. 4th DCA 1973); *National Indem. Co. v. Corbo*, 248 So. 2d 238 (Fla. 3d DCA 1971); *Schmidt v. Utilities Ins. Co.*, 182 S.W.2d 181 (Mo. 1944).

In dismissing Garcia's complaint with prejudice, the trial court did not have the benefit of this Court's holding in *Taurus* that policy language with the same goal as the "because of" phrase at issue here carries a broad, lay meaning, not a crabbed, legalistic one.[6] Neither the District Court, the Eleventh Circuit nor the

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[6] In common usage, the preposition "because of" means "on account of" or "by reason of." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 163 (3d ed. 1992). The phrase derives from the Middle English "*bi cause of*," which translates to "by reason of" and descends, through Old French, from the Latin "*causa*," meaning "reason" or "purpose."

parties in this action unearthed any authority directly interpreting "because of" in the context in which it is used in the Policy; therefore, *Taurus* provides the best guidance available as to the methods of construction to be employed and the likely interpretation of "because of" under Florida law. While Federal has attempted to dispense with *Taurus* as irrelevant, the Eleventh Circuit readily grasped the decision's import in the certifying opinion. (CO-7-11.)

The principles expounded in *Taurus* apply with even greater vigor to the provision at issue here because courts have widely held, and common sense dictates, that such omnibus-insured clauses are plainly intended to expand coverage in that they provide coverage to persons other than the named insured. *See, e.g., DeJarnette v. Federal Kemper Ins. Co.,* 475 A.2d 454, 457 (Md. 1984) (holding that such clauses are designed to expand coverage and, therefore, must be construed liberally in favor of coverage); *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 175 S.E.2d 478, 480 (W. Va. 1970) ("The ultimate goal of such [a] clause is to afford additional protection to the general public. To enhance the attainment of that goal it is well recognized by the authorities that the omnibus clause should be given a liberal construction."). Here, the Court does not need to stretch the language to bring Garcia within the Policy's omnibus clause; the Policy, by its own express terms, includes her in its coverage.

II. THE CASES RELIED UPON BY FEDERAL ACTUALLY SUPPORT GARCIA

In its decision for Federal, the trial court cited only one Florida case – *Container Corp. of America v. Maryland Casualty Co.*, 707 So. 2d 733 (Fla. 1998) – in concluding that "Garcia would be covered only if[7] she is liable because of the acts or omissions of Anderson." (R1-22-5-6.) In *Container Corp.*, however, this Court held that position to be plainly contrary to Florida law. Specifically, the Court held that a plant owner's coverage as an additional insured under a contractor's liability policy was ***not*** limited to situations where the plant owner was vicariously liable for the contractor's acts or omissions. Instead, the Court held that coverage extended to the plant owner's liability for its own negligence. *Id.* at 736. It did so in no uncertain terms:

> Had Maryland [the insurer] wished to limit Container's coverage to vicarious liability, it could have done so by clear policy language. Because the endorsement in the instant case contains no limiting language, we hold that Container was entitled to coverage under the Maryland policy for its own negligence.

Id. at 736 (citations omitted).

The District Court also cited a case applying Pennsylvania law, *Consolidation Coal Co. v. Liberty Mutual Insurance Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), as "persuasive authority," (R1-22-5), although the case undercuts

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[7] It is noteworthy that the District Court found it necessary to use the phrase "only if" to convey the purported meaning of the Federal provision, which lacks any such limiting terms.

Federal's position. In *Consolidation Coal,* which was referenced by the Eleventh Circuit in its certifying opinion, the court concluded that "the phrase 'but only with respect to the acts or omissions' used in the endorsement to the insurance policy is ambiguous" – a provision that, owing to the added phrase "but only," is less ambiguous and more narrow than Federal's.[8] *Id*. at 1295. Under Florida law, the analysis would end there, as a court would have no choice but to hold that there was coverage as a matter of law. *See State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So. 2d 1072, 1076 (Fla. 1998); *Vector Products, Inc. v. Hartford Fire Ins. Co.,* 397 F.3d 1316, 1319 (11th Cir. 2005); *State Farm Fire & Cas. Co. v. Steinberg,* 393 F.3d 1226, 1230 (11th Cir. 2004). The court in *Consolidation Coal,* however, was applying the law of Pennsylvania, which, unlike Florida, does not adhere to *contra proferentem*. Under Pennsylvania law, a court confronted with ambiguous language must attempt to divine the intent of the contracting parties, which in that case included a collateral indemnity undertaking. So, while

