IN THE SUPREME COURT OF OHIO

THE CINCINNATI INSURANCE CO., et al	)	Case No.06-0722
	)	
Plaintiffs-Appellants	)	
	)	
vs.	)	On Appeal from Cuyahoga County
	)	Court of Appeals, Eighth Appellate
CPS HOLDINGS, INC, ET AL.	)	District, Case Nos. 85967/ 85969
	)	
Defendants-Appellees	)	

REPLY BRIEF OF APPELLANT THE CINCINNATI INSURANCE COMPANY

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ARGUMENT

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I. INTRODUCTION

Collectively, CPS[1] and the State offer four reasons why CIC's appeal should fail:

(1) This Court should not consider the issue of whether CIC's Umbrella Policy provides indemnity for the allegations in the Franklin County Litigation because neither of the lower courts did.

(2) This case will have limited application, and therefore this Court should not even bother with it--even if the court of appeals was wrong.

(3) This entire case is nothing but an attempt by CIC to seek an advisory opinion.

(4) The CIC Umbrella Policy is ambiguous with respect to CIC's duty to defend, and therefore must be construed liberally to provide coverage whenever any other policy provides coverage.

As discussed below, the first three contentions are largely transparent and easily dispatched. The last contention--the primary argument against CIC's appeal–has superficial appeal, but, when carefully examined, is without merit. Rather, it is a cynical attempt to circumvent the express provisions of the CIC Umbrella Policy through a pretextual claim of ambiguity. As CPS quips: "[The CIC Umbrella Policy] 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." (CPS Merit Brief, p. 5).

CIC does not dispute that where an insurance policy is ambiguous, the rule of contra proferentem will be applied to construe the ambiguous provisions liberally in favor of the insured. However, as explained below, in this case, the CIC Umbrella Policy is not ambiguous, and therefore

[1]For purposes of clarity, consistency and brevity, the same abbreviations used in CIC's Merit Brief are used in this Reply Brief.

this black letter law provides CPS and the State with little relief. Rather, as the First Appellate District recently remarked in another insurance coverage case where an insured and a governmental entity teamed up to try to squeeze insurance coverage out of an insurer where there was not any: "As Tweedledee said to Tweedledum, 'If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic." *Safe Auto Ins. Co. v. Corson*, 155 Ohio App.3d 736, 2004 Ohio 249, at ¶15 (*quoting* Carroll, Through The Looking Glass (Easton Press Ed. 1965) 65). Similarly, if the law and facts were different in this case, there might be some merit to Appellees' ambiguity arguments--but as they aren't, there ain't. That's logic.

II. AN INSURER HAS NO OBLIGATION TO PROVIDE A DEFENSE UNLESS THERE IS AT LEAST A POTENTIAL DUTY TO INDEMNIFY UNDER ITS POLICY.

CPS claims: "The duty to defend is the only issue before this Court, not the duty to indemnify . . . 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." (CPS Merit Brief, p. 3). The State makes similar arguments. (State Merit Brief, p. 10). These assertions, however, are nonsense.

In the Trial Court, CIC challenged its obligation to provide CPS with both defense and indemnity. Why? Because it is well-established that where a liability insurer has contracted to defend, as well as to indemnify its insured, ***the insurer's duty to defend is only triggered when there is at least a potential duty to indemnify based upon the plaintiff's allegations against the insured.*** *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003 Ohio 3048, at ¶¶16-21 (describing the development of Ohio law regarding the duty to defend). This Court has instructed lower courts to look to the "coverage of the policy" or the "liability insurance coverage" provisions to determine whether there is a potential or arguable duty to indemnify. *Id. See, also, Zanco v. Michigan Mut.*

Ins. Co. (1984), 11 Ohio St.3d 114, 115-116, 464 N.E.2d 513. As explained by this Court over 60 years ago:

> The duty of an insurance company to defend an action brought against its insured is determined by the plaintiff's petition, and, when that pleading on its face discloses a case within the coverage of the policy, the insurer is required to make a defense regardless of its 'ultimate liability" to the insured . . . ***It is axiomatic that a policy which contains a provision that the insurer shall make defense of an action brought to recover damages for which indemnity is payable even though such action may be groundless, does not require the insurer to defend a groundless action which is not within the coverage of the policy***. Conversely, the fact that the claim of Harper was in reality groundless does not of itself relieve the insurer from making defense provided his second amended petition alleges facts ***which showed a claim within the coverage of the policy***. (Emphasis added; citations omitted).

