*2011 U.S. Dist. LEXIS 110651, **

HARCO NATIONAL INSURANCE COMPANY, Plaintiff, v. ZURICH AMERICAN INSURANCE COMPANY, Defendant. FIRST LEASE, INC., Plaintiff, vs. ZURICH AMERICAN INSURANCE COMPANY, Defendant.

CASE NO. 8:10-CV-27-T-17TGW,CASE NO. 8:10-CV-138-T-17TGW

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

2011 U.S. Dist. LEXIS 110651

September 26, 2011, Decided
September 26, 2011, Filed

SUBSEQUENT HISTORY: Affirmed by Harco Nat'l Ins. Co. v. Zurich Am. Ins. Co., 2012 U.S. App. LEXIS 12978 (11th Cir. Fla., June 26, 2012)

CORE TERMS: insured, coverage, rental agreement, delivery, lease, independent contractors, carrier, lessor, endorsement, renter, truck, summary judgment, indemnity, certificate, leased, leasing, contractor, door, bodily injury, indemnify, rented, liability insurance, property damage, lessee, strap, liability coverage, indemnification, trucker, settlement, customer

COUNSEL: **[*1]** For Harco National Insurance Company (8:10-cv-00027-EAK-TGW), Plaintiff, Consol Plaintiff: Dale Jay Spurr, Edward Randall Nicklaus, LEAD ATTORNEYS, Nicklaus & Associates, PA, Coral Gables, FL; Susan Y. Marcus, Lewis, Brisbois, Bisgaard & Smith, LLP, Ft Lauderdale, FL.

For Zurich American Insurance Company (8:10-cv-00027-EAK-TGW), Defendant: Bradley S. Fischer, LEAD ATTORNEY, Susan Y. Marcus, Lewis, Brisbois, Bisgaard & Smith, LLP, Ft Lauderdale, FL.

For First Lease, Inc. (8:10-cv-00138-EAK-TGW), Plaintiff: Dale Jay Spurr, Edward Randall Nicklaus, LEAD ATTORNEYS, Nicklaus & Associates, PA, Coral Gables, FL.

For Zurich American Insurance Company (8:10-cv-00138-EAK-TGW), Defendant: Bradley S. Fischer, LEAD ATTORNEY, Lewis, Brisbois, Bisgaard & Smith, LLP, Ft Lauderdale, FL.

JUDGES: ELIZABETH A. KOVACHEVICH, United States District Judge.

OPINION BY: ELIZABETH A. KOVACHEVICH

OPINION

ORDER

This cause is before the Court on:

Dkt. 18 Motion for Summary Judgment
Dkt. 21 Response
Dkt. 23 Cross-Motion for Summary Judgment
Dkt. 27 Response to Cross-Motion

Plaintiffs Harco National Insurance Company ("Harco") and First Lease, Inc. ("FirstLease") seek entry of judgment against Defendant Zurich American Insurance Company ("Zurich"), and **[*2]** a finding

that Zurich must provide indemnity to Harco and First Lease as a matter of law. Harco and FirstLease seek a declaratory judgment of their rights against Zurich in connection with Harco's payment to settle the underlying lawsuit, Case No. 06-CA-006710, Howard Bryant, Jr. v. FirstLease, Inc., and damages for indemnity for all monies expended in the defense of the lawsuit.

Zurich has moved for summary judgment on undisputed evidence as follows: 1) the vehicle in question was rented to Howard Bryant in his individual capacity, and not as an agent of Southeast Independent Delivery Services, Inc.; 2) Howard Bryant was contractually required to maintain bodily injury liability insurance naming FirstLease as an additional insured, but this requirement was limited to coverage protecting FirstLease from liability to third persons, not from liability to Howard Bryant, the renter himself.

The parties have filed cross-motions for summary judgment, agreeing that there are no material facts in dispute, but disagreeing as to the inferences which may be drawn from the undisputed facts, or as to the correct application of the law to the facts.

I. Standard of Review

Summary judgment should be rendered **[*3]** if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

> The plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The appropriate substantive law will guide the determination of which facts are material and which facts are...irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson, 477 U.S. at 248. But, "[i]f the evidence is merely colorable...or is not significantly probative...summary judgment **[*4]** may be granted." Id. at 249-50.

In a declaratory judgment action, "if the allegations in the complaint alleging a claim against the insured either are acts not covered by the policy or are excluded from the policy's coverage, the insurer is not obligated to defend or indemnify the insured." IDC Constr., LLC v. Admiral Ins. Co., 339 F.Supp.2d 1342, 1347 (S.D.Fla.2004) (citations omitted). A court should grant summary judgment "in a declaratory judgment action seeking a declaration of coverage, when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." Id. (citations omitted).

II. Statement of Undisputed Facts

1. Zurich American Insurance Company issued automobile liability insurance policy TRK 2938900-03 to Southeast Independent Delivery Services, Inc. ("SEIDS"), effective 3/31/2006 through 3/31/2007 (Dkt. 18-2, p. 17). SEIDS is the "Named Insured." Policy TRK 2938900-03 includes numerous endorsements. (Dkt. 18-2, p. 20).

2. Southeast Independent Delivery Services, Inc. provides delivery services to a retail furniture chain. To provide the delivery services, SEIDS hires independent contractors to **[*5]** perform the delivery services.

3. Howard Bryant and SEIDS (f/k/a "Independent Delivery") executed the Equipment Lease and Independent Truckman's Agreement ("ITA") on January 15, 2006. (Dkt. 21-7). Under the terms of the ITA, SEIDS hired Howard Bryant as an independent contractor.

4. If equipment is operating in interstate commerce, 49 C.F.R. 376.11(a) requires D.O.T.-authorized

Motor Carriers to execute a written lease with the owner-operators of equipment operating under their ICC Certificate. The ITA was also an equipment lease of the equipment from the independent contractor (lessor) to SEIDS (lessee).

5. Steve Johnson, CFO of SEIDS, testified that once the independent contractor has passed the background check and interview, and SEIDS has learned the independent contractor wants to have a piece of equipment through FirstLease, SEIDS assists independent contractors by contacting FirstLease to provide a name, date and type of equipment the delivery contractor will be picking up. (Johnson Deposition, Dkt. 18-2, Exh. F. p. 14, I. 19-25. SEIDS contacted FirstLease as to Howard Bryant.

6. The independent contractors who perform delivery services for SEIDS must have a delivery truck. An independent **[*6]** contractor may use his own vehicle in performing delivery services for SEIDS. In the alternative, SEIDS will assist the independent contractor to lease a vehicle. (Dkt. 21-9, Marple Affidavit)

7. Independent contractors for SEIDS have used leasing companies other than Firstlease to lease a vehicle. (Johnson Deposition, Dkt. 18-2, Exh. F, p. 14, I. 9-12).

8. On 5/2/2006, Howard Bryant executed Rental Agreement, and picked up a 2006 International Van, Unit No. 376008, from FirstLease. In his deposition in the underlying case, Howard Bryant testified that he signed the Rental Agreement on behalf of H. Bryant Delivery, Inc. and not on behalf of SEIDS. (Dkt. 21-11, Exh. K, p. 5, I. 6-12).