[8] The Court in *Container Corp*. cited to *Consolidation Coal* for the proposition that, "[h]ad the insurer wished to limit ... coverage to vicarious liability, it could have done so by clear policy language," *Container Corp.,* 707 So. 2d at 736, and parenthetically describes the case as "construing coverage language as insuring the additional insured only for vicarious liability." *Id*. The court in *Consolidation Coal* actually found the policy language ambiguous – hardly a ringing endorsement of its clarity.

the insurer prevailed in Pennsylvania, the result in Florida would be to the contrary.

Further, as the Eleventh Circuit noted in its Order, the court in *Consolidation Coal* based its interpretation "on the entirety" of the language in the relevant coverage clause and that language is distinguishable from Federal's, in that Federal did not limit its provision with the key phrase "but only." (CO-11.)

Similarly, the only Florida cases other than *Container Corp*. relied on by Federal (but not by the trial court) – *Chrysler Credit Corp. v. United States Automobile Association,* 625 So. 2d 69 (Fla. 1st DCA 1993) and *Oliver v. United States Fidelity & Guaranty Co.,* 309 So. 2d 237 (Fla. 2d DCA 1975) – provide no support for the carrier's position. *Chrysler Credit Corp*. was decided on the basis of an exclusion, not a coverage provision. 625 So. 2d at 74. Moreover, the insurer in *Chrysler Credit Corp*., unlike Federal, did use restrictive language in its definition of a "covered person" – "any person or organization ***but only with respect to*** legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part." *Id*. at 70 (emphasis added). *Oliver*, as well, supports Garcia, not Federal.[9] The court held in *Oliver* that a purported insured was covered

[9] This point is reinforced by the fact that the trial court stated that "*Oliver* ... is inapposite." (R1-22-6.) The trial court, however, apparently was under the mistaken impression that it was Garcia rather than Federal that was relying on *Oliver*. (R1-22-6.)

because the policy definition of "Persons Insured" was ambiguous.[10] 309 So. 2d at 238. The court wrote:

> After reading the pertinent provisions of the policy, we cannot agree with the contention of United [the insurer] that Oliver is not afforded coverage as an insured under the policy. To paraphrase a well known saying, the small print giveth, and the small print taketh away….
>
> We submit that the language of these paragraphs is hopelessly irreconcilable and inconsistent with each other. In such circumstances, courts have adopted the construction which provides the most coverage. It is a well-settled axiom that ambiguities in an insurance policy are to be construed against the insurer.
>
> The terms and provisions of the policy in question were drafted and selected by United, not Oliver or this court.

Id. at 238-39 (citations omitted).

III. THE POLICY LANGUAGE IS, AT BEST, AMBIGUOUS

A. Under Florida law, a term is ambiguous if the insurer could have used clearer language

Under Florida law, a term is ambiguous if it is susceptible to two or more reasonable interpretations. *Fayad v. Clarendon Nat'l Ins. Co.,* 899 So. 2d 1082 (Fla. 2005); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 165 (Fla. 2003); *Anderson*, 756 So. 2d at 34. If the policy contains ambiguities, courts must liberally interpret the ambiguous language in favor of the policyholder and strictly against the insurance company that drafted the policy. *Tobin v. Michigan Mut. Ins.*

[10] The policy includes coverage for "any other person or organization but only with respect to his or its liability because of acts or omissions of the Named Insured." *Oliver,* 309 So. 2d at 237-38.

Co., 31 Fla. L. Weekly 5875 (Fla. Dec. 21, 2006); *CTC Dev. Corp.*, 720 So. 2d at 1076; *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998); *Woodall v. Travelers Indem. Co.*, 699 So. 2d 1361, 1364 (Fla. 1997); *Vector Products*, 397 F.3d at 1319; *Steinberg*, 393 F.3d at 1230.