Socony-Vacuum Oil Co. v. Cont'l Cas. Co. (1945), 144 Ohio St. 382, 392-393, 59 N.E.2d 199. As succinctly stated more than half a century later: "***If the insurance company is to be required to provide a defense for its policy holder, the underlying claims must at least arguably fall within the coverage of the policy***." *Anders*, at ¶51 (Emphasis added). Thus, where an insurer has contracted to defend its insured, the duty to defend is only triggered where the duty to indemnify is potentially triggered. While it may be possible to have a duty a defend where there is no ultimate duty to indemnify, it is not possible to have a duty to defend where there is no potential for indemnity. Moreover, it is axiomatic that if there is no potential to indemnify, there can be no ultimate duty to indemnify. Thus, the duty to indemnify and the duty to defend are inextricably linked and have logically and historically been collectively combined under the rubric of "coverage."

III. THIS CASE INVOLVES INTERPRETATION OF STANDARDIZED POLICY LANGUAGE THAT WILL AFFECT MANY POLICIES IN MANY CASES.

Both CPS and the State dispute that the CIC Umbrella Policy includes standardized policy language that is used throughout the insurance industry, they affirmatively represent that there is no

evidence of widespread use of the policy language in the CIC Umbrella Policy and they argue that this case is of no interest to anyone outside of this case. Indeed, the State goes so far as to affirmatively represent that the "CIC umbrella policy is really a manuscripted policy"[2]–that is, a policy written specifically for CPS and no one else. If one is to make such unequivocal statements, it is usually prudent to make sure they are true. In this case, unfortunately, they are not.

In this regard, the CIC Umbrella Policy and its insuring agreement are part of the record, and, are expressly addressed in detail at pp. 11-14 of CIC's Merit Brief. CPS and the State dispute the meaning, but not the content, of this policy language. (*See* State's Merit Brief, pp. 11-12; CPS Merit Brief, pp. 9-10). Accordingly, there is no debate over what terms of the CIC Umbrella Policy are at issue.

The central issue to resolution of this case is whether the Gulf E&O Policy qualifies as "underlying insurance",which is defined as "the policies listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the 'occurrence'". No one disputes that the Gulf E&O Policy was not "listed in the Schedule of Underlying Policies." Accordingly, the issue is whether the Gulf E&O Policy constitutes "insurance available to the insured under all other insurance policies ***applicable to the 'occurrence'***." (Emphasis added).

The term "occurrence" appears in quotation marks, and therefore is specifically defined, in pertinent part, to mean "an accident, including continuous or repeated exposure to substantially the

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[2]*See* State's Merit Brief, p. 1, FN 1.

same general harmful conditions, ***that results in . . . 'property damage'***". (Emphasis added).[3] It is this definition of "occurrence",which is the driving force behind whether the Gulf E&O Policy qualifies as "underlying insurance." Contrary to Appellees' representations, this definition of "occurrence" is not manuscripted or unique. Rather, it is directly derived from "the insurance industry's 1966 revision to the standard CGL policy [where] the term 'occurrence' was substituted for the term 'accident,' with an *occurrence* being defined as '***an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.***'" Stempel, J., Stempel on Insurance Contracts (2007), §14.01[A][2], pp 14-13 (Emphasis added).[4] Moreover, derivations of this definition have been given widespread analysis in Ohio, and have been the subject of myriad judicial decisions, including this Court's recent decision in *Anders*, at ¶¶29-35 (defining "occurrence" as "an accident . . . which results, during policy period, in . . . property damage"). *See also eg.*, *Rodeen v. Royaltowne Wood Works, Inc.*, 8th Dist. No. 59601, 1992 WL 2587, at *1 ("occurrence means an accident . . . which results in bodily injury or property damage"); *Clapper v. Columbia Mfg. Co.*, 3d Dist. No. 5-87-41, 1989 WL 77020, at *2 ("occurrence means an accident . . . which results in bodily injury or property damage"); *and Sanborn v. St. Paul Fire & Marine Ins. Co.* (11th Dist. 1993), 84 Ohio App.3d 302, 309, 616 N.E.2d 988 ("Occurrence means an accident . . . which results

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[3]The CIC Umbrella Policy provides that "words and phrases that appear in quotation marks have a special meaning. Refer to Definitions (Section V)." (Supplement p. 00053).

