IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2524

MARIA N. GARCIA,

Appellant

vs.

FEDERAL INSURANCE COMPANY,

Appellee

REPLY BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

INTRODUCTION

Maria N. Garcia refers the Court to her Initial Brief for a full recitation of the facts, the issues and her arguments, and will employ the same conventions in referring to the parties and the Record. The intent of this reply is not to reargue Garcia's case but to correct the errors of law and fact in Federal's Answer Brief (AB).

ARGUMENT

Federal maintains that the meaning of the coverage grant here at issue "is clear and unambiguous" (AB: 10), yet it took the insurer 50 pages to try – and ultimately fail – to imbue its policy language with clear meaning. It was just such language that prompted this Court to write:

> 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.

Hartnett v. Southern Ins. Co., 181 So. 2d 524, 528 (Fla. 1965).

I. FEDERAL CONFUSES THE FACTS AS WELL AS THE LAW

Federal's revisionism is not limited to its policy language but also embraces the facts of the underlying case. Federal states that Anderson's liability is only vicarious, arising solely out of Garcia's negligence, and that Garcia's liability is

only direct, arising solely out of her own negligence. (AB: 6, 11.) The underlying complaint, however, expressly alleges that Anderson was directly negligent in failing to maintain the Volvo, which Anderson's family allowed Garcia to drive while running errands for Anderson and which Garcia was driving, solely for the benefit of Anderson, at the time of the incident.[1] (R1-10B-1-70.) Federal's misstatement is important because the policy language is reasonably read to cover situations where the named insured's fault is in part a cause of liability, and not, as Federal would have it, *only* where the additional insured incurs liability vicariously for the negligence of the named insured.

II. FEDERAL MISAPPREHENDS THIS COURT'S LIMITED TREATMENT OF *CONSOLIDATION COAL* IN *CONTAINER CORP.*

Federal devotes more than a dozen pages to the argument that this Court resolved the determinative issue at hand in *Container Corp. of America v. Maryland Casualty Co.*, 707 So. 2d 733 (Fla. 1998), through a parenthetical reference to yet another case, *Consolidation Coal Co. v. Liberty Mutual Insurance Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976). (AB: 7-11, 29-31, 34-36, 39-40, 42.) Although one would never know it from reading Federal's Answer Brief, this Court in *Container Corp.* did not analyze, or even discuss, *Consolidation Coal.*

[1] It is far more plausible that Anderson, entrusted with her son-in-law's car, actually owed the maintenance obligation, rather than Garcia, a housekeeper.

The terse reference to *Consolidation Coal* in *Container Corp*. is, in full: "*See Consolidation Coal Co. v. Liberty Mut. Ins. Co.,* 406 F. Supp. 1292 (W.D. Pa. 1976) (construing coverage language as insuring the additional insured only for vicarious liability)." That's it – a citation and a 12-word parenthetical.

Federal then asserts that this Court in *Container Corp.* concluded that the phrase "acts or omissions" limits the coverage provision to cases of vicarious liability. Not so. The clearer language that the *Container Corp*. Court cited to in *Consolidation Coal* included the restrictive phrase "but only," which, unlike "acts or omissions," is on its face a limitation that is conspicuously absent from the Federal provision. "But only" is explicit limiting language that Federal could have used – and that many, if not most, insurers do use – to restrict the meaning of "covered person." *See Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 36 (Fla. 2000) (courts may consider whether more precise language was available to avoid ambiguity).

III. FEDERAL'S POSITION FINDS NO SUPPORT IN THE CASE LAW

In stating that Garcia has "cited no cases interpreting the Federal Policy language" (AB: 13), Federal ignores the adage about those dwelling in glass houses: It has cited no such cases, and ignores the fact that both the United States District Court and the Eleventh Circuit found that no such cases exist. (CO: 10.)

That is in part why the Eleventh Circuit certified this case to this Court.[2]

Federal, however, claims to be more perceptive than those courts, boldly claiming manifold support for its coverage-defeating interpretation. For this proposition, it instead cites to a raft of cases that involved different (and arguably clearer) policy language,[3] were decided against an insurer in Federal's position,[4] or involved questions that bear no connection to the issues in this case.[5] That the law

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[2] A likely factor in the absence of court interpretations of the language employed by Federal is that other insurers have chosen to use clearer, more explicit language, as discussed above and below.

