

IN THE SUPREME COURT OF FLORIDA

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

Petitioners, *
*

vs. *
*

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

Respondents. *
*

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

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. 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. There is no valid reason to overturn the Florida precedents or Florida policy. To the contrary, affirming the *Gaskins* interpretation of the exclusion serves the important goal of avoiding gaps in insurance coverage.

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 Dist. Ct. App. 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.*

The Carriers argue that *Gaskins* is inapposite because the policy in that case excluded coverage for “liability arising out of your product” while the language of the exclusion in the Taurus Policies excludes coverage for “bodily injury and property damage...arising out of your product.” This argument contravenes the plain language and meaning of the *Gaskins* decision. The *Gaskins* court made no distinction between “liability arising out of” and “damage arising out of.” In fact, the opinion actually focused on whether the product proximately caused the damage alleged:

The herbicide which was delivered was not the cause of the **damage**. The herbicide was merely the incidental instrumentality through which the **damage** was done. The proximate cause of the **damage** was the appellee’s (insured) negligence in delivering the wrong product to Clark (third party) and appellee’s liability arose out of the accident which occurred at the time of the negligent misdelivery.

Id. at 1015 (emphasis added).

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 Dist. Ct. App. 1989) (“*AEGIS*”). That court did not limit *Gaskins*, nor could it. While the *AEGIS* court interpreted products

hazard *coverage* rather than the products hazard *exclusion*, the *AEGLIS* court's interpretation of "arising out of your product" is 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 (emphasis added).¹

The Carriers make only passing reference to *Florida Farm Bureau Mutual Ins. Co. v. James*, 608 So.2d 931 (Fla. 4th Dist. Ct. App. 1992), because they cannot make it fit their argument. The *James* court applied the *Gaskins* rule. That the *James* court applied the exclusion and denied coverage does not detract from that court's endorsement of the *Gaskins* rule. The *James* court's held 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 is good law after 23 years. Numerous jurisdictions recognize it 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.

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,

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). This black letter law applies regardless of whether the context is herbicides, propane tanks, animal feed, or guns.

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 their association, the Complex Insurance Claims Litigation Association (“CICLA”), 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).

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.

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 “intent of an exclusion” while Florida does not recognize the reasonable expectations rule. However, that court concluded that the exclusion applied only to defective product cases well before discussing the objective of the drafters. *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. California remains in the majority on this issue.

CICLA’s argument that these decisions should be distinguished because they involve gun dealers rather than manufacturers fails also. These negligent distribution and marketing claims are the same whether leveled at the manufacturer or at the distributor.

CICLA’s bold assertion that it knows of no gun liability cases where the court did not apply the products hazard exclusion to allegations of negligence (CICLA Brief at 14) is contradicted later in its own brief (page 16). Taurus has **never** argued that the exclusion cannot apply any time negligence is alleged. Taurus contends (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. CICLA's 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. The wisdom, public policy justifications, and wide acceptance of this rule persists regardless whether manifested in one lawsuit against an insured about a gun or 30 such lawsuits.²

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

The Carriers' argument that the jurisdictions are basically split equally on the proper interpretation of the exclusion is based on 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 the minority interpretation. However, effectively, *Hagen* has been overruled. *Hagen* is based on Minnesota law. The Minnesota Supreme Court adopted the majority rule 20 years later, explicitly relying on *Gaskins*. See *American Trailer Service v. The Home Insurance*

² The Carriers' hollow attempt to distinguish these majority cases by characterizing the underlying City Suits as "Mass Tort Litigation" misses the mark. As the Carriers well know, the legal principles do not change when the insured is sued by

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 minority and have been counted as such.

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 without guidance from that state's courts themselves. They should be given little influence.

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

30 plaintiffs instead of one. If anything, the need for reliable coverage is greatest

parroted the analysis of the *Brazas* opinion. The *Beretta* court relied on the interpretation of a different provision, not the exclusion at issue.

Furthermore, the laws of these states concerning insurance policy interpretation differ from Florida law. For example, Florida law requires that courts examine 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 Dist. Ct. App. 1993). In contrast, under the Maryland law applied in *Beretta*, theories of liability are irrelevant. While Florida law evinces a public policy favoring coverage, reads policy exclusions narrowly, and reads 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 not 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

when facing dozens of lawsuits as opposed to just one.

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. FLORIDA LAW REQUIRES INTERPRETING THE PRODUCTS HAZARD EXCLUSION 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).

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 recognize the numerous reasonable interpretations of the term and construe it in favor of coverage.

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.’”

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. 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.*; *see also, Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 181 (Fla. 4th Dist. Ct. App. 1997) (holding that the term “arising out of” had several reasonable meanings ranging from “appearance and origination to causation,” and was therefore ambiguous).

The Carriers’ “arising out of” cases simply do not bear on the meaning of this phrase in the context of the products hazard exclusion. The Carriers cite a total of nineteen cases. Eight of these cases are not decided under Florida law. Of these eight, only two even purport to construe a products hazard exclusion. The

other six foreign cases construe pollution exclusions, various illegal acts exclusions, employment exclusions and even an indemnity clause provision. Of the eleven Florida cases Carriers cite, ten relate to automobile policies and one examines worker's compensation coverage. The Carriers' inability to escape the solid line of *Gaskins* cases leaves them grasping for help from different states, different types of policies, and different types of provisions.

Equally problematic, these cases define the term to mean anything from "caused by" to "originating from," to "flowing from" or "incident to," to something as broad as "having a causal connection with." Yet in each of them, the court adopted the broadest interpretation of the provision, 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 and adopted the **majority** interpretation of the pollution exclusion as its own. To adopt the majority interpretation of the products hazard exclusion means to follow *Gaskins* and to interpret it to apply only to claims of product defects, an interpretation that favors the insured.

Even the cases cited by the Carriers acknowledge the term has many varied meanings. Under this Court's jurisprudence, the phrase should be interpreted in favor of the insured.

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

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 Dist. Ct. App. 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 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 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 a 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 Dist. Ct. App. 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) and other foreign authorities to contend that "products hazard" coverage extends to non-defective products. The *Abbott* case, however, actually supports Taurus' argument. That 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. That Court applied the

Gaskins approach to the meaning of products hazard, i.e. since the alleged negligence affected the quality of the product, the product did not perform as expected and was defective. *Id.* The products liability policy covered the claim while the CGL policy containing the products liability exclusion excluded it. *Id.* (As discussed in Taurus' prior brief, Arizona adheres to the majority rule.)

Moreover, the Carriers' reliance on a few select cases ignores the numerous other jurisdictions that hold that products hazard coverage applies only to defective product claims. *See, e.g., 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 product defect 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 the exclusion is not so limited (the Carriers' interpretation), 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 have no 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.

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.³

³ 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

V. CONCLUSION.

The Court should answer the Certified Question, NO.

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written for decades in Florida, under this interpretation of the exclusion, without threat to the insurance industry's existence.

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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