It is undisputed that the State has not alleged "bodily injury" against CPS. It is further undisputed that the CIC Umbrella Policy specifically excludes any and all "personal injury" and "advertising injury." (*See* Supplement, pp. 00051 to 00052). Accordingly, the only definition of "occurrence" that is relevant is "an accident . . . ***that results in . . . 'property damage.***'" (Emphasis added).

[4] CPS agrees that STEMPEL is authoritative on such matters. (*See* CPS Merit Brief, p. 9).

in bodily injury or property damage"); *The Ohio Cas. Co. v. Jos. Sylvester Constr. Co.*, 11th Dist. No. 90-T-4439, 1991 WL 206628, at *3 ("occurrence means an accident . . . which results in bodily injury or property damage"); *Cincinnati Indemn. Co. v. Martin*, 12th Dist. No. CA97-12-248, 1998 WL 281338, at *1 ("occurrence means an accident . . . which results, during the policy period, in . . . bodily injury"). It is a mystery why CPS and the State would represent the contrary to this Court.

IV. CIC DOES NOT SEEK AN ADVISORY OPINION IN THIS CASE.

Appellees also argue that CIC's appeal merely seeks an advisory opinion. In essence, they claim that the Eighth Appellate District's ruling should rest undisturbed because it really does not mean much because CIC's duty to indemnify is not really implicated, and it seems unlikely that its duty to defend will be. However, there are two problems with this assertion.

First, CIC affirmatively disputed both defense and indemnity in its Motion for Summary Judgment in the Trial Court–***and won***. The Eighth Appellate District took this ruling away–subjecting CIC to years of additional litigation and expense. It cannot now seriously be disputed that CIC has both an interest and a right in having this Court reinstate the Trial Court Opinion.

Second, if CIC is truly seeking an advisory opinion from this Court, it is only because the Eighth Appellate District issued an advisory opinion with respect to CIC's obligations in this case. If CIC's potential duty to indemnify and current duty to defend were not truly resolved by the Trial Court Opinion, then the Eighth Appellate District should never have issued its decision with respect to CIC. Instead, it should have dismissed Appellees' appeal as to CIC because it was merely seeking an advisory opinion. *See, Corron v. Corron* (1988), 40 Ohio St.3d 75, 79, 531 N.E.2d 708 (holding that declaratory judgment should not issue if it "would merely result in an advisory opinion over which there is not actual justiciable dispute"); *Reinbolt v. Nat'l Fire Ins. Co. of Hartford*, 158 Ohio

App.3d 453, 2004 Ohio 4845, at ¶¶12-16 (in insurance contract dispute holding that "courts have the power to resolve present disputes and controversies, but do not have the authority to issue advisory opinion[s] to prevent future disputes); *Indiana Ins. Co. v Fox*, 2d Dist. No. 20683, 2005 Ohio 1040, at ¶13 (following *Reinbolt*); and *Bartlett v. Nationwide Mut. Ins. Co.*, 11th Dist. No. 2004-A-0015, 2005 Ohio 6579, at ¶9 (following *Fox* and *Corron*). Therefore, even if Appellees are correct (which they are not), the Eighth Appellate District's decision itself would be subject to reversal because it was merely advisory as to CIC.

V. THE CIC UMBRELLA POLICY IS NOT AMBIGUOUS WITH RESPECT TO WHETHER COVERAGE IS PROVIDED TO CPS FOR THE FRANKLIN COUNTY LITIGATION.

The heart of Appellees' opposition to CIC's appeal lies in their claim that the CIC Umbrella Policy is ambiguous, and therefore must be interpreted liberally in favor of coverage for CPS. Such arguments are not new. *See, e.g., Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999 Ohio 292. Nor are the legal principles to be applied if an ambiguity exists in dispute. However, as explained below, there is no legal ambiguity in the CIC Umbrella Policy that could result in a finding of coverage with respect to the State's claims against CPS in the Franklin County Litigation.