[3] *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); *Transportation Ins. Co. v. George E. Failing Co.*, 691 S.W.2d 71 (Tex. App. 1985); *Long Island Lighting Co. v. Hartford Accident & Indem. Co.*, 350 N.Y.S.2d 967 (N.Y. Sup. Ct. 1973); *Vulcan Materials Co. v. Casualty 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), all of which involve provisions that contain the limiting phrases "but only" or "only if."

[4] *Merchants Ins. Co. of N.H., Inc. v. U.S. Fid. & Guar. Co.*, 143 F.3d 5 (1st Cir. 1998); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993); *Container Corp. of Am. v. Maryland Cas. Co.*, 707 So. 2d 733 (Fla. 1998); *Koala Miami Realty Holding Co. v. Valiant Ins. Co.*, No. 3D04-2910, 2005 WL 2219455 (Fla. 3d DCA Sept. 14, 2005); *Florida Power & Light Co. v. Penn Am. Ins. Co.*, 654 So. 2d 276 (Fla. 4th DCA 1995); *Oliver v. U.S. Fid. & Guar. Co.*, 309 So. 2d 237 (Fla. 2d DCA 1975); *Hartford Cas. Ins. Co. v. Travelers Indem. Co.*, 2 Cal. Rptr. 3d 18 (Cal. Ct. App. 2003); *Acceptance Ins. Co. v. Syufy*, 81 Cal. Rptr. 2d 557 (Cal. Ct. App. 1999); *Casualty Ins. Co .v. Northbrook Prop. & Cas. Ins. Co.*, 501 N.E.2d 812 (Ill. App. Ct. 1986); *Fircrest Poultry Farms Co. v. State of Oregon*, 728 P.2d 968 (Or. Ct. App. 1986); *Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, No. LX-1549-1, 1995 WL 1055940 (Va. Cir. Ct. July 27, 1995).

[5] *Liberty Mut. Ins. Co. v. Capeletti Bros.*, 699 So. 2d 736 (Fla. 3d DCA 1997), where the issue was an exclusion rather than an insuring clause.

is against Federal is punctuated by the fact that the party-insurer lost on this issue in every pertinent Florida decision cited by Federal – *Container Corp.*; *Koala Miami Realty Holding Co., Inc. v. Valiant Insurance Co.,* No. 3D04-2910, 2005 WL 2219455 (Fla. 3d DCA Sept. 14, 2005); *Florida Power & Light Co. v. Penn America Insurance Co.,* 654 So. 2d 276 (Fla. 4th DCA 1995); *Oliver v. U.S. Fidelity & Guaranty Co.,* 309 So. 2d 237 (Fla. 2d DCA 1975).

Hence, Federal is left to argue from dicta or by negative implication, and this it does, at great length, particularly regarding *Container Corp.* and *Consolidation Coal.* Federal is similarly coy in its handling of the *Florida Power & Light* decision, using a case in which an insurer lost on this issue and asserting that the court would have reached the opposite decision if the provision had contained "acts or omissions." (AB: 31.) Again, Federal ignores the fact that the language cited in *Florida Power & Light* as clearer contained the words "but only." Federal seems to be arguing that any word not in the losing language would have, if inserted, made it a winner – so long as those words are in the Federal provision. Even if Federal's interpretation of the policy language were reasonable, it cannot prevail under Florida law, so long as the putative insured demonstrates, as Garcia has here, that an alternative interpretation exists that is not unreasonable. *Anderson*, 756 So. 2d at 34 ("If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and ... another limiting

coverage, the insurance policy is considered ambiguous.").

IV. ANY LIMITATIONS ON COVERAGE UNDER AN OMNIBUS-INSURED PROVISION MUST BE EXPLICIT

Federal insisted in its motion to dismiss that "because of" were the talismanic words in its omnibus-insured provision that restricted coverage to situations involving vicarious liability. (R1-11-7, 8, 9, 10, 12, 13.) In the Eleventh Circuit, Federal waffled, arguing that "acts or omissions" is the runic phrase that limits coverage. Now, Federal succumbs to the allure of "because of" as the limiting phrase. (AB: 9, 11, 16, 17, 20, 26, 36, 43) If Federal is unable to consistently identify which words or phrases restrict the coverage, it cannot task this Court with agreeing that Federal intended a particular word or phrase to restrict coverage.

Federal's vacillation is understandable, as the words that courts have consistently held restrict coverage to vicarious liability are "but only" or "only if," and they are nowhere to be found in the Federal provision. Regardless of whether Federal focuses on "acts or omissions" or "because of," it still is in the position of asking the Court to effectively implant an "only" into the policy language (as the District Court unwittingly did).