To establish that a policy term is ambiguous, the putative insured needs to show neither that her interpretation is correct nor that the insurer's interpretation is unreasonable; she must merely demonstrate that the insurer's interpretation is not the only reasonable interpretation; *i.e.*, there exists an alternative interpretation that is not unreasonable. *Continental Ins. Co. v. Roberts*, 410 F.3d 1331, 1333 (11th Cir. 2005) ("the existence of two competing, reasonable interpretations establishes ambiguity"). Accordingly, if the policy is open to two reasonable interpretations, one in favor of coverage and one restricting coverage, the court will resolve the ambiguity by adopting the reasonable interpretation that provides coverage as opposed to the reasonable interpretation that would limit coverage. *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785-86 (Fla. 2004); *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 271 (Fla. 2003); *Anderson*, 756 So. 2d at 33-34. Here, the policy language reasonably includes within its coverage a person such as Garcia, whose liability resulted, in whole or in part, from the named insured's negligence. That, in fact, is the most reasonable reading of the provision, though it need merely be "not unreasonable" in order to establish ambiguity.

The fact that courts disagree over the interpretation of a term demonstrates that the term is ambiguous. *Security Ins. Co. of Hartford v. Investors Diversified Ltd.*, 407 So. 2d 314, 316 (Fla. 4th DCA 1981) ("The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that [various courts] have arrived at opposite conclusions from a study of essentially the same language."); *Roberts*, 410 F.3d at 1333 ("All they [putative insureds] have to show is that their position is reasonable, and a net difference of … court of appeals opinions … is enough to do that."). In determining whether policy language is ambiguous, Florida courts consider whether clearer language was available that the insurer could have used to remove the interpretive problem. *Anderson*, 756 So. 2d at 36.

B. Florida court finds a provision that is clearer than Federal's to be ambiguous

A Florida appeals court, in *Florida Power & Light Co. v. Penn American Insurance Co.*, 654 So. 2d 276 (Fla. 4th DCA 1995), a case of first impression,[11] expressly held that an "additional insured" definition more precise than Federal's "covered person" definition is ambiguous as a matter of law and that the policy language, therefore, did not limit coverage to cases of vicarious liability. The policy in *Florida Power & Light* defined an "additional insured" as:

[11] *See Florida Power & Light*, 654 So. 2d at 278.

> (a) any person, organization, trustee or estate to whom or to which the named insured is obligated by virtue of a written contract or permit to provide insurance such as is afforded by the terms of this policy, but only with respect to operations by or on behalf of the Named Insured or to facilities used by the Named Insured and then only to the extent of the "coverage required" by such contract and for the "limits of liability specified in such contract", but in no event for insurance not afforded by this policy nor for limits of liability in excess of the applicable limits of liability of this policy.

Id. at 277. After analyzing the provision, the court concluded:

> In the instant case, the pertinent policy language merely reads "but only with respect to operations by or on behalf on the Named Insured," Eastern. No language in the provision requires fault on behalf of Eastern before FPL can be considered an additional insured. Thus, the language … can only be considered ambiguous at best…. [B]ecause Penn America did not utilize specific language limiting coverage to the vicarious liability situation and because the language actually utilized is ambiguous at best, the "additional insured" provision must be construed against Eastern and in favor of FPL, the insured. Consequently, the trial court erred in entering a summary judgment in favor of Penn America determining that FPL was not an additional insured under the policy.

Id. at 279.

C. Courts elsewhere find similar provisions ambiguous

In *Dillon Companies, Inc. v. Royal Indemnity Co.*, 369 F. Supp. 2d 1277 (D. Kan. 2005), the court rejected the interpretation ascribed to "acts or omissions" set forth in *Consolidation Coal* and relied upon by Federal, determining that "the limited clause of the additional endorsement is ambiguous because it is capable of two reasonable interpretations." *Id.* at 1284. The court reasoned that the interpretation provided by *Consolidation Coal* required the addition of words and

concepts not found expressly within the insuring clause, and rendered the policy's additional insured endorsement "mere surplusage." *Id.* at 1285-86.

> [Consolidation Coal] ignores the fact that a narrow interpretation of the endorsement, limiting coverage to vicarious liability, renders the entire endorsement mere surplusage. The Tenth Circuit, interpreting Wyoming law, stated:
>
> > Where the additional insured is held no more than vicariously liable for the acts of the named insured, the additional insured would have an action for indemnity against the primary wrongdoer. Thus, an endorsement that provides coverage only for the additional insured's vicarious liability may be illusory and provide no coverage at all. In this light, it is obvious that additional insureds expect more from an endorsement clause than mere protection from vicarious liability.