This Court has examined claims of insurance policy ambiguity simply: "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. . . ***As a matter of law, a contract is unambiguous if it can be given a definite legal meaning*** " *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, at ¶11 (Emphasis added). Such simplicity is necessary to give effect to the parties' intent–which is to be derived from the language of the contract itself. *Id.*, at ¶9. Otherwise even the simplest, most straightforward

language could be subjected to attack on the grounds of ambiguity–*see, e.g.,* the classic Clintonian defense: "It depends upon the what the meaning of the word 'is' is."

As previously explained, the key to the coverage dispute in this case is whether the Gulf E&O Policy qualifies as "underlying insurance" to the CIC Umbrella Policy. This resolved by a simple three-step analysis:

> (1) Because it is undisputed that Gulf E&O Policy was not "listed in the Schedule of Underlying Policies," the issue becomes whether the Gulf E&O Policy constitutes "insurance available to the insured under all other insurance policies ***applicable to the 'occurrence'***." (Emphasis added).
>
> (2) This, in turn, is resolved by definition of "occurrence" which means, in pertinent part, "an accident. . . ***that results in . . . 'property damage'***". (Emphasis added). As a matter of law, this definition is not ambiguous because it "can be given a definite legal meaning". *See Anders*, at ¶¶29-35 (defining "occurrence" as "an accident . . . which results, during policy period, in . . . property damage").
>
> (3) Because it is undisputed that the State is not seeking damages from CPS because of "property damage," the Gulf E&O Policy is not an insurance policy "applicable ***to the 'occurrence'***" as to qualify as "underlying insurance". (Emphasis added).

Nevertheless, Appellees claim this is too hard. (*See, e.g.,* CPS Merit Brief, p. 16 ["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 simper and logical coverage analysis"). Accordingly, they submit four reasons why this Court should rewrite the CIC Umbrella Policy to give CPS coverage.

First, they advance different interpretations of the foregoing provisions that they hope will result in coverage for CPS. In this regard, CPS argues the insuring agreement could be read to mean, in pertinent part:

> [1] We will pay on behalf of the insured "ultimate net loss" which the insured is legally obligated to pay as damages in excess of the "underlying insurance." [2] 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 "underlying insurance" . . .

(*See* CPS Merit Brief, pp. 11-12). It goes on to argue that "CIC attempts to read 'an occurrence' requirement into both of these coverage situations, however, the Insuring Agreement only mentions this requirement under the second scenario". (*Id.*, pp. 13-14). However, this argument runs afoul of the plain definition of "underlying insurance" which, in this case, is limited to all other policies "applicable to the 'occurrence'." Despite the fact that the term "occurrence" is specifically defined, CPS argues that this Court should redefine it to refer "generically to the allegations of the [Franklin County Litigation]." (*See* CPS Merit Brief, p. 15). CPS suggests such redefinition is supported by the fact that the term "underlying insurance" employs the phrase "applicable to ***the*** 'occurrence'" rather than "applicable to ***an*** 'occurrence.'" (Emphasis added). (*Id.*). However, under the facts of this case, this is a distinction without a difference. There is no legal or grammatical authority that holds that the meaning of a specifically defined contract term changes depending upon whether one uses the article "the" or the article "an" before the term. To the contrary, in this case, the article is irrelevant. The word "*an*" is an "indefinite article"–"The chief grammatical function of *an* (or *a*) is to connote a thing not previously noted or recognized." Webster's New World Dictionary of the American Language, Second College Edition (1984), p. 48. The word "*the*", on the other hand, is a "definite article"–"the meaning is controlled by the basic notion 'a previously recognized, noticed, or encountered' in distinction with A, AN . . . *the* (as opposed to *a, an*) is used to refer to a particular person, thing, or group as . . . that (one) being spoken of or already mentioned." *Id.*, p. 1473.

Therefore, the use of the article "the" simply means that the CIC Umbrella Policy applies only to the same "occurrence" as the insurance available to the insured under all other insurance policies. If, as in this case, there is no "occurrence", whether "the" or "an" is used is irrelevant. There is no "underlying insurance" over which to provide coverage if there is no "occurrence."

The State disputes the definition of "occurrence" for different reasons, suggesting:

> [O]ne could read the policy as covering all damages in excess of underlying policy limits, but only "occurrence[s] [sic?] covered by this policy . . . because of bodily injury, property damage, personal injury, or advertising injury.". . . The limiting phrase therefore should be read to apply only to claims resulting from "occurrences." When CPS/IQ seek [sic] umbrella coverage for damages in excess of their underlying primary policies, they should not be required to show that the damages result from . . . property damage. . . .

