In the

Supreme Court of Ohio

THE CINCINNATI INSURANCE CO.,	:	Case No. 2006-0722
Plaintiff-Appellant,	:	
v.	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
CPS HOLDINGS, INC., et al.,	:	
Defendants-Appellees.	:	Court of Appeals Case Nos. 85967 and 85969

MERIT BRIEF OF DEFENDANT-APPELLEE
STATE OF OHIO, DEPARTMENT OF ADMINISTRATIVE SERVICES

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INTRODUCTION

Despite Appellant Cincinnati Insurance Company's ("CIC's") protest, this is not a case about the "future of liability insurance in Ohio." The decision below did not work any revolutionary change in the insurance industry or establish new precedent in Ohio insurance law, and Appellees, CPS Holdings, Inc., d.b.a. IQ Solutions, LLC ("CPS/IQ"), and the Ohio Department of Administrative Services ("the Department") seek no such changes in this appeal. Rather, this case is simply about applying well-established rules to construe the breadth of an ambiguous umbrella insurance policy and determine whether the umbrella insurer (CIC) owes its insured (CPS/IQ) a duty to defend against certain claims brought by the Department.

In this case, the Department sued CPS/IQ for breach of the latter's professional obligations in procuring natural gas for the Department. CPS/IQ tendered its defense to its insurers, including Gulf Underwriters Insurance Company ("Gulf"), which had issued a specialty errors and omissions policy (i.e., the primary insurance policy), and CIC, which had issued a primary commercial liability policy (not in issue here) and an umbrella liability policy.[1] (An "umbrella" policy provides coverage broader than underlying primary insurance policies, including some "excess" coverage, i.e., where the limits of the primary policy have been exhausted, and some primary coverage where there are gaps in the underlying primary coverage.) Both insurers

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[1] Without any citation to the record, CIC states that its umbrella policy "is based upon standard policy language copyrighted by ISO [Insurance Services Office, Inc.] and used, in one form or another, throughout the insurance industry in umbrella liability policies," and thus implies that the lower court decision, if left standing, would have a significant effect on the insurance industry. CIC Merit Brief, p. 11. Even if it were appropriate for the Court to consider such extra-record arguments, CIC's statement is not accurate: The CIC umbrella policy is really a manuscripted policy drafted and copyrighted in 1994 by CIC containing some 1992 ISO "copyrighted material." ISO did not produce a "standard" commercial liability umbrella policy or program until August 2000. See <http://www.iso.com/press_releases/2000/08_21_00.html>.

refused to defend CPS/IQ. CIC then sought a declaratory judgment regarding its duty to defend and indemnify, and the common pleas court agreed that CIC and Gulf had no duty to defend.

The Eighth District Court of Appeals reversed that judgment, and correctly determined that CIC has a duty to defend its insured, CPS/IQ, under an "umbrella" liability policy which covered damages in excess of the insured's "underlying insurance." *Cincinnati Ins. Co. v. CPS Holdings, Inc.* (8th Dist.), 2006-Ohio-713, ¶¶ 24-27. Under the policy, "underlying insurance" includes "the insurance available to the insured under all other insurance policies applicable to the occurrence." *Id.* ¶ 26. The Eighth District determined that the Gulf primary policy applied and required Gulf to defend CPS/IQ. Thus, according to the Eighth District, the Gulf policy "arguably [fell] within the underlying insurance language [in the CIC umbrella policy]. . . [and therefore] . . . CIC does have a duty to defend since the Gulf policy falls under CIC's umbrella policy." *Id.* ¶ 27. The court of appeals' ruling was in accordance with established precedent that recognizes that an insurer's duty to defend is broader than its duty to indemnify, and that policy provisions that are susceptible to more than one meaning will be construed liberally in favor of the insured and strictly as against the insurer. See, e.g., *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St. 2d 95, syllabus (ambiguous policy language construed against the insurer); *Socony-Vacuum Oil Co. v. Continental Cas. Co.* (1945), 144 Ohio St. 382, syllabus ¶ one (duty to defend is broader than duty to indemnify). The court of appeals did not decide whether CIC owes any duty to indemnify CPS/IQ for damages that have yet to be incurred.