Id. (quoting *Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.,* 243 F.3d 1232, n.5 (10th Cir. 2001)). The same is true here. The Federal provision at issue would amount to nothing more than surplusage if it applied only to instances of vicarious liability, because the putative additional insured already has a cause of action against the named insured, which the insurer would have to cover. *See United States Fire Ins. Co. v. Aetna Life & Cas.*, 684 N.E.2d 956, 999 (Ill. App. Ct. 1997) and *Maryland Cas. Co. v. Regis Ins. Co.*, No. CIV.A. 96-cv. 1790, 1997 WL 164268, at *5-6 (E.D. Pa. April 9, 1997),[12] both of which find *Consolidation*

[12] It is noteworthy that *Regis* came 20 years after *Consolidation Coal* and was decided by a court in a sister district in Pennsylvania.

Coal to be inconsistent with the interpretive rules applicable to insurance policies, and applied by Florida courts.

In *Syufy Enterprises,* a California appeals court noted that it was interpreting policy language "similar"[13] to that at issue in *Florida Power & Light* and held that, regardless of whether the provision is ambiguous, the language is broad enough to include situations that do not involve vicarious liability, notwithstanding the addition of the limiting term "only." *Syufy Enters.,* 81 Cal. Rptr. 2d at 558. That conclusion, the court stated, has been reached by "the great majority of courts in other jurisdictions where such issues have been considered." *Id*.

The insurer in *Syufy Enterprises,* like Federal here, argued that an additional insured is not covered for liability arising out of his or her own negligence. Significantly, the *Syufy Enterprises* court expressly rejected that argument, stating, "The fact that the defect was attributable to [the additional insured's] negligence is irrelevant, since the policy language does not purport to allocate coverage according to fault," *id*. at 561, adding:

> Insurance companies are free to, and commonly have, issued additional insured endorsements that specifically limit coverage to situations in which the additional insured is faced with vicarious liability for negligent conduct by the named insured…. [W]hen an

[13] *Syufy Enterprises,* 81 Cal. Rptr. 2d at 560. The policy provision at issue in *Syufy Enterprises* stated that a person was an additional insured "but only with respect to liability arising out of" the named insured's work – the same language found ambiguous by the Court in *Consolidated Coal. Id.* at 558.

> insurer chooses not to use such clearly limited language in an additional insured clause, … the additional insured is covered without regard to whether injury was caused by the named insured or the additional insured.

Id. at 562-63.

Likewise, the Tenth Circuit has held that similar policy language is ambiguous and does not apply exclusively to vicarious liability. In *McIntosh v. Scottsdale Insurance Co.*, 992 F.2d 251 (10th Cir. 1993), the Tenth Circuit was applying the law of Kansas, which, like Florida, employs *contra proferentem* to resolve ambiguities in policy language. In *McIntosh*, Judge Tacha wrote:

> At best, the phrase, "but only with respect to liability arising out of [named insured's] operations" is ambiguous as to whose negligence is covered and whose negligence is excluded from coverage. Because this ambiguous language purports to limit coverage, we must construe it narrowly…. [W]e believe that the Kansas courts, like courts in other jurisdictions that liberally construe ambiguous insurance policy provisions in favor of the insured, would conclude that the additional insured endorsement does not limit the policy's coverage to cases where [an additional insured] is held vicariously liable for [the named insured's] negligence.

Id. at 254 (citations omitted). *See also Fircrest Poultry Farms Co. v. State of Oregon*, 728 P.2d 968 (Or. Ct. App. 1986) (holding that driver and his employer were covered under liability policy issued to vehicle's owner, where the policy covered "[a]nyone liable for the conduct of an insured described above is an insured but only to the extent of that liability"); *Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, No. LX-1549-1, 1995 WL 1055940 (Va. Cir.

Ct. July 27, 1995) (holding that a similar provision was not limited to vicarious liability).[14]

IV. BECAUSE THE COMPLAINT INCLUDES ALLEGATIONS THAT ANDERSON'S NEGLIGENCE MAY HAVE LED TO GARCIA'S LIABILITY, FEDERAL HAS, AT THE VERY LEAST, A DUTY TO DEFEND GARCIA.

