

IN THE SUPREME COURT OF OHIO
CASE NO: 06-0722

THE CINCINNATI INSURANCE CO., et al)	
)	
Plaintiffs-Appellants,)	On Appeal from the Cuyahoga
)	County Court of Appeals,
vs.)	Eighth Appellate District
)	Case Nos. 85967 / 85969
CPS HOLDINGS, INC., et al.)	
)	
Defendants-Appellees)	
)	

MERIT BRIEF OF APPELLEES IQ SOLUTIONS, LLC., ET AL.

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STATEMENT OF FACTS

A. The Procedural History

Appellees CPS Holdings, Inc., CPS Holding Company, Ltd., and I.Q. Solutions, L.L.C. (“CPS/IQ”) were sued by the State of Ohio, Department of Administrative Services (“DAS”) in Franklin County Common Pleas Court for negligence, professional negligence, breach of implied warranty, breach of contract, breach of express warranty, conversion, unjust enrichment, recovery of public funds, and piercing the corporate veil.

CPS/IQ tendered the defense of this lawsuit to its liability insurers, Gulf Underwriters Insurance Company (\$1 million professional errors and omissions coverage) and Cincinnati Insurance Company (\$5 million umbrella policy). Gulf and CIC both denied any defense obligation.

CIC filed a declaratory judgment action against CPS/IQ in Cuyahoga County Common Pleas Court. CPS/IQ filed a counterclaim against CIC and against Gulf.

The parties filed cross motions for summary judgment/declaratory relief solely on the issue of duty to defend. No depositions were conducted and the trial court heard no oral testimony. The motions were submitted on stipulated exhibits, CPS/IQ’s answers to Gulf’s request for admissions, and the affidavit of Thomas Rosenberg, CPS/IQ’s attorney in the Franklin County litigation.

The trial court found in favor of the insurers. Despite DAS’s allegations against CPS/IQ of negligence and professional negligence, the trial court erroneously engaged in fact-finding in order to allow the carriers to escape their duty to defend by finding that

[P]ublic policy does not support the theory that an insurance company must defend and insure the intentional acts of its insureds. Although the complaint is styled to allege negligence, the substance of the claim is theft.

CPS/IQ appealed, and the appellate court reversed, following the long-established rule that the duty to defend is determined only by the allegations contained in the complaint, not the “true facts”, especially where, as here, there was no evidence in the record from which to establish the “true facts.”

The court of appeals held that Gulf is obligated to defend the DAS action since the negligence allegations in the complaint arguably or potentially fall within the coverage provisions of the policy. Gulf appealed to this Court, but jurisdiction was denied.

As to CIC, the appeals court merely held that CIC, as the umbrella carrier, must defend CPS/IQ if and when Gulf exhausts its \$1 million policy limits defending the DAS action.

The court of appeals did not address either carrier’s duty to indemnify CPS/IQ. The parties agreed that the issue of indemnity would turn on the facts proven by DAS at the underlying trial, and that the duty to defend was the only present point of contention.

B. The Underlying Facts

CPS/IQ accepts the facts contained in CIC’s brief with the following qualifications:

- 1. The only issue before the Court is whether CIC may, in the future, have a duty to defend CPS/IQ. CIC’s duty to indemnify is not before the Court.**

Liability insurers have two separate and distinct duties—the duty to defend and the duty to indemnify. CIC repeatedly asserts that the issue the Court must decide is whether there is “coverage” under CIC’s policy for the allegations contained in DAS’s complaint. If, by the use of the term “coverage”, CIC means a duty to indemnify, then

CIC is wrong. The duty to defend is the only issue before the Court, not the duty to indemnify.

The court of appeals held:

We, therefore, agree with appellants' contention that CIC does have a duty to defend since the Gulf policy falls under CIC's umbrella policy. Thus, the lower court's finding that CIC has no duty to defend is reversed.

The duty to indemnify was never addressed by the parties' briefs or by the court of appeals. Obviously, it cannot be addressed by this Court.