CIC's umbrella policy provisions are reasonably susceptible of more than one meaning. The umbrella olicy provides excess coverage for negligent acts covered by the underlying policy, and that coverage is not limited solely to "occurrences" as the term is defined in the umbrella policy (i.e., bodily injury or property damage). A reasonable interpretation of this provision—

and the one that the court below adopted—is that the umbrella language follows the conditions of the underlying policy. Accordingly, the Court should construe the ambiguous CIC policy provision liberally in favor of the insured, CPS/IQ, and affirm the appellate court's ruling.

Moreover, the CIC umbrella policy does not clearly exclude losses from CPS/IQ's provision of professional energy management consulting services to the Department, and such services are included in the scheduled services under the Gulf insurance policy. The CIC umbrella policy specifically excludes services relating to computing programming, consulting and software, for example, but not the type of services CPS/IQ provided the Department. The court of appeals decided that the underlying Gulf policy requires a defense to the Department's claims against CPS/IQ. As the Court has declined Gulf's appeal of that ruling, Gulf's duty to defend is settled. Accordingly, CIC's failure to exclude acts covered by the underlying insurance means it must accept the defense if and when the underlying Gulf policy limits (of $1 million) are exhausted. The court of appeals correctly reversed the trial court's holding that the umbrella carrier has no duty to defend once the underlying policy's $1 million limits are exhausted.

Accordingly, the Court should affirm the judgment of the court of appeals.

STATEMENT OF THE CASE AND FACTS

A. CPS/IQ entered into a fiduciary relationship with the Department, and then breached its fiduciary duty to act in a professional manner.

CPS/IQ contracted with the Department to act as a third-party administrator for the State's natural gas procurement program. CIC Supp. at 88, ¶ 27 (State of Ohio's First Am. Compl.). CPS/IQ had represented to the Department that it was an expert in the field of natural gas procurement and management. *Id.* at 92, ¶ 52. Under the program, natural gas is supplied to State agencies and eligible political subdivisions by natural gas suppliers. *Id.* at 88, ¶ 26. Per the contracts, the Department forwarded state gas supplier funds to CPS/IQ, and CPS/IQ was required to pay natural gas suppliers in a timely manner on behalf of the Department. *Id.* at 89, ¶ 31.

Initially unknown to the Department, CPS/IQ kept and commingled the Department's gas supplier funds with its own funds, instead of paying the gas suppliers. *Id.* ¶ 33. The Department learned about CPS/IQ's failure to pay when the gas suppliers began to contact the Department demanding payment. *Id.* ¶ 35. The Department first wrote CPS/IQ that it had not made timely payments as required by the contract, and demanded a cure from CPS/IQ. *Id.* at 89-90, ¶ 36. The Department also advised CPS/IQ that it would be liable for the cost of any replacement services and other damages if it failed to cure. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶ 16. The Department thereafter notified CPS/IQ it was claiming damages for CPS/IQ's breach of its contractual duty. *Id.* ¶ 17.

CPS/IQ did not cure its failure to pay gas suppliers, and the Department terminated its contract with CPS/IQ. CIC Supp. at 90, ¶ 41. As a result of CPS/IQ's failure to pay the gas suppliers, the Department has lost over $5,771,302. *Id.* at 90-91, ¶ 42.

The Department subsequently sued CPS/IQ, its affiliated businesses and certain officers and directors 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/business entity veil. See CIC Supp. at 81-99 (Amended Complaint, *State of Ohio, Dept. of Admin. Servs. v. IQ Solutions, LLC, et al.*, Franklin C.P. No. 03-CVH05-6054 (filed Dec. 9, 2003)). Specifically, the Department brought claims of negligence and professional negligence because CPS/IQ breached its professional and fiduciary duty to provide professional services and act in a reasonably and professionally competent manner. *Id.* at 91-92, ¶¶ 45-55. CPS/IQ tendered its defense to its insurance carriers, including (1) Gulf, its underlying carrier, which provides claims-made specialty errors and omissions liability coverage up to $1 million, see CPS/IQ Supp. (Gulf Underwriters Insurance Company Policy); and (2) CIC, which provides both commercial general liability and umbrella coverage, see CIC Supp. at 2-27 (CIC CGL Policy), 48-80 (CIC Umbrella Policy). Both Gulf and CIC denied CPS/IQ a defense against the Department's claims. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶ 4. (The underlying case in the Franklin County Common Pleas Court, which had been stayed pending a decision on the insurers' duty to defend, was recently reactivated after this Court declined review of Gulf's appeal.)