Florida courts do not, however, rescue insurers from their drafting choices. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). In a Florida case decided just weeks ago, an appeals court interpreting a "covered

person" provision held that the putative insured was covered because the provision did not "explicitly and plainly" exclude him. *Lenhart v. Federated Nat'l Ins. Co.*, No. 4D06-359, 2007 WL 461335 (Fla. 4th DCA Feb. 14, 2007). "In a contract filled with tightly drawn, context-specific provisions, there is not a single word limiting the broad generality of *covered person* ... to coverage of [the putative insured]." *Id*. at *3. The court expressly rejected the insurer's argument, like Federal's here, that the policy language was "meant to be modified by [an] unwritten word" – in that case, the word "legally"; in this case, "only." The burden is on the insurer to draft policy language that leaves no doubt as to who is and who is not covered. *Id.*

In a recent Pennsylvania case applying Florida law and relying heavily on this Court's decision in *Taurus*, the same court that decided *Consolidation Coal* held that an "insured person" provision was ambiguous because the insurer failed

to use language that made explicit who was and who was not covered.[6] *Trunzo v. Allstate Ins. Co.*, No. CV-04-1789, 2006 WL 2773468 (W.D. Pa. Sept. 25, 2006). "[D]efendant [the insurer] asserts that the Policy, which it drafted, means something other than what it says. The ease with which this apparent ambiguity could have been avoided tends to favor the position advanced by plaintiffs [the putative additional insured]." *Id*. at *8.

Trunzo also is significant in that it indicates how *Consolidation Coal* might have been decided if the district court had been applying Florida law instead of Pennsylvania law. The court in *Consolidation Coal* found the policy language ambiguous. 406 F. Supp. at 1295. Under Florida law, the analysis ends at that point, and the language is construed against the insurer that drafted it. *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998). Under

[6] The coverage grant at issue stated:
Insured person means:
a. While using your insured auto
   (i) you,
   (ii) any resident, and
   (iii) any other person using it with your permission;
b. While using a non-owned auto
   (i) you,
   (ii) any resident relative using a four wheel private passenger auto or utility auto; or
c. Any other person or organization liable for the use of an insured auto if the auto is not owned or hired by that person or organization, provided the use is by an insured person under a. or b. above and then only for that person's acts or omissions.

Pennsylvania law, however, a court confronted with ambiguous language must attempt to divine the intent of the contracting parties. *Consolidation Coal*, 406 F. Supp. at 1296.

Federal argues that *Taurus* has no application here because the language that this Court broadly interpreted in *Taurus* ("arising out of") differs from the comparable language in the Federal policy ("because of"), a contention with which the Eleventh Circuit disagreed. (CO: 11.) A new decision also applying Florida law, *St. Paul Fire & Marine Insurance Co. v. Medical Protective Co. of Fort Wayne, Ind.*, No. 2:04CV0391-FTM, 2006 WL 3544817 (M.D. Fla. Dec. 8, 2006), undercuts Federal's position. In *Medical Protective*, the court was confronted with two potentially applicable insurance policies. One contained a coverage grant that provided coverage to the putative insured if the claim was "based on" the rendition of professional services. The other contained an exclusion that vitiated coverage of any claims that "result from" the rendition of such services. The court turned to this Court's construction of "arising out of" in *Taurus*,[7] and concluded that the phrases at issue, like "arising out of," bear a broad meaning that can be expressed as "inherently involved." *Id*. at *8. As pleaded, Garcia's liability unquestionably was inherently involved with that of Anderson.

[7] "'[O]riginating from,' 'having its origin in,' 'growing out of,' 'flowing from,' 'incident to' or 'having a connection with.'" *Taurus*, 913 So. 2d at 532 (quoting *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963, 965 (Fla. 5th DCA 1996)).