2. This case is not about "the future of liability insurance in Ohio."¹

CIC grossly overstates the potential impact of this case. It does so by asserting, without any citation to the record, that "The CIC Umbrella Policy is based upon standard policy language copyrighted by ISO and used, in one form or another, throughout the insurance industry in umbrella liability policies."²

CIC's umbrella policy indicates at the bottom of the primary policy form that the form is copyrighted by The Cincinnati Insurance Company and "contains copyrighted material of Insurance Services Office." The policy does not indicate what sections of the form come from ISO, nor is there any proof anywhere in the record that the ISO portion, whatever it may be, is used throughout the insurance industry.

In fact, it is unlikely that this is a standard form umbrella policy since most umbrella policies are not standard form, as pointed out in Woodward, *CGL and Umbrella Insurance Guide*, 3rd Ed., p. 137 (International Risk Management Institute, 2002):

Unlike general liability insurance, umbrella and excess liability coverages are not written under standard forms.

¹ CIC's Merit Brief, page 2.

² CIC's Merit Brief, page 11.

Insurance Services Office, Inc. (ISO) and the American Association of Insurance Services (AAIS) recently introduced umbrella liability coverage forms of their own, but these forms in no way constitute an industry “standard.”³

Rather than being a landmark case, this is actually a narrow dispute over a narrow issue that turns on a unique set of facts. CPS/IQ is not asking the Court to establish any new precedent, and the consequences of a loss by CIC will be relatively minor. All it will have to do is step in and assume CPS/IQ’s defense in the unlikely event that Gulf ever exhausts its \$1 million policy limit defending CPS/IQ in the DAS lawsuit.

C. CIC Is Asking for an Advisory Opinion

CIC’s initial complaint sought an advisory opinion, as does this appeal. Even if the Court finds in favor of CPS/IQ, CIC will have no actual obligation to perform as long as Gulf continues to defend. Since Gulf has \$1 million in policy limits, it is extremely unlikely that Gulf will deplete its limits in the defense of the DAS lawsuit and turn the defense over to CIC; it certainly has not done so yet.

Furthermore, no ruling in this case will obligate CIC to indemnify CPS/IQ regardless of the outcome of the DAS lawsuit; that is another issue for another day.

It is hard to imagine a case with less precedential effect. This was an argument that CPS/IQ asserted in its jurisdictional brief for why the case should not be accepted by the Court, and the argument still stands. This case is not of great public or general interest, it involves no unique issues of law, and it basically seeks an advisory opinion.

³ See attached Appendix 1.

ARGUMENT OPPOSING CIC'S PROPOSITION OF LAW

CIC'S PROPOSITION OF LAW NO. 1: Where an umbrella liability policy, in pertinent part, provides coverage for "damages in excess of [all other insurance policies applicable to the "occurrence"]", such coverage is not triggered for claims that are not caused by "occurrences" even if unscheduled underlying insurance policies may apply to such losses.

I. SUMMARY OF ARGUMENT

CIC's sole assignment of error relies on bracketed language to reword the actual policy language. CIC probably elected to use the bracketed language because the actual policy language is confusing and grammatically incorrect. In legal terms, it is ambiguous, and when the policy language is construed most strongly in favor of CPS/IQ—as the Court is required to do—the result is predictable. CPS/IQ wins, CIC loses, and the court of appeals' decision is affirmed.

Despite CIC's argument to the contrary, CIC's umbrella policy is not strictly an occurrence-based property damage policy. It is an umbrella policy that provides coverage in two situations:

- 1) When a claim is covered by underlying insurance but exceeds the limits of the underlying insurance; or
- 2) When a claim is not covered by underlying insurance but constitutes an occurrence resulting in bodily injury or property damage.

This case turns on an entrenched principle of insurance policy construction, the doctrine of *contra proferentum*. As *Buckeye Union Ins. Co. v. Price* (1974)⁴ held in its syllabus:

⁴ 39 Ohio St.2d 95, 311 N.E.2d 844

Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.