It is well settled in Florida that an insurer's duty to defend "is determined solely by the claimant's complaint if suit has been filed." *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 9 (Fla. 2004), *reh'g denied* Jan. 31, 2005. An insurer's duty to defend arises when the complaint alleges facts that potentially bring the suit within policy coverage. *CTC Dev. Corp.*, 720 So. 2d at 1077 n.3; *Lime Tree Village Cmty. Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405-06 (11th Cir. 1993). The insurer must defend even if the allegations in the complaint are factually incorrect or meritless. *Sunshine Birds & Supplies, Inc. v. U.S. Fid. & Guar. Co.*, 696 So. 2d 907, 910 (Fla. 3d DCA 1997). "Moreover, … any doubt with regard to the duty to defend must be resolved in favor of the insured." *Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 444 (Fla. 2005). That the insurer's duty to defend is governed solely by the allegations of the complaint was reaffirmed recently in *Rad Source Technologies, Inc. v. Colony National Insurance Co.*, 914 So. 2d 1006 (Fla. 4th DCA 2005).

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[14] The court ultimately held, however, that there was no coverage because of a separate exclusion. Reversed on other grounds, 475 S.E.2d 264 (Va. 1996).

> [A] duty to defend claims against an insured is greater than an insurer's duty to indemnify. *See First Am. Title Ins. Co. v. Nat'l Union Fire Ins. Co.*, 695 So. 2d 475, 476 (Fla. 3d DCA 1997). "All doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured." *Grissom v. Commercial Union*, 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992). An insurer must defend a lawsuit against its insured if the underlying complaint, when fairly read, alleges facts which create potential coverage under the policy. *See Int'l Surplus Lines Ins. Co. v. Markham*, 580 So. 2d 251, 253 (Fla. 2d DCA 1991).

Id. at 1007. Even more recently, the Eleventh Circuit endorsed the interpretation advanced by Garcia regarding the breadth of an insurer's duty to defend under Florida law. "All doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured." *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1292 (11th Cir. 2006) (quoting *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 813 (Fla. 1st DCA 1985)).

These principles apply where, as here, the insurer questions whether the person seeking coverage qualifies as an additional insured. *Continental Cas. Co. v. Charleston*, 704 So. 2d 137 (Fla. 1st DCA 1997).

> Appellant [insurer] argues that it did not have a duty to defend Floridin [the putative additional insured] because, under the actual facts of the primary case, Floridin did not qualify for coverage as an additional insured under the ... policy. We hold, however, that Appellant's duty to defend Floridin arose because a fair reading of the complaint revealed facts ... indicating that the policy would potentially cover Floridin's liability. The law is well settled on this point. *National Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533, 536 (Fla. 1977); *Fun Spree Vacations, Inc. v. Orion Ins. Co.*, 659 So.

> 2d 419, 421 (Fla. 3d DCA 1995); *Psychiatric Assoc. v. St. Paul Fire & Marine Ins. Co.*, 647 So. 2d 134, 137 (Fla. 1st DCA 1994); *Grissom v. Commercial Union Ins. Co.*, 610 So. 2d 1299, 1306-07 (Fla. 1st DCA 1992); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810 (Fla. 1st DCA 1985). Thus, the trial court properly entered summary judgment for Appellee Floridin.

Id. at 137. Accordingly, because the underlying complaint alleges facts that potentially bring the suit within policy coverage, *CTC Development Corp*., 720 So. 2d at 1077 n.3, Federal must defend even if the allegations in the complaint are factually incorrect or meritless, *Sunshine Birds*, 696 So. 2d at 910.

CONCLUSION

As Garcia has demonstrated above, the Policy covers not only Anderson but also Garcia, who incurred liability at least in part because of the acts or omissions of Anderson. The "covered person" provision was designed to expand coverage, but Federal has tried to turn it into a restriction – "because of vicarious liability for" – that appears nowhere in the Policy and runs counter to the applicable case law, including this Court's decision in *Taurus*. As the Court stated, "[I]n interpreting policies, the language is key," *Taurus*, 913 So. 2d at 535, and "the language of the policy should be liberally construed to effect broad coverage." *Id*. at 533. Further, the authority relied on by Federal and the trial court actually supports the position that Garcia is covered under the Policy. At best, the Federal provision is ambiguous, which dictates that it be interpreted in Garcia's favor. For these reasons, the first question certified by the Eleventh Circuit – is the policy

language ambiguous? – must be answered in the affirmative, while the second – is coverage limited to instances of vicarious liability? – must be answered "no."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail on this ___ day of January, 2007, to counsel for Federal: Irene Porter, Esq., Jennifer A. Kerr, Esq., Mark Hicks, Esq., **Hicks & Kneale, P.A.,** 799 Brickell Plaza, Suite 900, Miami, FL 33131.