Courts elsewhere also require insurers that seek to cover only the vicarious liability of additional insureds to expressly exclude coverage for their independent torts. The court in *St. Paul Fire & Marine Insurance Co. v. Hanover Insurance Co.*, No. 5:99CV164BR-3, 2000 WL 34594777 (E.D.N.C. Sept. 19, 2000), analyzed decisions from multiple jurisdictions and concluded that coverage under a provision more restrictive than Federal's[8] was not limited to instances of vicarious liability because it "does not *explicitly* exclude coverage for liability arising from independent acts or omissions of the additional insured." *Id*. at *3 n.8 (emphasis added). Similarly, the court in *Pennsylvania Turnpike Commission v. Transcontinental Insurance Co.*, No. CIV.A.94-5039, 1995 WL 465197 (E.D. Pa. Aug. 7, 1995) held that more restrictive language[9] than Federal's was "ambiguous with respect to whether an additional insured is covered for its independent acts of negligence." *Id*. at *4. "[T]he endorsement could have been made more clear by the inclusion of express language exempting the additional insured from coverage for its independent acts of negligence." *Id*. The court found *Consolidation Coal*

[8] The pertinent section of the coverage grant read "but only with respect to liability arising out of your work."

[9] The relevant language is: "but only with respect to liability arising out of 'your work' for that insured by or for you."

"unhelpful in resolving the issue" because the policy language was different.[10] *Id*. at *7. The court pointed, instead, to the endorsement at issue in *Harbor Insurance Co. v. Lewis*, 562 F. Supp. 800 (E.D. Pa. 1983) as an example of "clear and unambiguous language" that limited an additional insured's coverage to instances of vicarious liability. *Pennsylvania Tpk. Comm'n*, 1995 WL 465197, at *5. The relevant provision in *Lewis* provided coverage to an additional insured "but only to the extent of liability resulting from occurrences arising out of negligence of [the named insured] and/or its wholly-owned subsidiaries." *Id*. at *6. The Federal provision – "with respect to liability because of acts or omissions of" the named insured – on its face lacks the restrictive language employed by Harbor in *Lewis* – "but only to the extent of," "resulting from occurrences," "arising out of the negligence of."

V. A PLAIN-MEANING ANALYSIS SUPPORTS COVERAGE

Federal argues that the dictionary definition of "because of" – "on account of" or "by reason of" – bolsters its position (AB: 16), when in fact it supports Garcia. According to the facts pleaded in the underlying complaint, Garcia did

[10] Every citing reference to *Consolidation Coal* is negative, as the courts that have cited it have done so only to distinguish it (*Hartford Cas. Ins. Co. v. Travelers Indem. Co.*, 2 Cal. Rptr. 3d 18 (Cal. Ct. App. 2003); *Container Corp. of America v. Maryland Casualty Co.*, 707 So. 2d 733 (Fla. 1998)) or to decline to follow it (*U.S. Fire Ins. Co. v. Aetna Life & Cas.*, 684 N.E.2d 956 (Ill. App. Ct. 1997); *Dillon Cos. v. Royal Indem. Co.*, 369 F. Supp. 2d 1277 (D. Kan. 2005)).

incur liability, in whole or in part, "on account of" or "by reason of" Anderson's failure to maintain the Volvo's brakes.

There is no small measure of irony in Federal's attempt to apply a plain-meaning analysis to its policy language, which, in the end, has no real meaning, plain or otherwise. "With respect to liability because of the acts or omissions of you" is not a construction "that the average person can clearly understand," *Hartnett v. Southern Ins. Co.*, 181 So. 2d 524, 528 (Fla. 1965), or a construction that has an "everyday 'man-on-the-street' understood meaning." *Goldstein v. Paul Revere Life Ins. Co.*, 164 So. 2d 576, 578 (Fla. 4th DCA 1964). The clause resonates with Judge Gobbie's exasperated exhortation in *Fontainebleau Hotel Corp. v. United Filigree Corp.*, 298 So. 2d 455, 458 (Fla. 3d DCA 1974):

> In "My Fair Lady", Professor Higgins lamented, "Why Can't the English Learn How to Speak?" On behalf of the insureds and their attorneys, this plea may well be paraphrased to, "Why Can't the Companies Learn How to Write?" Why is it that so many of them insist upon cluttering up their policies with braintesting definitions, exclusions and conditions? Why do they compound the error by scattering their provisions and clauses with equally baffling phrases such as "unless as a condition precedent thereto"; "but only if"; "notwithstanding anything to the contrary"; "except with respect to" – naming just a few? For years they have insisted upon inserting ambiguity and repugnancy in their policies, to the consternation of laymen and attorneys alike, all in face of the fact that when they indulge in such practice, the courts invariably construe the policies liberally in favor of the insured and against the insurer. In fact, these days, the mere mention of the provisions of an insurance policy is looked upon as a not-so-funny joke.

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 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 2nd day of March, 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.

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).

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