9. The Rental Agreement (Dkt. 21-7) provides:

> 5. RENTER agrees to maintain in full force at its expense an automobile bodily injury and property damage liability insurance policy, and furnish OWNER satisfactory evidence with OWNER as an additional named insured and Loss Payee. Such insurance shall be written by an insurance company properly licensed and authorized to transact business, protecting OWNER and RENTER, and their respective agents, servants, or employees from any and all liabilities for injuries **[*7]** to the property and person, including death, of Third Persons, resulting from the ownership, use, operation, or maintenance of the Vehicle. Such insurance shall have limits of at least $1,000,000 Combined Single Limit. Such insurance shall be primary with respect to the OWNER and any insurance carried by OWNER shall not inure to the benefit of RENTER or RENTER's agents, servants or employees. RENTER agrees to indemnify and hold OWNER, its agents, servants, or employees harmless from any and all claims for injury to all Third Persons or damage to property of Third Persons and to any and all expenses incurred in the defense of such claims. Renter agrees to provide OWNER a certificate of required insurance and that such certificate name OWNER as additional insured and provide at least ten days written notification to OWNER in the event of cancellation of such insurance.

10. The Rental Agreement (Dkt. 21-7) indicates the customer is:

> 001 10001425 000
> SEIDS - Howard Bryant
> 11540 Highway 92 East
> Seffner, Florida 33584

11. Howard Bryant furnished a Certificate of Insurance to FirstLease. (Dkt. 1-2). The Certificate states "Insured includes Howard Bryant." The Certificate Holder is FirstLease. The **[*8]** Certificate further states: "Certificate holder is an Additional Insured/Loss Payee to the following vehicle: 2007 International Unit #377002 vin # 1HTMAAL77H368405". (Dkt. 1-2, pp. 10-12). The Certificate is dated 3/28/2006.

12. The equipment rented from FirstLease pursuant to the Rental Agreement signed by Howard Bryant was operated wholly intrastate.

13. FirstLease submitted individual invoices to SEIDS for rental charges incurred by each of the independent contractors leasing vehicles from FirstLease. (Exh. E, Dkt. 21-5, p. 17).

14. SEIDS deducted the rental charges from each contractor's settlement checks, making payments to FirstLease on behalf of the individual contractors. (Exh. F, Dkt. 21-6, p. 25, 27, 29; Exh. E, Dkt. 21-5, p. 12, Exh. I, Dkt. 21-20.)

15. All rental charges and charges for liability insurance remained the obligation of the driver/independent contractors. (Exh. I, Dkt. 21-10; Exh. E, Dkt. 21-5).

16. Kimberly Dunn, leasing agent of FirstLease, Inc., testified in her deposition that Howard Bryant signed the Rental Agreement as a representative of SEIDS.

17. George Morrell, Vice President, FirstLease, testified that FirstLease does not rent trucks to private individuals. **[*9]** (Morrell Affidavit, Dkt. 18-2, pp. 7-9).

18. Steve Johnson, CFO of SEIDS, testified in his deposition that SEIDS had an 11-year business relationship with FirstLease:

> Q. When did SEIDS first start doing business with FirstLease?
>
> A. I don't know the answer to that. When I joined the company roughly we'll say 11 years ago, because in July will be 11 years, there was already a relationship between Independent Delivery Service, Southeast Independent Delivery and First Lease.

(Dkt. 18-2, Exh. F, p. 10, I. 13-23).

19. There was no written master lease agreement between SEIDS and Firstlease.

20. On 5/13/2006, Howard Bryant was injured in an accident in connection with the vehicle leased from FirstLease.

21. Howard Bryant filed suit for negligence against FirstLease in Hillsborough County Circuit Court. His claim was based on negligent maintenance of the truck he leased from FirstLease. (Dkt. 18-1, p. 1).

22. On 9/30/2006, FirstLease and Harco demanded that Zurich provide a defense and indemnity.

23. On 4/20/2007, Zurich declined to provide a defense and indemnity.

24. Harco defended FirstLease and settled the case with Howard Bryant. Harco and FirstLease now seek the settlement amount and the costs **[*10]** of legal defense as damages.

25. On 10/6/2008, FirstLease filed a Third Party Claim in the underlying case against SEIDS for contractual indemnity under the terms of Rental Agreement with Howard Bryant. (Dkt. 21-1). In the Third Party Complaint, FirstLease alleged that FirstLease rented a truck to S.E. Independent Delivery Services, Inc. (par. 8), and Howard Bryant was authorized to sign the Rental Agreement for the truck on behalf of S.E. Independent Delivery Services (par. 10).

26. SEIDS denied its status as party to the Rental Agreement and denied that Howard Bryant executed the Rental Agreement as its authorized agent.

27. SEIDS moved for entry of partial summary judgment. The Hillsborough County Circuit Court determined that the indemnity clause of the Rental Agreement was not enforceable, since FirstLease sought indemnity for claims arising from its own negligence. The indemnity clause was declared invalid and unenforceable on summary judgment in Hillsborough County Circuit Court. (Dkt. 21-2, 21-3).

III. Motions for Summary Judgment and Responses

Harco and FirstLease seek entry of summary judgment in their favor as a matter of law, as there are no facts in dispute, and no reasonable **[*11]** interpretation of the insurance policy allows Zurich to avoid the entry of summary judgment against Zurich.

A. Motion for Summary Judgment

Harco and FirstLease argue that the FirstLease vehicle was rented to Southeast Independent Delivery Services, Inc. ("SEIDS"), and that Howard Bryant was acting as the actual agent or apparent agent for SEIDS, based on the SEIDS representation, by word and deed, in sending Howard Bryant to FirstLease to obtain a vehicle, permitting Howard Bryant to sign the Rental Agreement containing SEIDS' name and address, and obtaining a certificate of insurance (Exhibit J), on which FirstLease relied and which induced a change of position on the part of FirstLease.

Harco and FirstLease argue that SEIDS' Policy No. TRK 2938900-3 provides coverage for the subject vehicle obtained by Howard Bryant on behalf of SEIDS, and FirstLease is an additional insured under that policy. Harco and FirstLease argue that the allegations in Howard Bryant's Complaint in the underlying lawsuit triggered Zurich's duty to defend and indemnify and to provide coverage. Harco and FirstLease argue that Policy No. TRK 2938900-3 was primary, under the policy's "other insurance" clause. Harco **[*12]** and FirstLease further argue that, under the clear and unambiguous terms of SEIDS' policy with Zurich, Zurich owed indemnity and coverage to FirstLease and Harco.

B. Response

Zurich responds that the vehicle in question was rented to Howard Bryant in his individual capacity, and not as an agent of SEIDS. Howard Bryant was contractually obligated to maintain bodily injury liability insurance naming FirstLease as an additional insured, but this requirement was limited to coverage protecting FirstLease from liability to third persons, not from liability to Howard Bryant, the renter.