CIC's policy is excess to Gulf's professional liability policy. Accordingly, if there is potential coverage under Gulf's policy, then there must be potential coverage under CIC's umbrella policy. Potential coverage triggers the duty to defend, the only issue before the Court. The court of appeals was correct; if and when Gulf pays more than \$1 million in defense costs in the DAS lawsuit, CIC must step in and defend.

II. RELEVANT LAW

A. The Law on Duty to Defend

The duty to defend is broader than the duty to indemnify.⁵ As stated in *Socony-Vacuum Oil Co. v. Continental Casualty Co.*⁶:

The duty of a liability insurance company under its policy to defend an action against its insured is determined from the plaintiff's petition, and when that pleading brings the action within the coverage of the policy of insurance, **the insurer is required to make defense regardless of its ultimate liability to the insured.**

The duty to defend is determined by the scope of the allegations in the complaint, and not by the "true facts" as later determined at the trial.⁷ Thus, the duty to defend does not mirror the duty to indemnify; an insurer may be required to defend a lawsuit even though it ultimately is determined to have no duty to indemnify.

⁵ *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, 294 N.E.2d 874

⁶ (1945), 144 Ohio St.382, 59 N.E.2d 199

⁷ *Trainor, supra*

An insurance policy which states that the insurer is obligated to defend in any action seeking damages payable under the policy against the insured, even where the allegations are groundless, false or fraudulent, imposes an absolute duty upon the insurer to assume the defense of the action where the complaint states a claim that is partially or arguably within policy coverage.”⁸ If the facts may be read to support a potentially covered claim, the insurer must defend, even if the underlying claim is incompetently or inartfully drafted, or fails to state the formal legal theory upon which the claim is based.⁹

When a complaint contains more than one claim based on the same occurrence, only one of which is within the coverage of the policy, the insurer must defend its insured against all claims.¹⁰

The insurer’s duty to defend arises the moment suit is filed, and is not dependent on its ultimate liability to the insured for the verdict.¹¹

Doubts in the pleadings regarding coverage, if any exist, must be resolved in favor of the insured rather than in a separate factual inquiry.¹²

The duty to defend is a legal issue that is decided by the court, not a factual issue for a jury to resolve.¹³

⁸ *Sanderson v. Ohio Edison Co.* (1994), 69 Ohio St.3d 582, 635 N.E.2d 19

⁹ Anderson, *Insurance Coverage Litigation*, § 3.02, p. 3-10 (2001)

¹⁰ *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78, 491 N.E.2d 688

¹¹ *Bloom-Rosenblum-Kline Co. v. Union Ind. Co.* (1929), 121 Ohio St. 220, 167 N.E. 884

¹² *Zanco, Inc. v. Michigan Mut. Ins. Co.* (1984), 11 Ohio St.3d 114, 464 N.E.2d 513, (noting that the duty to defend arises “if the pleading against the insured contains allegations which are vague, nebulous, or incomplete such that a potential for coverage exists.”)

B. General Rules of Insurance Policy Interpretation

The interpretation of an insurance contract is a matter of law to be determined by the court.¹⁴ Ohio follows the doctrine of *contra proferentum*. *Buckeye Union Ins. Co. v. Price* (1974)¹⁵ held in its syllabus:

Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.

Under this doctrine, ambiguities within a policy are always resolved in favor of the insured.¹⁶ Furthermore, when a policy can be reasonably interpreted in more than one way, the reviewing court **should not review the choices and pick the most reasonable interpretation**. Rather, as stated in Kalis, *Policyholders Guide to Insurance Coverage*, § 20.02, the doctrine of *contra proferentum* **requires** the court to adopt the most liberal interpretation of the policy that is reasonably possible:

Under this interpretive principle, a policyholder must show only that its interpretation of the ambiguous policy language is not unreasonable. On the other hand, the insurer must show both (i) that the policy is capable of the interpretation it favors; and (ii) that its interpretation is the only fair interpretation of the language. The insurer cannot meet this burden by merely showing that its interpretation is more reasonable than the policyholder's. If the insurer fails to meet its burden, the doctrine of *contra proferentum* will operate to **require** a coverage-enhancing interpretation of the policy.