B. The CIC umbrella policy requires CIC to defend and indemnify CPS/IQ against damage claims in excess of underlying insurance, including all other insurance policies.

CIC insured CPS/IQ under a primary commercial general liability policy[2] and an umbrella policy. CIC Supp., Exhs. A & B. The CIC umbrella policy's general insuring paragraph provides as follows:

> 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 "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".

CIC Supp. at 53, Section I.A (emphasis added). The CIC umbrella policy defines "underlying insurance" as:

> * * * 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."* "Underlying insurance" also includes any type of self-insurance or alternative method by which the insured arranges funding for legal liabilities that affords coverage that this policy covers.

Id. at 65, Section V.16 (emphasis added). The CIC policy defines "occurrence" to mean "either "[a]n accident * * * that results in "bodily injury" or "property damage, * * *" or "[a]n offense that results in "personal injury" or "advertising injury." *Id.* at 64, Section V.9. The CIC umbrella policy also requires CIC to defend suits that are "groundless, false, or fraudulent." *Id.* at 57, Section I.C.1.

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[2] The trial court found, and Appellees conceded on appeal, that the CIC primary commercial general liability policy did not cover the Department's claims against CPS/IQ. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶ 23; trial court op. ¶¶ 7-8.

In this case, Gulf Underwriters Insurance Company ("Gulf") issued a "claims made" specialty errors and omissions insurance policy to CPS/IQ. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶ 12; CPS/IQ Supp., Exh. D.[3] (As is typical in the insurance industry, a "claims made" policy covers damages against the insured for any claims that are made within the policy period, regardless of when the events giving rise to the underlying claim took place. See pages 12-13 of this brief.) The Gulf policy was not listed in the Schedule of Underlying Policies in the CIC policy. *Id.* ¶ 26. However, the court of appeals in this case held that Gulf had a duty to defend CPS/IQ under Gulf's policy, and this Court declined review of Gulf's appeal of that ruling. See *id.* ¶¶ 19-22; *7/05/2006* Case Announcements, 2006-Ohio-3306.

The Gulf policy defined a claim as "a demand or assertion of a legal right seeking **Damages** made against any of **You**." CPS/IQ Supp. at 113 (Gulf Underwriters Insurance Policy, Part 6.C). It further read, "**We** will consider a **Claim** to be first made against **You** when a written **Claim** is first received by any of **You**." CPS/IQ Supp. at 109 (Gulf Underwriters Insurance Policy, Part 5.C.2.a). Moreover, the policy provided that Gulf has a "right and duty to appoint an attorney and defend a covered **Claim**, even if the allegations are groundless, false or fraudulent." CPS/IQ Supp. at 107 (Gulf Underwriters Insurance Policy, Part 5.A.2). Covered claims include "**Wrongful Acts**," such as a "negligent act, error or omission." CPS/IQ Supp. at 114 (Gulf Underwriters Insurance Policy, Part.6.L.1). The Gulf policy has a $1 million limit. CPS/IQ Supp. at 102 Gulf Underwriters Insurance Policy, Part 1, Item 5). Only when the Gulf policy's $1 million coverage limit is exhausted will excess insurance (such as CIC's policy) come into play.

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[3] Gulf actually issued two identical policies to CPS/IQ. The first policy was effective from November 13, 2001 through November 13, 2002 (the parties later amended the effective dates to include December 13, 2001 through December 13, 2002). The second Gulf policy renewed the first Gulf policy with effective dates December 13, 2002 through December 13, 2003. Both policies had a retroactive date of November 13, 1997.