Zurich relies on the provisions of the Independent Truckman's Agreement ("ITA"), which defined the relationship between SEIDS and Howard Bryant, and which contains provisions which demonstrate that Howard Bryant had no authority to act as SEIDS agent, or to bind SEIDS in any rental agreement. The ITA required that Howard Bryant maintain a policy of bodily injury liability coverage which named the SEIDS as an additional insured. SEIDS' independent contractors were required to execute a written lease for vehicles used in interstate commerce to SEIDS, which held the ICC certificate, pursuant to 49 C.F.R. 376.11(a). **[*13]** Zurich explains that SEIDS paid the premium for the liability policy to Zurich on behalf of its independent contractors, and each contractor was added as an additional insured to the Zurich policy issued to SEIDS.

The ITA required Howard Bryant to "independently lease" his own equipment. Zurich argues that the reference to SEIDS on the face of the Rental Agreement was included to identify where the rental invoices should be sent, because FirstLease rents vehicles to other individuals unrelated to SEIDS. Zurich argues that FirstLease regularly submitted individual invoices to SEIDS for rental charges incurred by each of the independent contractors who leased a vehicle from FirstLease.

Zurich argues that FirstLease assigns a unique customer number to each independent contractor; Howard Bryant's number is shown on the payment stub to identify payment on behalf of Bryant. Zurich further argues that SEIDS remitted payments to FirstLease as a courtesy to the independent contractors, including Howard Bryant. Zurich argues that both SEIDS and Howard Bryant acknowledged that: 1) Howard Bryant executed the Rental Agreement in his individual capacity, and not as an agent or representative of SEIDS; **[*14]** 2) Howard Bryant had no authority to execute the Rental Agreement on behalf of SEIDS; and 3) Howard Bryant was responsible for all obligations set forth in the Rental Agreement including payment of rental charges and procurement of liability insurance.

Zurich argues that Kimberly Dunn, FirstLease employee, and Jeffrey Scott Lyle, FirstLease branch manager, testified that they believed that Howard Bryant signed the Rental Agreement as a representative of SEIDS, but offered no testimony that their belief was based on representations of SEIDS or Howard Bryant.

C. Cross-Motion for Summary Judgment

Zurich moves for entry of summary judgment in favor of Zurich on the basis that FirstLease is not an insured under the Zurich policy because SEIDS did not "hire" or "borrow" an auto from FirstLease. Zurich argues that Plaintiffs have produced no competent evidence demonstrating that SEIDS hired or borrowed an auto from FirstLease, and all the evidence is to the contrary. Zurich argues that SEIDS did not execute the Rental Agreement and Howard Bryant did not have actual or apparent authority to rent the FirstLease truck on SEIDS' behalf.

Zurich argues that, assuming SEIDS is a party to the Rental **[*15]** Agreement, SEIDS did not "hire" the vehicle from FirstLease because SEIDS did not maintain the requisite possession, use or control over Howard Bryant or the vehicle. Zurich further argues that the Federal Motor Carrier regulations do not create a contractual lessee/lessor relationship between SEIDS and FirstLease. Zurich argues that FirstLease is not an insured under "Lessor-Additional Insured" Endorsement or the "Designated Insured" Endorsement because SEIDS was not required by written contract to maintain liability insurance for the benefit of FirstLease and Howard Bryant was only required to maintain liability insured and name "FirstLease" as an "additional insured" for liability to Third Persons.

Zurich further argues that Harco is not entitled to recover its legal fees and defense costs. Zurich argues that the exception to the general rule that there is no right to contribution between insurance companies for attorney's fees or defense costs does not apply because SEIDS did not enter into a contractual relationship with FirstLease, and the indemnity provision contained in the FirstLease-Howard Bryant Rental Agreement was deemed unenforceable. Zurich also argues that FirstLease **[*16]** is not entitled to any recovery because it sustained no compensable damages. Zurich argues that Harco paid the settlement amount, plus legal fees and defense costs. Zurich argues that there is no deductible payment under bodily injury liability coverage.

Zurich seeks an order granting summary judgment in favor of Zurich, and the following determinations: 1) FirstLease is not an insured under the Zurich policy or any of its endorsements; 2) FirstLease did not sustain, was not obligated to pay or did not pay compensable damages and thus cannot maintain this action; and 3) Harco is precluded from recovering underlying legal fees and defense costs from Zurich.

D. Response

Harco and FirstLease respond that Zurich has not presented sufficient evidence to establish that Howard Bryant was not an agent, servant or employee of SEIDS at the time that he entered into the Rental Agreement with FirstLease. Harco and FirstLease argue that Howard Bryant was required to wear a uniform which displayed the logo of the retail furniture chain for which SEIDS provides delivery services, that Howard Bryant's truck displayed SEIDS' DOT number, and that SEIDS' truckers were dissuaded from performing services **[*17]** for other entities.

Harco and FirstLease further argue that sufficient evidence has been presented to establish agency or apparent agency. Harco and FirstLease argue that the contract at issue is the insurance policy which names FirstLease as an additional insured; Harco and FirstLease allege that Zurich breached the contract by declining to provide coverage, and a defense.

IV. Discussion

In the Complaint Harco alleges that SEIDS owes FirstLease indemnity under the Vehicle Rental Agreement (Dkt. 1, par. 14a). Harco alleges that Zurich has refused to provide coverage, indemnity, or a defense to FirstLease, notwithstanding that FirstLease is an additional insured under Policy No. TRK 2938900-03, issued by Zurich, and said refusal is wrong under the terms of the Vehicle Rental Agreement. (Dkt. 1, par. 14b). Harco alleges that Zurich is liable for coverage, a defense and indemnification with respect to the action filed against FirstLease. Harco alleges that the refusal to provide coverage forms the doubt between the parties which is the basis for the claim for declaratory relief,

Harco alleges that Mr. Howard Bryant was an independent contractor working for SEIDS at the time of the accident, **[*18]** 5/13/2006, and that SEIDS entered into a Vehicle Rental Agreement dated

5/2/2006 with FirstLease. (Dkt. 1, par. 8). In Count I, Harco seeks indemnification from Zurich under Policy No. TRK 2938900-03. Harco alleges that First Lease is an additional insured under SEIDS' policy with Zurich, and an insured along with SEIDS and Mr. Howard Bryant on the same policy on May 13, 2006, the date of the accident (Dkt. 1, par. 21). Harco further alleges that in the Vehicle Rental Agreement SEIDS agreed to provide liability coverage for itself and FirstLease from any and all liabilities for injuries to the property and person, including death, of third persons, resulting from the ownership, use, operation, or maintenance of the vehicle. (Dkt. 1, par. 22). Harco further alleges that SEIDS agreed to indemnify and hold FirstLease harmless from any and all claims for injury to all third persons and to pay any and all expenses incurred in the defense of such claims. Harco alleges that, pursuant to the Rental Agreement and the insurance contract, FirstLease required the customer and its insurer to provide indemnification and to provide coverage for the type of accidents referred to in Exhibit A, (Dkt. **[*19]** 1, par. 23), i.e. those resulting from the negligence of FirstLease.