¹³ *Leber v. Smith* (1994), 70 Ohio St.3d 548, 639 N.E.2d 1159; *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146

¹⁴ *Leber v. Smith* (1994), 70 Ohio St.3d 548, 639 N.E.2d 1159

¹⁵ 39 Ohio St.2d 95, 311 N.E.2d 844

¹⁶ *Bobier v. Natl. Cas. Co.* (1944), 143 Ohio St. 215, 54 N.E.2d 798

The rule of liberal construction applies with “greater force to language that purports to limit or to qualify coverage.”¹⁷ In order to apply, exclusions must be clear and exact.¹⁸ “An exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded.”¹⁹

C. The Distinction Between an Umbrella Policy and an Excess Policy

An excess policy provides coverage once the limits of a primary policy have been exhausted. Coverage under an excess policy is only as broad as the coverage provided by the underlying primary policy.

An umbrella policy provides coverage broader than the underlying primary policies; it provides excess coverage and some primary coverage where there are gaps in the primary coverage. As explained in Stempel, *Law of Insurance Contract Disputes*, §16.02:

It is this presence of additional primary liability coverage that distinguishes umbrella insurance from excess insurance. The umbrella policy is used as something of a “gap filler” in the construction of corporate insurance programs.

III. THE RELEVANT POLICY PROVISIONS

CIC does not quote in its brief the entire Insuring Agreement. Instead, it paraphrases the actual language. The umbrella policy states:

¹⁷ *Watkins v. Brown* (1994), 97 Ohio App.3d 160, 164, 646 N.E.2d 485, 487

¹⁸ *Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St.3d 20, 445 N.E.2d 1122

¹⁹ *Hybud Equip. Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St.3d 657, 597 N.E.2d 1096

A. Insuring Agreement

We will pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages in excess of the “underlying insurance” or for an “occurrence” covered by this policy which is either excluded or not covered by “underlying insurance” because of:

1. “Bodily injury” or “property damage” covered by this policy occurring during the policy period and caused by an “occurrence”; or
2. “Personal injury” or “advertising injury” covered by this policy committed during the policy period and caused by an “occurrence”.²⁰

Two definitions are significant:

“Occurrence” means [an] accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in “bodily injury” or “property damage”.

“Underlying insurance” means the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the “occurrence”.

The umbrella policy also imposes a heightened defense obligation on CIC on page 57 by requiring that CIC defend suits that are “groundless, false, or fraudulent.” The policy states that Cincinnati must:

[D]efend any claim or “suit” against the insured for damages covered by this policy, **even if the allegations are groundless, false, or fraudulent**, when:

- a. The applicable limits of the “underlying insurance” and any other insurance have been exhausted by payment of claims; or
- b. Damages are sought for “bodily injury”, “property damage”, “personal injury” or “advertising injury”

²⁰ See policy at CIC’s Supplement to Merit Brief, Exhibit B, page 53.

which are not covered by “underlying insurance” or other insurance.

IV. THE CONSTRUCTION OF THE UMBRELLA POLICY

The umbrella policy’s general insuring paragraph states:

We will pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages in excess of the “underlying insurance” or for an “occurrence” covered by this policy which is either excluded or not covered by “underlying insurance” because of:

1. “Bodily injury” or “property damage” covered by this policy occurring during the policy period and caused by an “occurrence”; or
2. “Personal injury” or “advertising injury” covered by this policy committed during the policy period and caused by an “occurrence”.

Breaking this unwieldy paragraph down, Cincinnati is obligated to pay damages—and thus defend—in two situations: (1) when the damages exceed the underlying insurance (the excess part of the umbrella coverage), or (2) when the damages are not covered by underlying insurance but fall within the coverage afforded by the umbrella policy (the “gap filler” part of the umbrella coverage).