C. Gulf and CIC refused to defend CPS/IQ against the Department's claims and CIC sued for declaratory judgment.

Gulf and CIC refused to defend their insured CPS/IQ, and instead, CIC sued for declaratory judgment in the Cuyahoga County Common Pleas Court ("trial court"). *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶ 4. CPS/IQ counterclaimed against CIC and filed third-party claims against Gulf, other insurers and the Department. *Id.* The parties filed cross-motions for summary judgment. *Id.* The trial court held that neither CIC nor Gulf owed CPS/IQ a duty to defend or indemnify against the Department's claims. *Id.*; trial court op. ¶¶ 6, 8, 17. As to the CIC policy, the trial court believed that the issue depended upon whether the claims in the Department's complaint against CPS/IQ were for "property damage." Trial court op. ¶ 5. The trial court further opined that the substance of the Department's claims against CPS/IQ was theft (i.e., that CPS/IQ converted public funds for private use), and that was not an instance of property damage. *Id.* ¶ 6.

On appeal, the Eighth District Court of Appeals reversed, holding that both Gulf and CIC owed CPS/IQ a duty to defend. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶¶ 22, 27-28. With regard to the CIC policy, the Eighth District concluded that the CIC policy's "underlying insurance" language—"and the insurance available to the insured under all other insurance policies applicable to the occurrence,"—"can be read as covering parallel policies such as CPS'[s] Gulf policy." *Id.* ¶ 26. The appellate court held "[s]ince this court has found that the Gulf policy requires a duty to defend, that policy arguably falls within the underlying insurance language . . . [and therefore] CIC does have a duty to defend since the Gulf policy falls under CIC's umbrella policy." *Id.* ¶ 27. The appeals court did not decide whether Gulf or CIC has a duty to indemnify CPS/IQ under the insurers' respective policies. See *id.* ¶¶ 22, 27.

CIC moved the court of appeals to certify a conflict between the opinion below and two decisions from the Tenth District Court of Appeals. The panel, consisting of the same three

judges from the opinion below, unanimously denied without comment CIC's motion to certify. Thereafter, both CIC and Gulf appealed to this Court. While the Court declined review of Gulf's appeal, the Court accepted CIC's appeal on its first proposition of law. See *7/05/2006 Case Announcements*, 2006-Ohio-3306. The Court also rejected CIC's appeal on its other propositions of law. *Id.*

ARGUMENT

<u>The State's Proposition of Law:</u>

CIC has a duty to defend CPS/IQ against the Department's claims after the underlying Gulf policy's limits are exhausted, as CIC's ambiguous umbrella policy language does not require the insured to suffer "bodily injury" or "property damage" as a condition precedent for coverage, and does not clearly exclude coverage for CPS/IQ's negligent acts.

A. The Court of Appeals correctly determined that CIC would have a duty to defend CPS/IQ (i.e., if the Gulf policy's coverage limits are exhausted).

The Court of Appeals correctly determined that CIC, an umbrella liability insurer of CPS/IQ, would have a duty to defend CPS/IQ against the Department's claims, as the Gulf policy falls under CIC's umbrella policy's provision for excess coverage for "underlying insurance." Cincinnati Ins. Co., 2006-Ohio-713, ¶ 27. Thus, in the event that Gulf's primary coverage (with a limit of $1 million, see CPS/IQ Supp. at 102) is exhausted, CIC would have a duty to defend CPS/IQ against the Department's claims. CIC's umbrella policy is not triggered unless the Gulf $1 million policy limit is exhausted. See CIC Supp. at 53 (CIC Umbrella Policy, Part I.A). Until that occurs, Gulf alone is responsible for defending CPS/IQ against the Department's claims.

In this case, the court of appeals expressly declined to decide whether CIC must indemnify CPS/IQ. Cincinnati Ins. Co., 2006-Ohio-713, ¶ 22. Instead, the court simply reversed the trial court's finding that CIC has no duty to defend CPS/IQ against the Department's claims. Id. ¶ 27.