Harco alleges that Zurich issued an automobile liability policy to SEIDS which covered FirstLease, as required by the Vehicle Rental Agreement and which affirmatively named FirstLease as an additional insured and loss-payee for the truck leased to SEIDS by FirstLease. (Dkt. 1, par. 25). Harco alleges that Harco demanded a defense and indemnification, which Zurich wrongfully refused. Harco alleges that Zurich had a duty to defend FirstLease in the underlying case, and a duty to pay Harco for its attorney fees in defending the underlying action.

Harco seeks a declaration that: 1) the Zurich policy provides coverage to FirstLease for Howard Bryant's accident, and is the primary insurance with respect to FirstLease; 2) FirstLease is entitled to full indemnity for any Judgment against it by Zurich; 3) that pursuant to Ch. 627.426, Fla. Stat., Zurich is not permitted to deny coverage based on any particular coverage defense; 4) that Harco is entitled to its costs and attorney's fees in defending the underlying case, as well as fees and costs for this declaratory judgment action; 5) the award of any other damages or declaratory **[*20]** relief afforded by law or deemed fair. Harco requested an Order requiring Zurich to defend the underlying case, but that case was resolved by settlement.

In its Answer and Affirmative Defenses, Zurich admits that Howard Bryant was working as an independent contractor for SEIDS on 5/13/2006. (Dkt. 3, par. 8, 19). Zurich denies that SEIDS entered into the Vehicle Rental Agreement on 5/2/2006. (Dkt. 3, par. 8). Zurich denies that FirstLease is an insured or additional insured under the Zurich policy as to the underlying negligence case. (Dkt. 3, par. 11). In its affirmative defenses, Zurich asserts that the incident giving rise to Harco's Complaint does not involve the claim of a "Third Person," disqualifying FirstLease from status as an additional insured for the claims alleged in the underlying negligence case, by virtue of the terms of the policy's "Lessor—Additional Insured and Loss Payee" Endorsement, which defines "additional insured (lessor)" as "only those where require[d] by written contract," and paragraph 5 of the Vehicle Rental Agreement.

I. Preliminary Issues

A. Vehicle Rental Agreement

The Vehicle Rental Agreement ("Agreement") is an integrated contract. (Dkt. 21-7, p. 2, par. **[*21]** 14).

> 14. This Agreement represents the entire Agreement between **OWNER** and **RENTER**, and there are no other representatives (sic) or understanding affecting it. **OWNER'S** failure to strictly enforce any provision hereunder shall not be deemed a waiver of said provisions and shall not excuse **RENTER** from future performance of any terms and conditions of this Agreement.

The Agreement states:

> **IN CONSIDERATION OF** the covenants herein contained **FIRSTLEASE, INC. ("OWNER")** hereby rents to the Corporation, firm or individual executing Page 2 of the reverse side hereof ("**RENTER"),** the motor vehicle described on the reverse side hereof ("Vehicle") of the terms and conditions contain herein (Included on the reverse side hereof) set forth....

The Agreement spells out the respective obligations of the Renter and Owner as to the Vehicle in fourteen separate paragraphs.

Howard Bryant signed the Agreement on four separate lines. On the face of the Agreement, Howard Bryant signed the Agreement twice as the "Renter," once to acknowledge his agreement to provide automobile liability and property damage coverage in the minimum amount of $1,000,000, and once to acknowledge his agreement to provide comprehensive and **[*22]** collision coverage in an amount acceptable to the lessor and subject to a deductible not to exceed $5,000 for which he would be responsible. Howard Bryant's signature appears next to the phrase "Customer Signature" on the first page and on the Commercial Vehicle Damage Description Report. Howard Bryant signed the following acknowledgment:

> CUSTOMER ACKNOWLEGEMENT OF TERMS AND CONDITIONS: I have read the terms and conditions of this agreement and agree to be bound by them and to return the vehicle on or before the return date at the location specified. The renter acknowledges responsibility for the cost of body damage, parking, and photo radar violations.

There is no indication next to the signatures that Howard Bryant signed the Agreement in a representative capacity.

On the face of the Agreement, the "Customer" is also identified as:

> 001 10001425 000
> SEIDS-Howard Bryant
> 11540 Hwy 92 East
> Seffner, Florida
> 33584

Paragraph 5 of the Agreement required the Renter to maintain, at the expense of the Renter, an automobile bodily injury and property damage liability policy, and furnish satisfactory evidence to Owner that Owner was on the insurance policy as an "additional insured and Loss Payee." The **[*23]** purpose of the insurance policy was to protect "**OWNER** and **RENTER,** and their respective agents, servants, or employees from any and all liabilities for injuries to the property and the person, including death, of Third Persons, resulting from the ownership, use, operation, or maintenance of the vehicle."

Howard Bryant provided a certificate of liability insurance dated 3/28/2006 to FirstLease (Dkt. 1-2, pp. 10-12) which states that Howard Bryant is an insured under Zurich's automobile liability policy TRK29389003. The certificate states that the Certificate Holder, First Lease, Inc., is an additional insured/Loss Payee to the following vehicle: 2007 International Unit 37702, vin # 1HTMMAAL77H368405. There is an additional certificate of liability insurance dated 3/29/2006 which states "[First] Lease Inc. and their affiliates are included as Additional Insured/Loss Payee. Coverage [intend]ed to include all vehicles leased or rented." (Dkt. 1-2, p. 13). The document's words are cut off and the additional certificate is an incomplete document.

The certificates are evidence that the liability insurance required by the Vehicle Rental Agreement was obtained by the Renter. The required coverages **[*24]** were limited to bodily injury liability coverage for personal injuries to third parties and damage to the property of third parties resulting from the ownership, use, operation, or maintenance of the vehicle while it was in the custody of the Renter, during the term of the Agreement.

Harco has contended that FirstLease entered into the Vehicle Rental Agreement with SEIDS, and that Howard Bryant signed the Agreement as the agent or apparent agent of SEIDS.

Zurich argues that, in the underlying litigation, FirstLease filed a third party complaint against SEIDS for contractual indemnity under the terms of the Rental Agreement with Howard Bryant. Zurich further argues that, throughout the underlying litigation, SEIDS denied that SEIDS was a party to the Agreement, and that Howard Bryant executed the Agreement as the authorized agent of SEIDS.

SEIDS also argued that, even if SEIDS were deemed a party to the Agreement, the indemnity provisions contained in the Agreement were not enforceable since FirstLease sought indemnity for claims arising out of its own negligence. The Hillsborough County Circuit Court granted summary judgment in favor of SEIDS, declaring the indemnity clause in the Agreement **[*25]** to be invalid and unenforceable.