The coverage interpretation issue for the Court to decide is this: What does the language in the insuring agreement beginning with “because of” modify, both of the preceding clauses or only the immediate preceding clause? That is, which of the following is the correct interpretation of the insuring agreement?

We will pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages in excess of the “underlying insurance.” We will also pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages for an “occurrence” covered by this policy which is either

excluded or not covered by “underlying insurance” because of:

1. “Bodily injury” or “property damage” covered by this policy occurring during the policy period and caused by an “occurrence”; or
2. “Personal injury” or “advertising injury” covered by this policy committed during the policy period and caused by an “occurrence”.

OR

We will pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages

1. in excess of the “underlying insurance”, or
2. for an “occurrence” covered by this policy which is either excluded or not covered by “underlying insurance”.

In both cases, the loss must result from either:

1. “Bodily injury” or “property damage” covered by this policy occurring during the policy period and caused by an “occurrence”; or
2. “Personal injury” or “advertising injury” covered by this policy committed during the policy period and caused by an “occurrence”.

Which construction is correct? It is unclear from CIC’s brief which interpretation it believes is correct, but perhaps this issue will be addressed in its reply brief. CPS/IQ believes that the first construction is correct, and anticipates that CIC will favor the second.

V. THE RULES OF GRAMMAR FAVOR THE CONSTRUCTION URGED BY CPS/IQ.

Ohio law provides several grammatical rules for interpreting insurance policies, starting with R.C. 1.42, which provides that

Words and phrases shall be read in context and construed according to the rules of grammar and common usage.²¹

This Court recently affirmed a longstanding rule of grammar that is relevant to the issue at hand:

The rules of grammar and common usage are clear that “referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent * * *”²²

There is nothing in the record regarding the intent of the parties, so the referential phrase beginning with “because of” only modifies the last antecedent. That is, it only modifies the phrase

for an “occurrence” covered by this policy which is either excluded or not covered by “underlying insurance”

This means that the umbrella policy provides coverage in two situations:

- (1) when the damages exceed the underlying insurance (the excess part of the umbrella coverage), or
- (2) when the damages are not covered by underlying insurance but fall within the coverage afforded by the umbrella policy (the “gap filler” part of the umbrella coverage).

The requirement that “bodily injury” or “property damage” occur only applies to (2) above; it has no application to (1). All (1) requires is a loss covered by some underlying insurance policy, and the Gulf policy qualifies, as discussed below.

CIC attempts to read “an occurrence” requirement into both of these coverage situations, however, the Insuring Agreement only mentions this requirement under the

²¹ See Appendix 2.

²² *Hedges v. Nationwide Mutual Ins. Co.*, 109 Ohio St.3d 70, 2006 Ohio 1926, 846 N.E.2d 16, quoting *Independent Insurance Agents of Ohio v. Fabe* (1992), 63 Ohio St.3d 310, 587 N.E.2d 814 and *Carter v. Youngstown* (1946), 146 Ohio St. 203, 65 N.E.2d 63.

second scenario. In effect, CIC seeks to rewrite the policy by adding the language in bold:

We will pay on behalf of the insured the “ultimate net loss” which the insured is legally obligated to pay as damages in excess of the “underlying insurance” **[for an occurrence]** or for an “occurrence” covered by this policy which is either excluded or not covered by “underlying insurance” because of:

1. “Bodily injury” or “property damage” covered by this policy occurring during the policy period and caused by an “occurrence”; or
2. “Personal injury” or “advertising injury” covered by this policy committed during the policy period and caused by an “occurrence”.

CIC cannot add words to its policy to clarify its intent; the policy does not require an occurrence or property damage to trigger coverage under scenario (1).

Even if CIC’s policy construction were grammatically correct, it would not render the construction urged by CPS/IQ unreasonable. CIC’s sloppy grammar created an ambiguity in the umbrella policy’s insuring agreement, so this Court is required to adopt the construction most favorable to the insured. This means that the umbrella policy must be construed so as to cover all damage that the insured is obligated to pay in excess of any underlying insurance that covers the loss.