(*Id.*, pp. 13-14). Quite frankly, it is not clear what the State is trying to say (which is ironic considering the State is claiming ambiguity). But whatever it is, it again runs afoul of the specific definition of "underlying insurance". Incredibly, the State recognizes this hurdle, and attempts to counter it by arguing:

> "Underlying insurance" includes scheduled policies and "all other insurance policies applicable *to the 'occurrence.'*" [citation omitted]. 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. [citation omitted] . . .
>
> 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 . . . 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*. . . (Emphasis in original).

(*Id.*, pp. 14-15). Put another way, the State is arguing that the parties to the CIC Umbrella Policy did not intend to provide coverage excess to policies such as the Gulf E&O Policy. Because the

parties did not intend such a result, and included policy language that would preclude such coverage, this Court should find the CIC Umbrella Policy is ambiguous and rewrite it to provide coverage that the parties never intended in the first place. Obviously, no court has the authority to do what the State asks.

Nevertheless, the State's contortions serve the useful purpose of highlighting the fact that neither CPS nor CIC ever intended for the Gulf E&O Policy, or policies like it, to serve as "underlying insurance" to the CIC Umbrella Policy. Why? Because E&O, or malpractice policies serve very different purposes than umbrella and CGL policies. As explained by Stempel:

> E&O policies are distinct from property and CGL policies in that they cover purely economic loss to the third-party claimant resulting from the professional services error . . . Although the professional services insured under the policy vary with the professional in question, the policies commonly exclude coverage for bodily injury or property damage, which is normally insured under the CGL or other liability policy.

Id., at §22.03[C], pp. 22-22 to 22-23. As the parties' contract language evidences an intent that the Gulf E&O Policy does not serve as "underlying insurance," this Court should apply that language as written. *Galatis*, at ¶¶9-14.

Second, Appellees make the blanket statement that the CIC Umbrella Policy provides coverage for ***any*** claim of negligence. (*See* State Merit Brief, p. 2 ["The umbrella olicy [sic] 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"]; CPS Merit Brief, p. 15). However, this is contrary to the plain language of the CIC Umbrella Policy and controlling legal authority. In this regard, the CIC Umbrella Policy does not purport to provide coverage for "negligence"–indeed, the term "negligence" does not appear in the policy. Rather, the policy purports

to provide coverage for damages because of "property damage" caused by an "occurrence".[5] It is the definition of "occurrence"--as "an accident"--that brings negligence actions within the scope of coverage. However, to be covered, such negligence must result in "property damage". *See Anders*, at syllabus (holding that insurance policies that limit liability to property damage arising from accidents do not generally provide coverage for negligence actions that do not result in property damage– such as negligent misrepresentation); *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 38-39, 1996 Ohio 113 ("Inherent in a policy's definition of 'occurrence' is the concept of an incident of an accidental, as opposed to intentional, nature."). Indeed, in *Anders*, at ¶¶37-39, this is the express reason why this Court found that a similar CIC umbrella policy did not provide coverage for allegations of negligent misrepresentation–ie., even if true, the negligence did not result in "property damage."

Third, Appellees argue that the inclusion of Exclusion of Designated Professional Services Endorsement No. UA 302 01 96 ("Professional Services Exclusion," Supplement, p. 00050) somehow evidences an intent that the CIC Umbrella Policy was to provide excess E&O coverage. (*See* CPS Merit Brief, pp. 16-17; State Merit Brief, pp. 16-17). However, it is well established that exclusions and exceptions to exclusions do not expand the basic coverage provided by an insurance policy. *See LISN, Inc. v. Commercial Union Ins. Cos.* (9th Dist. 1992), 83 Ohio App.3d 625, 630-632, 615 N.E.2d 650, *motion to certify overruled* (1993), 66 Ohio St.3d 1459; *State Auto Mut. Ins. Co. v. Fairfield Homes, Inc.*, 5th Dist. No. 11-CA-89, 1989 WL 139822, at *3-4, *appeal dismissed by* (1990), 50 Ohio St.3d 716, 553 N.E.2d 1370; and *Akers v. Beacon Ins. Co. of America*, 3rd Dist.