Under Florida law, a writing that the parties intend to be their final embodiment of agreement cannot be modified by evidence that adds to, varies, or contradicts the writing. King v. Bray, 867 So.2d 1224 (Fla. 5th DCA 2004). Harco has argued that FirstLease always understood that the Vehicle Rental Agreement was between FirstLease and SEIDS, with Howard Bryant signing on SEIDS' behalf. The Agreement itself identifies the Renter as the person who signed the Agreement, and there is no indication in the signature that the Agreement was signed in a representative capacity. The Court finds that there is no ambiguity as to the capacity in which Howard Bryant signed the Agreement. If the Agreement were found to be ambiguous by virtue of the inclusion of "SEIDS" in the Customer address, then considering the undisputed evidence that each individual contractor renting equipment from FirstLease is assigned a unique customer number, which appears on each individual rental agreement and invoice, the evidence confirms that Howard Bryant signed the Agreement in his individual capacity. (Dkt. 21, p. 10).

After considering the Agreement, the Court concludes that FirstLease **[*26]** and Howard Bryant were parties to that Agreement, and SEIDS was not a party.

Florida law permits vehicle leasing companies to shift primary coverage for liability and personal injury protection benefits up to the limits required by Florida's financial responsibility laws.. The Court notes that Ch. 627.7263, Florida Statutes, provides:

> (1) The valid and collectible liability insurance or personal injury protection insurance providing coverage for the lessor of a motor vehicle for rent or lease is primary unless otherwise stated in at least 10-point type on the face of the rental or lease agreement. Such insurance is primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736.
>
> (2) If the lessee's coverage is to be primary, the rental or lease agreement must contain the following language, in at least 10-point type:
>
> "The valid and collectible liability insurance and personal injury protection insurance of any authorized rental or leasing driver is primary for the limits of liability and personal injury protection coverage required by ss. 324.021(7) and 627.736, Florida Statutes."

Where properly invoked, Ch. 627.7263 provides that the **[*27]** lessee and not the lessor is responsible for providing primary liability insurance on a leased vehicle, and that the lessee's insurer will defend its insured in any suit against the lessee. Allstate Insurance Company v. RJT Enterprises, Inc., 692 So.2d 142 (Fla. 1997). Where a lessor fails to properly invoke the provisions of Ch. 627.7263, the lessor, and its insurer, if any, will remain primarily responsible for damages caused as a result of negligence in the use of the vehicle. Rosati v. Vaillancourt, 848 So. 2d 467 (Fla. 5th DCA 2003).

The shifting of responsibility for the duty to indemnify to the extent of the financial responsibility requirements of the law does not encompass a duty on the part of the lessee's insurance carrier to defend the lessor. RJT, supra at 145. In the absence of an express statutory or contractual duty to defend, there is no such duty. RJT at 144.

B. Equipment Lease and Independent Truckman's Agreement (Dkt. 21-8)

Howard Bryant entered into the Equipment Lease and Independent Truckman's Agreement ("ITA") with SEIDS on 1/15/2006, in his capacity as a "Contractor." The ITA is an integrated Agreement:

> 27. This agreement contains the entire understanding between the parties **[*28]** and supersedes any prior agreement between the parties concerning the subject matter of this agreement.

The ITA is an equipment lease as to the equipment listed in Exhibit A to the Agreement, pursuant to 49 C.F.R. 376.11(a). SEIDS is a motor carrier for whom Howard Bryant performed delivery services as an independent contractor. The purpose of the federal leasing regulations is to prevent motor carriers from avoiding responsibility for the negligence of their drivers through the owner-operator relationship. In Saullo v. Douglas, 957 So.2d 80, 83 (Fla. 5th DCA 2007), the Court notes:

> One of the primary reasons Congress expanded the province of the Secretary, and thus, the ICC,FN2 was "to protect the public from the tortious conduct of judgment-proof operators of interstate motor carrier vehicles," by requiring motor carriers "to assume full direction and control of leased vehicles." See Price v. Westmoreland, 727 F.2d 494, 496 (5th Cir.1984). A fair reading of the leasing regulations yields the notion that they were specifically intended to prevent motor carriers from avoiding responsibility for the negligence of their drivers through the use of an owner-operator relationship. Logo **[*29]** Liability, 33 Transp. L.J. at 6. The ICC effectuated this purpose by promulgating leasing regulations requiring, among other things, that leases be in writing and "provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement ...." (emphasis added). See 49 C.F.R. 1507.4 (1974). FN3 Moreover, the regulations require motor carriers that use leased equipment to provide the lessor with a placard that contains information identifying the motor carrier for whom the equipment is being operated. Logo Liability, 33 Transp. L.J. at 6 (citing 49 C.F.R. 390.21 (2005)). The placard is usually affixed to the door of the tractor. Before the regulations were amended in 1986, it was the motor carrier's responsibility to retrieve the placards when the lease terminated. Id. at 6 (citing 49 C.F.R. 1507.4(d)(1) (1974)).

Under the leasing regulations, the lessor-truck driver was deemed to be the "statutory employee" of the lessee motor carrier, who was liable as a matter of law for the negligence of the driver. In Saullo, the Court further notes:

> In 1986, **[*30]** however, the ICC amended the leasing regulations to clarify that it never intended "to assign liability based on the existence of placards or to interfere with otherwise applicable State law." Lease & Interchange of Vehicles (Identification Devices), 3 I.C.C.2d 92, 93-94 (1986). Under the amended regulations, the motor carrier was no longer required to obtain a receipt from the driver when the driver returned the placard upon termination of the lease. See Graham v. Malone Freight Lines. Inc.., 948 F.Supp. 1124, 1133 n. 14 (D.Mass.1996); 49 C.F.R. 1057.4(d) (1985). At the time of the 1986 amendments, the ICC explained:
>
> As noted by the comments, certain courts have relied on Commission regulations in holding carriers liable for the acts of equipment owners who continue to display the carrier's identification on equipment after termination of the lease contract. We prefer that courts decide suits of this nature by applying the ordinary principles of State tort, contract, and agency law. The Commission did not intend that its leasing regulations would supersede otherwise applicable principles of State tort, contract, and agency law and create carrier liability where none would otherwise **[*31]** exist. Our regulations should have no bearing on this subject. Application of State law will produce appropriate results
>
> ....
>
> The ICC yet again amended the leasing regulations in 1992, this time specifically to address the independent contractor issue. The amended leasing provision, currently *85 codified at 49 C.F.R. 376.12, added subsection (c)(4), that provides:
>
> Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative

> requirements.
>
> 49 C.F.R. 376.12(c)(4) (2007). Paragraph (c)(1) requires the lease to "provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. 376.12(c)(1) (2007). **[*32]** When the 1992 amendments were adopted, the ICC commented:
>
> The Commission's regulations are silent on the agency status of lessors, and our decisions are clear that the Commission has taken no position on the issue of independence of lessors.... While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship. These State agencies often find that the current regulation evidences the type of control that is indicative of an employer-employee relationship. We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact.
>
> Petition to Amend Lease & Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 670-72 (1992)(emphasis supplied). This comment, especially when considered **[*33]** in conjunction with the ICC's 1986 comments, suggests that the view imposing strict vicarious liability was not the result intended by the leasing regulations.

Saullo, supra, at 84-86.