Since there is potential liability under CIC’s umbrella, CIC must defend the DAS lawsuit if and when Gulf’s \$1 million policy limits are depleted.

VI. GULF'S POLICY CONSTITUTES UNDERLYING INSURANCE

A. The Difference Between “An Occurrence” and “The Occurrence”

Gulf's policy is not listed on the umbrella policy's Schedule of Underlying Policies.²³ However, Gulf's policy qualifies as underlying insurance by virtue of the definition of this term, which provides that “underlying insurance” includes scheduled policies and “all other insurance policies applicable to the “occurrence.”” Notice that the policy does not define “underlying insurance” to include only those insurance policies applicable to an occurrence. If it did, a reference in the definition of “underlying insurance” to the policy's definition of “occurrence” would make sense.

However, by referring to the occurrence, the policy is linking the phrase to the allegations in the complaint which give rise to coverage under the underlying policy, not to any definition in CIC's policy. As such, a reference to CIC's definition of “occurrence” makes no sense if the underlying policy does not contain this definition.

In this case, the Gulf policy is a claims-made policy, and, consequently, does not use “occurrence” language.²⁴ However, an allegation that an insured committed a negligent professional act triggers potential coverage under the Gulf policy. The court of appeals held that the Gulf policy must respond to DAS's allegations and this Court declined jurisdiction of Gulf's appeal. Therefore, the matter is settled—Gulf's policy provides coverage for the DAS lawsuit.

The term “the occurrence” can logically be interpreted as referring generically to the allegations of the DAS lawsuit. Since there is potential coverage under Gulf's policy

²³ See Exhibit B, page 49.

²⁴ See Supplement to Appellee's Merit Brief, Exhibit D.

for these allegations, the Gulf policy qualifies as “underlying insurance” for purposes of CIC’s umbrella.

Rather than adopting this common sense approach, CIC argues that the Court should perform the equivalent of legal gymnastics to arrive at its coverage determination:

- Read the Insuring Agreement and note that it refers to underlying insurance;
- Find the definition of underlying insurance and see that it refers to “the occurrence”;
- Realize that “the occurrence” means “an occurrence” as defined by the policy;
- Find the definition of an occurrence and see that it only applies to damages resulting from property damage;
- Find the definition of property damage to determine if the allegations in the DAS lawsuit fit the definition.

Insurance policies are complicated, but do they really need this degree of detective work to reach a result, especially when a common sense reading of the term “the occurrence” results in a far simpler and logical coverage analysis?

B. The Exclusion for Professional Services

CIC’s coverage position is further negated by the fact that the umbrella policy contains a special endorsement entitled Exclusion of Designated Professional Services, form UA 302 01 96.²⁵ This endorsement excludes coverage for damage due to the rendering or failure to render professional services in the areas of:

- Computer programming and consulting;
- Computer manufacturing, computer software;
- Electronic data processing services.

²⁵ See Exhibit B, page 50.

None of these exclusions for professional services impact on DAS's claim against CPS/IQ for professional negligence in providing natural gas bidding and billing services. However, the fact that CIC deemed it necessary to exclude from the umbrella policy coverage for certain professional services indicates that CIC intended the umbrella to cover professional negligence; otherwise there would have been no need for this special endorsement. Since all professional liability policies are written on a claims-made basis, and since virtually all—including Gulf's—cover damages other than those resulting from "bodily injury" or "property damage"²⁶, then the presence of this exclusion can only be explained by the policy interpretation urged by CPS/IQ. That is, CIC intended its umbrella policy to apply as excess coverage for professional liability policies written on a claims-made basis seeking damages for wrongful conduct.

In interpreting an insurance policy, a court must attempt to give meaning to all of the policy's terms and endorsements. The Exclusion of Designated Professional Services endorsement would be meaningless unless the umbrella policy was intended to cover professional E&O claims. Therefore, the Court should construe the policy in the manner advocated above, and hold that Cincinnati's policy is an excess umbrella policy with respect to the Gulf policy, and that if there is potential coverage under the Gulf policy, then there is potential coverage under the Cincinnati umbrella policy.