_____
Michael F. Huber, Esq.

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(2).

_____
Michael F. Huber, Esq.

ATTACHMENT "A"

"But only" language:

Merchants Ins. Co. of N.H., Inc. v. U.S. Fid. & Guar. Co., 143 F.3d 5 (1st Cir. 1998);

J&N Logging Co. v. Rockwood Ins. Co., 848 F.2d 1438 (8th Cir. 1988);

Sun Co. v. Brown & Root Braun, Inc., Nos. CIV. A. 98-6504, CIV. A. 98-5817, 2001 WL 8864 (E.D. Pa. Jan. 4, 2001);

Liberty Mut. Fire Ins. Co. v. Canal Ins. Co., 50 F. Supp. 2d 591 (S.D. Miss. 1998);

Canal Ins. Co. v. T.L. James & Co., 911 F. Supp. 225 (S.D. Miss. 1995);

Transport Ins. Co. v. Post Express Co., No. 91 C 5750, 1993 WL 135461 (N.D. Ill. 1993);

Vulcan Materials Co. v. Cas. Ins. Co., 723 F. Supp. 1263 (N.D. Ill. 1989);

Canal Ins. Co. v. Earnshaw, 629 F. Supp. 114 (D. Kan. 1985);

Consolidation Coal Co. v. Liberty Mut. Ins. Co., 406 F. Supp. 1292 (W.D. Pa. 1976);

Sentry Ins. Co. v. Pacific Indem. Co., 345 So. 2d 283 (Ala. 1977);

Sprouse v. Kall, No. 82388, 2004 WL 170451 (Ohio Ct. App. Jan. 29, 2004);

Acceptance Ins. Co. v. Syufy, 81 Cal. Rptr. 2d 557 (Cal. Ct. App. 1999);

Transportation Ins. Co. v. George E. Failing Co., 691 S.W.2d 71 (Tex. App. 1985);

Bituminous Cas. Corp. v. North River Ins. Co., 361 N.E.2d 60 (Ill. App. Ct. 1977);

Lusk v. Aetna Cas. & Sur. Co., 295 So. 2d 238 (La. Ct. App. 1974);

Domino's Pizza, Inc. v. Commerce Ins. Co., No. 97-6090-B, 2000 WL 1738370 (Mass. Super. Oct. 10, 2000);

Donegal Mut. Ins. Co. v. Action Bus. Ctr., No. C.A. 97C-06-029, 1999 WL 1568618 (Del. Super. Ct. Oct. 21, 1999);

Long Island Lighting Co. v. Hartford Accident & Indem. Co., 350 N.Y.S.2d 967 (N.Y. Sup. Ct. 1973).

See also Pawlick v. New Jersey Auto. Full Ins. Underwriting Ass'n, 666 A.2d 186 (N.J. Super. Ct. 1995) (where the insurer employed "only if" language).

ATTACHMENT "B"

Cases cited by Federal containing limiting phrase "but only" or "only if":

Merchants Ins. Co. of N.H., Inc. v. U.S. Fid. & Guar. Co., 143 F.3d 5 (1st Cir. 1998);

J&N Logging Co. v. Rockwood Ins. Co., 848 F.2d 1438 (8th Cir. 1988);

Sun Co., v. Brown & Root Braun, Inc., Nos. CIV. A. 98-6504, CIV. A. 98-5817, 2001 WL 8864 (E.D. Pa. Jan. 4, 2001);

Liberty Mut. Fire Ins. Co. v. Canal Ins. Co., 50 F. Supp. 2d 591 (S.D. Miss. 1998);

Transport Ins. Co. v. Post Express Co., Inc., No. 91 C 5750, 1993 WL 135461 (N.D. Ill. 1993);

Vulcan Materials Co. v. Cas. Ins. Co., 723 F. Supp. 1263 (N.D. Ill. 1989);

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Consolidation Coal Co. v. Liberty Mut. Ins. Co., 406 F. Supp. 1292 (W.D. Pa. 1976);

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