The Court notes that 49 CFR 376.21(c) provides:

> **376.21 General exemptions.**Except for § 376.11(c) which requires the identification of equipment, the leasing regulations in this part shall not apply to:
>
> ....
>
> (c) Equipment leased without drivers from a person who is principally engaged in such a business,

The ITA includes the acknowledgment of SEIDS and Howard Bryant that Howard Bryant would perform delivery services as an independent contractor:

> 6. **Independent Contractor Relationship.**
> INDEPENDENT DELIVERY and CONTRACTOR expressly acknowledge and agree that the services of CONTRACTOR will be rendered as an independent contractor and not as an employee.

The ITA includes specific obligations of the parties in paragraphs a through j, which are based on the parties' agreement of Howard Bryant's status as an independent contractor and not as an employee. Among these obligations is the provision acknowledging Howard Bryant's agreement to obtain insurance:

> j. During the term of this agreement, CONTRACTOR shall obtain the **[*34]** insurance described in Exhibit D. INDEPENDENT DELIVERY shall be named as an additional insured

> on all insurance required under this agreement and no insurance may be canceled unless INDEPENDENT DELIVERY is given Twenty (20) days advance written notice.

Exhibit D defines the minimum insurance requirements for independent owner-operators for SEIDS, including general liability, stating the required coverage and limits thereof, and automobile liability, stating the required coverage and limits thereof. The "Additional Conditions" include:

> Additional Insured/Loss Payees
>
> Lessor (As required by written contract)
>
> Additional Insured: Customer as designated by Independent Delivery
>
> Waiver of Subrogation (As required by contract)

Exhibit D further requires Cargo Coverage, Umbrella Liability, and Worker's Compensation coverage.

Howard Bryant signed an acknowledgment of and agreement to the terms and conditions of the insurance program, which was revised effective 3/31/2005 (Dkt. 21-8, p. 59). The statement of revision is directed to "Owner Operators" and is dated 4/28/2005. The statement of revision specifies the monthly costs for the following coverages: Auto Liability and Physical Damage - $2,000,000 **[*35]** limit, General Liability -$2,000,000 limit, Occupational Accident - various limits, Loss Fund (difference of $2,500 deductible to the point insurance coverage starts.

The statement of revision further provides that the deductible on the auto liability program is $500,000. "However, the OWNER OPERATOR will be responsible for the first $2,500 if they are under dispatch to IDS. OWNER OPERATORS under dispatch to a third party must obtain a separate endorsement; otherwise the full $500,000 will apply." The statement of revision further provides that "OWNER OPERATORS can secure their own insurance as long as the appropriate limits are carried. IDS must be listed as a named insured and the carrier must have an A.M. Best Rating of A-VIII or better."

The ITA includes an Indemnification and Hold Harmless provision:

> 9. Indemnification and Hold Harmless. The CONTRACTOR shall indemnify and hold INDEPENDENT DELIVERY harmless from any liabilities, claims, or demands (including the costs, expenses, and attorney's fees on account thereof) resulting from the injury or death of a person driving, operating, repairing, maintaining, loading or unloading the LEASED EQUIPMENT or from the injury or death of a **[*36]** person making a delivery for INDEPENDENT DELIVERY'S customers. Furthermore, CONTRACTOR shall indemnify and hold INDEPENDENT DELIVERY harmless from any liabilities, claims, or demands (including the costs, expenses, and attorney's fees on account thereof) that may be made:
>
> a. by anyone for injuries to persons or damage to property, including theft, resulting from acts or omissions of the CONTRACTOR, or by persons furnished by the CONTRACTOR; OR
>
> b. by persons furnished by CONTRACTOR for injuries or damages claimed under Workers' Compensation or similar acts.

Howard Bryant executed Addendum I, which is an agreement to as to liability or physical damage arising out of vehicle rented by Independent Delivery Services, Inc. on behalf of Howard Bryant. Howard Bryant further agreed to maintain policies of insurance for Auto Liability and Physical Damages, with a company acceptable to Independent Delivery Services, Inc. with the following coverages and limits:

Auto Liability Any Auto	$1,000,000 each occurrence
Auto Physical Damage Comprehensive	ACV less $2,500 deductible
Collision	ACV less $2,500 deductible

Addendum I further provides that Independent Delivery Services, Inc. will be included as an Additional

[*37] Insured on the above policy or policies.

C. Complaint in the Underlying Case

In his Complaint against FirstLease, Howard Bryant alleged that FirstLease rented a moving truck to him on 5/3/2006. (Dkt. 1-2, p. 3). Howard Bryant further alleged that the moving truck had a retractable rear door which originally came with two thick black straps bolted into the door, which allowed individuals to safely close the door by pulling down on the straps. Howard Bryant alleged that, at the time FirstLease rented the moving truck to him, both of the original black straps had been broken off, and instead of replacing the straps, FirstLease tied a thin "tie strap" to the handle of the retractable door, and furnished the moving truck him in an unsafe condition. (Dkt. 1-2, p. 3).

Howard Bryant further alleged that, on 5/13/2006, he attempted to close the retractable door by pulling on the thin "tie strap," which snapped, causing him to fall backwards and severely injure his arm. Howard Bryant alleged that FirstLease was negligent by committing one or more of the following negligent acts and/or omissions regarding the subject moving truck:

> a. Negligently failed to repair and/or replace the original black **[*38]** straps which had been bolted into the rear door; and/or
>
> b. Negligently tied a "tie strap" to the rear door handle to be used to close the door where said tie strap was not properly affixed to the door, was not bolted into the door and was unreasonably weak for this particular use;
>
> c. Negligently rented the subject moving truck in the above-described condition when Defendant **FIRSTLEASE, INC.** knew or in the exercise of reasonable care should have known that there was an unreasonable risk of the "tie strap" snapping and/or detaching from the rear door while it was being pulled; or
>
> d. Negligently failed to warn Plaintiff of the risk and/or danger of the "tie strap" snapping and/or detaching from the subject rear door during its use; and/or
>
> e. Negligently and/or intentionally made a monetary decision not to properly repair the original, black, bolted straps in the subject door, but instead tied a flimsy "tie strap" to the door handle as a cheaper alternative despite the unreasonable risk to human heal and safety caused by said decision; and/or
>
> f. Negligently violated its own policies and procedures with regard to only renting safe and fully functioning moving trucks to its customers; and/or
>
> g. **[*39]** Negligently violated applicable business standards, codes, laws and/or statutes; and or
>
> h. Was otherwise negligent in the inspection, repair, maintenance and/or rental of the subject moving truck.

The above acts and omissions took place while the moving truck was in the custody of FirstLease. Howard Bryant was injured by the alleged acts and omissions of FirstLease while he was using the truck to deliver furniture.

Harco, as insurer of FirstLease, paid a settlement to Howard Bryant. In the Settlement Agreement and Release of All Claims, FirstLease did not admit liability for its alleged negligence. Howard Bryant acknowledged:

> H. **NO ADMISSION OF LIABILITY**: BRYANT understands and agrees that this Release is a good faith compromise of disputed claims and that this Release is not to be construed as an admission of liability by the Released Parties and that the Released Parties deny any liability.