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[5]Recall that the policy is specifically endorsed to exclude "personal injury" and "advertising injury", and it is undisputed that "bodily injury" is not alleged.

No. 9-86-16, 1987 WL 16260, at *2-4. Moreover, there is nothing in the Professional Services Exclusion that even suggests that the insuring agreement of the CIC Umbrella Policy is being expanded. Rather, such exclusions are standard in CGL and umbrella policies, and are designed to channel professional negligence claims into E&O policies and away from general liability and umbrella policies.[6] As explained by Stempel:

> Commercial operations . . . obtain E&O or malpractice coverage sometimes as a main source of protection . . . and sometimes as a supplement to general liability coverage, which ordinarily has a professional services exclusion. FN 44.
>
> > FN 44. ***For example, a common CGL policy exclusion states that CGL coverage does not apply to injury incurred "due to the rendering or failure to render professional services."***
>
> . . . The important point is that a comprehensive risk management plan for these types of businesses generally calls for both CGL coverage and professional liability coverage . . . Whatever the particular language, the concept is the same: ***The professional policy is designed to cover only claims arising out of the delivery of professional services . . . and is not a general liability policy that covers liability from unsafe premises or an automobile policy should a modern-day Marcus Welby have a collision while on his way to a house call.*** (Emphasis added).

Id., at §22.03[A], pp. 22-19 to 22-21.

Finally, both CPS and the State suggest that CIC's obligation to provide coverage with respect to the Franklin County Litigation is somehow "heightened" by it promise to defend CPS even if the State's allegations against CPS are "groundless, false, or fraudulent". (*See*, CPS Merit Brief, pp. 6-7, 17-18 [describing CIC's duty to defend as "heightened']; State Merit Brief, p. 12 [describing

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[6]The fact that the CIC Umbrella Policy is an "umbrella policy" does not alter this analysis because the scope of coverage provided is still, in the first instance, determined by reference to policy's insuring agreement. Stempel, at §16.02, p. 16-19 ("For umbrella insurance, as with excess insurance, the principles of policy construction remain the same").

CIC's duty to defend as "absolute"). However, if the CIC Umbrella Policy does not provide coverage in the first instance, such language does not expand the basic coverage provided. As unanimously explained by this Court in *Anders*:

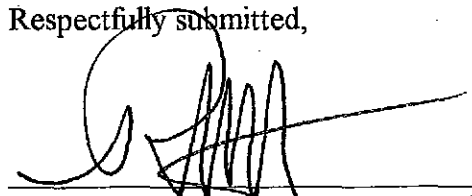
> The Renos also argue that the policy provision stating that GuideOne would provide a defense even if the suit is "groundless, false, or fraudulent" brings Cooper's underlying claims within the coverage of the insurance policy. Again we disagree.
>
> Since our holding *Preferred Risk*, it is still the law that if the conduct alleged in a complaint is indisputably outside the scope of coverage, there is no duty to defend. The fact that the Renos' policy contains more inclusive language than what was present in the *Preferred Risk* policy does not change our preceding analysis regarding how to determine whether the claims are covered by Renos' policy. If the insurance company is to be required to provide a defense for its policy holder, the underlying claims must at least arguably fall within the coverage of the policy.

Id., at ¶¶50-51. There is no reason to reach a different result in this case.

CONCLUSION

Despite Appellees' protestations otherwise, this is not a terribly complicated case from an insurance coverage standpoint. The provisions of the CIC Umbrella Policy are clear and unambiguous. The Gulf E&O Policy does not qualify as "underlying insurance" because it is not "applicable to the 'occurrence'". Why? Because there is no "occurrence" because there is no "property damage" alleged by the State. This Court unanimously reached such a result in *Anders*, and it should do the same here--reversing the Eighth Appellate District's ruling and remanding this case to the Trial Court with instructions to re-enter judgment for CIC.

Respectfully submitted,



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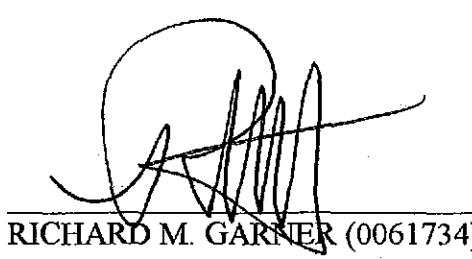

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