Thus, the only issue raised by this appeal is whether CIC must defend CPS/IQ against the Department's claims. The duty of an insurer to defend its insured is broader than and distinct from its duty to indemnify (i.e., the duty to pay damages for which the insured is found liable). *Socony-Vacuum Oil Co. v. Continental Cas. Co.* (1945), 144 Ohio St. 382, syllabus ¶ one. The duty to defend depends solely on the allegations in the complaint. *Id.* at 384. If the allegations "state a claim which is potentially or arguably within the policy coverage, or [if] there is some

doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim." *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St. 3d 177, syllabus. Whether an insurer has a duty to defend is a question of law for the court. *Erie Ins. Group v. Fisher* (1984), 15 Ohio St.3d 380, syllabus. The court of appeals here correctly determined that CIC had a duty to defend CPS/IQ against the Department's claims, as discussed further below.

B. The CIC umbrella policy language does not limit CIC's excess coverage to an "occurrence" as defined by the umbrella policy, but broadly extends both the limits and scope of insurance coverage so as to follow the conditions of the underlying Gulf policy.

The CIC umbrella policy's general insuring paragraph provides as follows:

> 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 "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".

CIC Supp. at 53 (CIC Umbrella Policy, Section I.A) (emphasis added). The CIC umbrella policy defines "underlying insurance" as:

> 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." "Underlying insurance" also includes any type of self-insurance or alternative method by which the insured arranges funding for legal liabilities that affords coverage that this policy covers.

CIC Supp. at 65 (CIC Umbrella Policy, Section V.16). The CIC policy defines "occurrence" to mean either "[a]n accident . . . that results in 'bodily injury' or 'property damage,'" or "[a]n offense that results in 'personal injury' or 'advertising injury.'" *Id.* at 64, (CIC Umbrella Policy, Section V.9).

The CIC umbrella policy also requires CIC to defend suits that are "groundless, false, or fraudulent." *Id.* at 57 (CIC Umbrella Policy, Section I.C.1). Such language imposes upon the insurer an absolute duty to defend, where the underlying complaint states a claim that is potentially or arguably within policy coverage. *Sanderson v. Ohio Edison Co.* (1994), 69 Ohio St.3d 582, 1994-Ohio-379, syllabus ¶ one.

1. Ambiguous contract language is construed liberally in favor of the insured and strictly against the insurer.

It is well established that insurance contract terms reasonably susceptible of more than one meaning are construed liberally in favor of the insured and strictly against the insurer. *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St.2d 95, syllabus. Ambiguities within a policy must be resolved in favor of the insured. Id. Similarly, conflicting provisions in an insurance policy will bind the insurer to the provision that is most favorable to the insured. *Para-Chem Southern, Inc. v. Natl. Union Fire Ins. Co.* (9th Dist.), 2004 Ohio App. Lexis 767, 2004-Ohio-834 ¶ 32. "Thus, in order to defeat coverage, 'the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question.'" *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 2001-Ohio-1607 (emphasis added) (quoting Reiter, Strasser & Pohlman, *The Pollution Exclusion Under Ohio Law: Staying The Course* (1991), 59 U. Cin. L. Rev. 1165, 1179).

2. The CIC umbrella policy provides coverage in excess of CPS/IQ's primary policies, including the Gulf policy.

Umbrella policies differ from standard excess liability policies because they fill in coverage gaps, both (1) vertically, by providing excess coverage when the primary policies' coverage limits are exhausted; and (2) horizontally, by providing "drop down" primary coverage for instances where underlying primary insurance provides no coverage at all. *Am. Special Risk Ins.*

Co. v. A-Best Prod., Inc. (N.D. Ohio 1997), 975 F. Supp. 1019, 1022; *Wright v. MedAmerica Intl.* (2nd Dist.), 2003 Ohio App. Lexis 5122, 2003-Ohio-5723 ¶ 32.