D. Florida Tort Law

FirstLease is in the business of renting motor vehicles. The Vehicle Rental Agreement established that the duty of "Regular Maintenance" and "P.M. Inspections" was with FirstLease. In the Vehicle Rental Agreement (par. 2), Howard Bryant acknowledged that the vehicle was the property **[*40]** of FirstLease. Howard Bryant filed suit against FirstLease for its alleged negligence in failing to repair the vehicle, failing to exercise due care in renting the vehicle,, and failing to warn Howard Bryant of the danger. The Complaint is directed to acts and omissions within the exclusive control of FirstLease prior to the Rental Agreement, which allegedly proximately caused Howard Bryant's injuries.

In Allstate Ins. Co. of Canada v. Value Rent-a-Car of Florida, Inc., 463 So.2d 320 (Fla. 5th DCA 1985), the Court observed:

> Under the dangerous instrumentality doctrine, owners of motor vehicles are liable for injuries which are caused by the operation of the vehicle. Negligent operators of motor vehicles are also liable for injuries they cause. Common law principles of negligence establish this responsibility. Where two persons are liable for an injury then the one who actually caused the injury is primarily liable and the other person may obtain indemnity from him for any payments made to the injured person. See Seabord Air Line Railway Company v. American District Electric Protective Company, 106 Fla. 330, 143 So. 316 (1932). Thus, an automobile owner who is only vicariously liable **[*41]** for injuries caused by another person's operation of his vehicle is entitled to indemnification from the negligent driver. Rebhan Leasing Corp. v. Trias, 419 So.2d 352 (Fla. 3d DCA 1982), review denied, 427 So. 2d 738 (Fla.1983); Hertz Corp. v. Richards, 224 So.2d 784 (Fla. 3d DCA 1969); Allstate Insurance Company v. Fowler, 455 So.2d 506 (Fla. 1st DCA 1984).

In this case, the only tortfeasor, as alleged in Howard Bryant's Complaint, was FirstLease. In the Rental Agreement, FirstLease and Howard Bryant agreed to the priority of insurance coverage in the event of personal injuries and property damage to third parties. Howard Bryant is not a third party, and the factual scenario of this case does not include any negligent act by Howard Bryant in the operation of the vehicle rented from Firstlease. The priority of liability insurance coverage is not involved where an operator of a motor vehicle seeks compensation for personal injuries from the owner of the motor vehicle on the basis of primary liability, not vicarious liability. Primary liability is "A liability for which a person is directly responsible as contrasted with one which is contingent or secondary." **[*42]** Black's Law Dictionary 823.

The Hillsborough County Circuit Court determined that the indemnification clause of the Vehicle Rental Agreement was unenforceable; there is no contractual indemnification available to FirstLease from Howard Bryant. Because FirstLease is the alleged tortfeasor, common law indemnification is not available to FirstLease.

Harco is seeking contractual indemnification for the settlement paid to Howard Bryant and the cost of FirstLease's defense in the underlying litigation from Zurich based on the terms of the Zurich policy which provided coverage for bodily injury to third persons and for property damage to third persons to SEIDS, Howard Bryant and FirstLease. Harco contends that Zurich had the duty to defend Firstlease in the underlying case, and has the duty to indemnify Harco for the cost of settlement paid to Howard Bryant on behalf of Harco's insured, FirstLease, and the cost of the defense provided to FirstLease.

II. Declaratory Judgment - the Zurich Policy

A. Construction of Insurance Contract

The construction of an insurance policy is a question of law for the Court. If the relevant policy language is susceptible of more than one interpretation, one providing **[*43]** coverage and one limiting coverage, the policy is considered ambiguous. See Weldon v. All Am. Life Ins. Co., 605 So.2d 911, 914-915 (Fla. 2d DCA 1992). Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy. State Farm Casualty and Surety Co. v. CTC Dev. Corp., 720 So.2d 1072 (Fla. 1998). The Court should construe the policy as a whole,

endeavoring to give every provision its full meaning and operative effect. See Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 941 (Fla. 1979).

Florida has declined to adopt the doctrine of reasonable expectations in construing policy provisions which are ambiguous. Deni Associates of Florida, Inc. v. State Farm Fire and Cas. Ins. Co., 711 So.2d 1135 (Fla. 1998). Insurance policies are interpreted according to the plain language of the policy, except when a genuine inconsistency, uncertainty or ambiguity in meaning remains after resort to ordinary rules of construction. State Farm Mutual Insurance Co. v. Pridgeon, 498 So.2d 1245, 1248 (Fla. 1996). A provision is not ambiguous because it is complex or requires analysis. Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So.2d 161, 165 (Fla. 2003).

B. **[*44]** Duty to Defend

An insurer's duty to defend is decided solely by reference to the claimant's complaint if suit has been filed. Higgins v. State Farm Fire and Cas. Co., 894 So.2d 5 (Fla. 2004); Underwriters at Lloyd's London v. STD Enterprises, Inc., 395 F.Supp.2d 1142 (M.D. Fla. 2005).

The Complaint (Dkt. 18-1) alleges that Firstlease owed a duty to Howard Bryant to maintain, inspect and repair the subject moving truck in a reasonably safe manner, and to rent the subject moving truck in a reasonably safe condition. The Complaint further alleges that Firstlease, its agents, servants and/or employees breached its duty of care to Howard Bryant, by negligently or intentionally committing certain acts, which proximately caused Howard Bryant's injuries. The Complaint alleges that Firstlease breached its duty of care on and before May 13, 2006, the date of the accident. Howard Bryant picked the moving truck up on May 2, 2006.

1. Endorsement U-CA-D-428-A. Truckers Coverage Form

CA 00 12 10 01

In the introduction, the Truckers Coverage Form states:

> Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.
>
> Throughout **[*45]** this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.
>
> Other words and phrases that appear in quotation marks have special meaning. Refer to Section VI - Definitions.
>
> As to liability coverage, the Truckers Coverage Form provides:
>
> **A. Coverage**
>
> > We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
> >
> > ....
> >
> > We have the right and duty to defend any "insured" against a suit asking for such damages or a "covered pollution cost or expense." However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends which the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

1. Who is An Insured

The following are "insureds":

a. [*46] You for any covered "auto".

....

d. The owner or anyone else from whom you hire or borrow a covered "auto" that is not a "trailer" while the covered "auto":

1. is being used exclusively in your business as a "trucker" and

2. is being used pursuant to operating rights granted to you by a public authority

e. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

However, none of the following is an "insured":

a. Any "trucker" or his or her agents or "employees", other than you and your "employees".

1. If the "trucker" is subject to motor carrier insurance requirements and meets them by a means other than "auto" liability insurance.

2. If the "trucker" is not an insured for hired "autos" under an "auto" liability insurance form that insures on a primary basis the owners of the "autos" and their agents and "employees" while the "autos" are being used exclusively in the "truckers" business and pursuant to operating rights granted to the "trucker" by a public authority.

....

B. Exclusions

This insurance does not apply to any of the following:

1. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of **[*47]** the "insured".