C. CIC Has a Heightened Duty to Defend

CIC's policy has a heightened duty to defend requirement by virtue of its inclusion of the requirement that CIC defend claims that are "groundless, false, or fraudulent." This requirement is triggered whenever the limits of any underlying policy are exhausted.

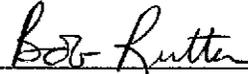
²⁶ See Gulf's policy, Supplement D at page

In this case, therefore, the court of appeals correctly held that this heightened responsibility requires CIC to step in and defend CPS/IQ if and when Gulf exhausts its \$1 million policy limits in defense of the DAS lawsuit.

CONCLUSION

This Court should dismiss CIC's appeal as improvidently granted since it seeks an advisory opinion on an issue that is extremely unlikely to ever occur. Gulf has plenty of coverage to defend the DAS lawsuit, and CIC will probably never have to step in and defend. In the alternative, the Court should affirm the court of appeals and require CIC to defend CPS/IQ in the unlikely event that Gulf exhausts its \$1 million policy limits in the defense of the DAS lawsuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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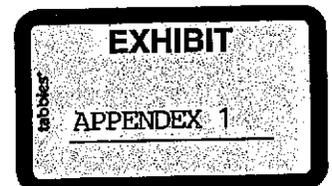
CGL AND UMBRELLA INSURANCE GUIDE

Third Edition

W. Jeffrey Woodward, CPCU



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UMBRELLA LIABILITY INSURANCE—I

The umbrella liability policy is one of the most important elements of any insurance program. It provides the source of protection for catastrophic liability losses by establishing relatively high limits of insurance above those of the commercial general liability (CGL) policy, the business auto policy (BAP), and the employers liability (EL) portion of the workers compensation policy. It also may afford a wider range of coverages than do the primary liability policies.

Unlike general liability insurance, umbrella and excess liability coverages are not written under standard forms. Insurance Services Office, Inc. (ISO), and the American Association of Insurance Services (AAIS) recently introduced umbrella liability coverage forms of their own, but these forms in no way constitute an industry "standard." The vast majority of insurers offering umbrella coverage have developed their own policy language and follow their own underwriting and pricing philosophies. Because of the lack of industry standardization, careful analysis of an umbrella policy is necessary in order to determine whether its coverages meet the needs of a particular insured.

Functions of an Umbrella Policy

An umbrella policy is generally designed to fulfill the following three basic functions.

- To extend the limits of the primary (underlying) liability policies
- To replace primary coverage once the primary aggregate limits of liability have been exhausted

- To afford broader coverage (in some areas) than primary policies provide, subject to a retention amount

These functions are illustrated in Exhibit 7.1.

It is important to note that umbrella policies do not "cap" limits at a level amount for all areas of coverage. When umbrella policies were first introduced, it was common for the limits of liability to be structured on an "up to" basis—that is, amounts of insurance defined as the difference between the underlying limits and the stated umbrella limit. In other words, the umbrella limit incorporated the primary limit within its coverage. For example, a \$10 million umbrella over a \$1 million primary policy would provide only \$9 million of coverage on an "up to" basis. Today, however, umbrella policies afford limits on an "in addition to" basis. A \$10 million umbrella over a \$1 million primary policy on an "in addition to" basis affords a total limit of \$11 million of insurance. Exhibit 7.1 also illustrates a \$10 million umbrella that provides limits "in addition to" those of the underlying. Note that the total amount of coverage is different for the various liability coverages, depending on which line of coverage the umbrella is sitting over and the underlying limits.

"Umbrella" versus "Excess" Insurance

An excess liability policy provides specific coverage above a specified underlying limit up to a specified limit. For example, an excess policy may provide \$2 million limits once products liability

§ 1.42**Statutes & Session Law****GENERAL PROVISIONS****CHAPTER 1: DEFINITIONS; RULES OF CONSTRUCTION****1.42 Common, technical or particular terms.**

1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

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