The CIC umbrella policy affords CPS/IQ blanket excess liability coverage and covers additional matters not covered by its terms and those of the Gulf policy. Specifically, the policy covers damages (1) in excess of the "underlying insurance," or (2) for an "occurrence" covered by the umbrella policy "because of 'bodily injury,' . . . 'property damage,' . . . 'personal injury,' or 'advertising injury.'" See CIC Supp. at 53 (CIC Umbrella Insurance Policy, Section I.A). Excess coverage under the CIC umbrella policy is not limited to policies listed in CIC's schedule. (In fact, the only policy listed is the CIC commercial general liability policy. See CIC Supp. at 49). Rather, the umbrella policy broadly covers any available insurance to the insured, including self-insurance and alternative risk finance. See CIC Supp. at 65 (CIC Umbrella Insurance Policy, Section V.16).

3. The CIC umbrella policy language does not restrict coverage solely to losses from bodily injury or property damage.

The umbrella policy's coverage for "damages in excess of the 'underlying insurance'" is not limited to damages "because of" bodily injury, property damage, personal injury, or advertising injury. Although the general insuring paragraph at Section I.A contains limiting language pertaining to harms caused "because of . . . 'bodily injury,' . . . 'property damage,' . . . 'personal injury' or 'advertising injury," see CIC Supp. at 53, the paragraph is ambiguous regarding how this clause modifies the remainder of the paragraph. One could read the policy as covering only losses that the insured "is legally obligated to pay . . . because of [bodily injury, property damage, personal injury, or advertising injury]." Alternatively, one could read the policy as covering *all* damages in excess of underlying insurance policy limits, but *only*

"'occurrence[s]' covered by this policy . . . because of [bodily injury, property damage, personal injury, or advertising injury]."

Because more than one interpretation "can fairly be placed on the language in question," the language is ambiguous. See *Andersen*, 93 Ohio St. 3d at 549. Because the language is ambiguous, it must be construed in favor of the insured. See *Buckeye Union*, 39 Ohio St. 2d 95. The limiting phrase therefore should be read to apply only to claims resulting from "occurrences." When CPS/IQ seek umbrella coverage for damages in excess of their underlying primary policies, they should not be required to show that the damages resulted from bodily injury, property damage, personal injury, or advertising injury.

Furthermore, common sense favors the narrower application of the limiting clause. Words must be read in context and construed by the ordinary rules of grammar and common usage. R.C. 1.42. "[R]eferential and qualifying words and phrases, where no contrary intention appears, refer *solely to the last antecedent*." *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926 ¶ 24 (emphasis added) (quoting *Independent Ins. Agents of Ohio v. Fabe* (1992), 63 Ohio St.3d 310, 314). Therefore, the requirement that "bodily injury," "property damage," "personal injury" or "advertising injury" occur does not apply to CIC's excess umbrella coverage unless the coverage is triggered by an "occurrence."

CIC next argues that its umbrella policy does not provide excess coverage beyond the Gulf policy because the Gulf policy is not "underlying insurance" applicable to an "occurrence" as defined in the CIC policy (i.e., bodily injury or property damage). "Underlying insurance" includes scheduled policies and "all other insurance policies applicable to *the 'occurrence.'*" See CIC Supp. at 65 (CIC Umbrella Policy Section V.16). The definition's use of the phrase "*the* occurrence" assumes that the policyholder's underlying insurance policies cover "occurrences."

However, the Gulf policy is a "claims made" policy. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶ 12; CPS/IQ Supp., Exh. D. Unlike an "occurrence" policy, which covers acts done during the policy period regardless of when a claim is made, a "claims made" policy covers claims brought against the insured during the life of the policy. *United States v. A.C. Strip* (6th Cir. 1989), 868 F.2d 181, 184. "Claims made" policies cover such claims even if the underlying acts occurred before the policy took effect. *LaValley v. Virginia Sur. Co.* (N.D. Ohio 2000), 85 F. Supp. 2d 740, 744; *Chamberlin v. Smith* (Cal. App. 1977), 72 Cal. App. 3d 835, 845 n.5.