2. Contractual

Liability assumed under any contract or agreement. But this exclusion does not apply to liability for damages:

a. Assumed in a contract or agreement that is an "insured contract" provided the bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or

b. That the "insured" would have in the absence of the contract or agreement.

....

Section VI - DEFINITIONS

G. "Insured" means any person or organization qualifying as an insured in the

> **Who is An Insured** provision of the applicable coverage. Except with respect to the Limit of insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

2. Endorsement CA 20 01 10 01 Lessor—Additional Insured and Loss Payee

Endorsement CA 20 01 10 01, (Dkt. 18-2, pp. 76-77) provides that the Named Insured is "S E Independent Delivery" and Additional Insured (Lessor) is: "Only those where require (sic) by written contract. The designation or description of "Leased Autos" is "Those where required by written contract." The endorsement includes liability, PIP, comprehensive and collision coverage.

The endorsement modifies **[*48]** insurance provided under: Business Auto Coverage Form, Business Auto Physical Damage Coverage Form, Motor Carrier Coverage Form, Truckers Coverage Form.

Endorsement CA 20 01 10 01 further states:

> A. **Coverage**
>
> > 1. Any "leased auto" designated or described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire or borrow. **Who is an Insured** is changed to include as an "insured" the lessor named in the Schedule.
> >
> > 2. The coverages provided under this endorsement apply to any "leased auto" described in the Schedule until the expiration date shown in the Schedule, or when the lessor or his or her agent takes possession of the "leased auto", whichever occurs first.
>
> B. **Loss Payable Clause**
>
> > 1. We will pay, as interest may appear, you and the lessor named in this endorsement for "loss" to a "leased auto"
> >
> > 2. The insurance covers the interest of the lessor unless the "loss" results from fraudulent acts or omissions on your part.
> >
> > 3. If we make any payment to the lessor, we will obtain his or her rights against any other party.
>
> ....
>
> E. **Additional Definition**
>
> > As used in this endorsement:
> >
> > "Leased auto" means an "auto" leased or rented to you, including any substitute, replacement **[*49]** or extra "auto" needed to meet seasonal or other needs, under a leasing or rental agreement that requires you to provide direct primary insurance for the lessor.

3. Endorsement CA 20 48 02 99 - **Designated Insured**

This endorsement modifies insurance provided under:

Business Auto Coverage Form

Garage Coverage Form

Motor Carrier Coverage Form

Truckers Coverage Form

This endorsement identifies persons(s) or organization(s) who are "insureds" under the Who Is An Insured Provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form.

....

SCHEDULE

Name of Persons(s) or Organization(s):

ONLY THOSE PERSONS OR ORGANIZATIONS WHERE REQUIRED BY WRITTEN CONTRACT EXECUTED PRIOR TO LOSS.

....

Each person or organization shown in the Schedule is an "insured" for Liability Coverage, but only to the extent that person or organization qualifies as an "insured" under the Who Is An Insured Provision contained in Section II of the Coverage Form.

The terms of an endorsement control over anything to the contrary in any other insuring agreement. Fireman's Fund Ins. Co. v. Levine & Partners, P.A., 848 So.2d 1186, 1187 (Fla. 3d DCA 2006). The Court accords the policy provisions their **[*50]** plain meaning, and gives effect to every provision. When viewed against the backdrop of applicable statutes and regulations, the meaning of the provisions becomes clear. The Court considered that the commercial automobile policy was designed for SEIDS, which is in the business of delivering furniture, which is subject to various federal and state motor carrier regulations, and which may use its own employees or independent contractors in the course of its business, and that those employees or independent contractors may own or lease vehicles to carry out delivery services for SEIDS.

In this case, both SEIDS and Firstlease entered into contracts with Howard Bryant which required him to obtain liability insurance which named SEIDS and Firstlease as "additional insured" for liability for bodily injuries resulting from Howard Bryant's operation of a motor vehicle, in the course of making deliveries as to SEIDS, and during the term of the rented vehicle, as to FirstLease.

Since SEIDS obtained the policy which provided coverage to Howard Bryant, and as such was the "named insured" Howard Bryant became an "additional insured" as contemplated by the ITA.

The Vehicle Rental Agreement required **[*51]** Howard Bryant to obtain liability coverage and property damage coverage for bodily injury or property damage to third parties during the term of the rental, which protected Howard Bryant as operator, and which protected Firstlease, as owner of the rented vehicle operated by Howard Bryant. Firstlease is an "insured" under the Zurich policy as "Anyone liable for the conduct of an "insured" described above but only to the extent of that liability." In this case, Howard Bryant is not the tortfeasor; only Firstlease is the alleged tortfeasor. The allegations of the Complaint do not involve the vicarious liability of Firstlease, and the statutorily-permitted shift of liability coverage does not come into play.

Policy TRK 2938900-03 includes SEIDS, Howard Bryant and Firstlease within the liability coverage provided to an "insured" as set forth in the section identifying "Who is An Insured" and the

endorsements which modify that section. The allegations of Howard Bryant's Complaint are not within the liability coverage provided to Firstlease for the conduct of insured Howard Bryant, which includes only liability to third parties. After consideration, the Court concludes that Zurich had no duty **[*52]** to defend Firstlease in the underlying case.

C. Duty to Indemnify

The duty to indemnify is determined by analyzing the actual facts of the underlying case. State Farm Fire and Cas. Co. v. CTC Dev. Corp., 720 So.2d 1072, 1077 n.3 (Fla. 1998). The Court may consider extrinsic evidence in determining the duty to indemnify. The undisputed evidence, including the terms of the Vehicle Rental Agreement, establishes that Howard Bryant was required to obtain liability insurance coverage and property damage coverage which was primary only as to bodily injury or property damage to third parties. Howard Bryant is a party to the Vehicle Rental Agreement, not a third party.

Under the terms of the Harco policy, once Harco paid the settlement to Howard Bryant, any rights Firstlease had to recover damages from another party were transferred to Harco. The Hillsborough County Circuit Court determined that the indemnification provision of the Rental Agreement was not enforceable. Howard Bryant had no duty to indemnify FirstLease under the Vehicle Rental Agreement.

After consideration, the Court concludes that, since Firstlease was only an insured as to liability coverage for bodily injury to third parties **[*53]** resulting from the negligence of its "Renter," Howard Bryant, Zurich has no duty to indemnify Harco for Firstlease's primary negligence to Howard Bryant under the terms of Policy No. TRK 2938900-03.

The Court has determined that Zurich had no duty to defend and no duty to indemnify under its policy. Harco therefore is precluded from recovering the settlement amount, its legal fees and defense costs from Zurich. Accordingly, it is

ORDERED that the Motion for Summary Judgment (Dkt. 18) is **denied** and the Cross-Motion for Summary Judgment (Dkt. 23) is **granted.** The Clerk of Court shall enter a final judgment in favor of Zurich American Insurance Company and close this case.

DONE and ORDERED in Chambers, in Tampa, Florida on this 26th day of September, 2011.

/s/ Elizabeth A. Kovachevich

ELIZABETH A. KOVACHEVICH

United States District Judge