The policy's definition of "underlying insurance" thus does not anticipate an underlying claims-made policy. The definition is therefore ambiguous as applied to the Gulf policy. Consistent with CIC's broad excess umbrella coverage language, a reasonable interpretation of this ambiguous policy provision is that the umbrella language follows the conditions of the Gulf policy. Because the Gulf policy is a claims-made and not occurrence-based policy, the phrase "the occurrence" as applied to the Gulf policy must logically and reasonably be construed to mean *the claim that triggers the Gulf policy coverage*—in this case, the Department's claims (and suit) against CPS/IQ. In other words, a claim that is sufficient to trigger Gulf's duty to defend requires CIC to defend if and when the Gulf policy's $1 million limit exhausts.

Gulf's duty to defend is settled by the court of appeals' decision because this Court declined jurisdiction of Gulf's appeal. The court of appeals did not err in holding that CIC has a duty to defend because its umbrella language follows the conditions of the Gulf policy. See *id.* ¶ 27.

C. The CIC umbrella policy language covers losses from CPS/IQ's negligent (i.e., wrongful) acts because the policy does not clearly exclude such coverage.

The rules for liberally construing insurance contract language apply to provisions that limit or exclude coverage. *Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St.3d 20, 23. "Where

exceptions . . . are introduced into an insurance contract, a general presumption arises to the effect that that which is not *clearly excluded* from the operation of such contract is included in the operation thereof." *Andersen*, 93 Ohio St.3d at 549 (alteration in original) (quoting *Home Indemn. Co. of New York v. Plymouth* (1945), 146 Ohio St. 96, syllabus ¶ two). The insurer, not the insured, bears the burden of proving a policy exclusion applies. *Continental Ins. Co. v. Louis Marx & Co.* (1980), 64 Ohio St.2d 399, 401-02.

The Gulf policy covers, inter alia, damages from each "Wrongful Act." CPS/IQ Supp. at 112. A "Wrongful Act" is defined by the policy to include allegations of "[a] *negligent* act, error or omission; * * *." *Id.* at 114 (emphasis added). The court of appeals properly concluded that the Department alleged claims that potentially or arguably fall within Gulf's policy coverage, triggering Gulf's duty to defend. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶¶ 21-22.

The CIC umbrella policy does not clearly exclude the professional services provided by CPS/IQ to the State as set forth on the Gulf policy's schedule of insured services:

> Item 4. Schedule of Insured services:
>
> Providing energy management consulting and energy management services to others, including accounting, auditing and administration services.

CPS/IQ Supp. at 101. The breadth of the CIC umbrella policy's definition of "underlying insurance," which includes "any type of self-insurance or alternative method by which the insured arranges funding for legal liabilities that affords coverage that this policy covers," see CIC Supp. at 65, Section V.16, means CIC assumes any and all underlying policies and scheduled coverage unless a specific exclusion, or endorsement excluding coverage, exists.

The CIC umbrella policy has the following express coverage exclusion endorsements:

- "bodily injury", "property damage", "personal injury", or "advertising injury" due to rendering or failure to render these scheduled professional services: (1) computer programming and consulting; (2) computer

manufacturing and computer software; (3) electronic data processing services

- any liability arising from "personal injury," and
- any liability arising from "advertising injury"

CIC Supp. at 50-52. CIC does not exclude other CPS/IQ services and subsequent "wrongful acts" from its umbrella coverage, though as drafter of the policy it certainly could have done so.

Gulf's duty to defend CPS/IQ against the Department's claims is settled, and the CIC umbrella policy does not clearly exclude coverage from such claims. CIC cannot avoid the consequence of its failure to do so -- it must accept the defense if and when the Gulf policy limits exhaust. The court of appeals correctly held that the CIC umbrella policy follows the conditions of the underlying Gulf policy. *Cincinnati Ins. Co.*, 2006-Ohio-713, ¶ 27.

CONCLUSION

For the above reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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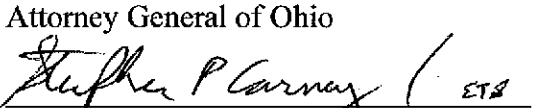

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CERTIFICATE OF SERVICE

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