CERTIFICATES OF INSURANCE

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I.

A TYPICAL FACTUAL SCENARIO

The following hypothetical closely resembles the actual facts of a case that the author recently settled for an insurance company client.

Mega Contractor Inc. ("Mega") contracted with Dave Developer ("Developer") to act as the general contractor in connection with the construction of a new building. Mega, in turn, entered into various subcontracts with numerous subcontractors hired to do portions of the work, including Fly by Night Construction ("Fly by Night") and Radical Roofing ("Radical"). Mega's standard subcontract form that it requires all of its subs to sign requires that the subs carry at least $1 million in general liability insurance and that the policy name Mega as an additional insured. Before any sub can start work, Mega requires that the sub provide Mega's risk manager with a certificate of insurance confirming compliance with the contract requirements.

Fly by Night, after signing its subcontract with Mega, went to its insurance agent, Sloppy Sam's Insurance and Bonding ("Sloppy") and requested the insurance certificate. Sloppy verified that Fly by Night's policy with Always Fair Mutual ("Always Fair") afforded CGL coverage to Fly By Night of $1 million per occurrence as required by the subcontract. Sloppy says that he can issue the additional insured endorsement naming Mega for only $20 in additional premium along with the required certificate of insurance "pronto" on Monday morning when "my girl that handles all of the certificates and stuff like that gets back from her vacation." Fly by Night's president leaves a check for the $20 in additional premium and leaves. Sloppy then leaves a note for his assistant to handle everything on Monday morning.

Radical's CEO, likewise, calls her insurance broker to make sure that her policy with We Are Cheap Insurance Co. ("Cheap Insurance") complies with the requirements of Radical's subcontract. The broker, after reviewing Radical's policy advises Radical's CEO that the policy affords $1 million in coverage as required and already contained a "blanket as required by contract" additional insured endorsement that automatically covered Mega to the extent that Radical was contractually obligated to cover Mega by virtue of its contract with Mega. Accordingly, the broker tells Radical's CEO that a certificate of insurance would be faxed shortly directly to Mega's risk manager so that Radical could begin work on Monday as well.

On the following Monday, Sloppy's assistant, still hung over from the all night casino party on her vacation cruise Saturday night, arrives at Sloppy's office, sees Sloppy's note and types up a certificate of insurance showing that Fly by Night had $1 million in coverage through Always Fair under policy no. 1234567-G and showing Mega as the "certificate holder" and stating that Mega is an "additional insured". She forgets, however, to do anything to have Always Fair issue the additional insured endorsement. She then faxes the certificate to Mega's risk manager who quickly looks at it and then puts it in his file drawer where he keeps all of the insurance certificates. He then checks off "insurance verified" on his checklist for Fly by Night and tells Fly by Night that they can begin work.

Likewise, on Monday, the broker for Radical, issues a certificate of insurance to Mega that confirms the coverage amount and specifically provides that Mega is the certificate holder and further that Mega is an "additional insured" on Radical's policy with Cheap Insurance. Mega then gives Radical the go ahead to start work.

Several weeks into the job, an employee of a third subcontractor, Dan Dead, falls to his death when he is overcome by fumes from the hot tar/glue roofing membranes being installed by Radical's crew. He had borrowed a safety harness from one of Fly by Night's guys but it was broken and did not work properly.

The following day, when Fly by Night reports the accident to Sloppy, Sloppy realizes his assistant's mistake in failing to get Mega insured as an additional insured and quickly types up a new back dated certificate that states that Mega has been added to the policy as an additional insured and faxes it to Fly by Night to give it to Mega. Sloppy tells Fly by Night that someone in his office had requested the additional insured endorsement from the beginning and that he does not know why Always Fair never got around to issuing the endorsement.

Dead's family eventually sues Mega, Radical and Fly by Night. Mega immediately demands that Always Fair and Cheap Insurance take over Mega's defense as an additional insured as required by the subcontracts, and points to the fact that Mega had certificates of insurance from both Radical and Fly by Night.

Always Fair denies defense to Mega on the grounds that Mega had never been added to its policy as an additional insured and points out that the original certificate of insurance issued by Sloppy did not say that Mega was an additional insured. Cheap Insurance likewise denies defense to Mega. It admits that Mega was an additional insured but points out that its policy issued to Radical contains a special endorsement that excludes coverage for any claims that arise out of the application of hot tar membrane roofs or the use of an open flame.

II.

THE TYPICAL QUESTIONS THAT ARISE

1. What is a certificate of insurance?

A certificate of insurance is a document issued by or on behalf of an insurance company to a third party, who has not contracted with the insurer to purchase an insurance policy, that acknowledges that the insurance policy has been written and setting forth in general terms what the policy covers. The most common type of certificate of insurance is one that is issued for informational purposes to advise a third party of the existence and amount of coverage issued to the named insured, usually in conjunction with some sort of contractual relationship between the named insured and the third party that requires the named insured to carry a certain type and amount of insurance. In addition to describing the insurance available to the named insured, the certificate may also purport to confirm that the third party, also called the "certificate holder", is an additional insured under the policy issued to the named insured. *TIG Ins. Co. v. Via Net,* 178 S.W.3d 10, 18-19 (Tex. App.—Houston [1rst Dist.] 2005), *reversed*, 211 S.W.3d 310 (Tex. 2006); 1 Allan D. Windt, *Insurance Claims and Disputes* Sec. 6.37A at 809-10 (4th ed. 2001); *Blacks Law Dictionary* 240 (8th ed. 2004).

2. Can Mega rely on the certificate of insurance issued by Sloppy to argue that Mega is covered on the Always Fair policy issued to Fly by Night as an additional insured?

No.

In *Granite Const. Co. v. Bituminous Ins. Cos., 832 S.W.2d 427 (Tex. App.—Amarillo 1992, no writ)*, Granite had a contract with the State of Texas for road work and, in turn, contracted with Brown to perform some aspects of the work and required Brown to name Granite as an additional insured on Brown's liability insurance. The insurance agent issued a certificate of insurance to Granite that provided that ***"Certificate holder is added as an additional named insured for all Granite Construction Company's work in the State of Texas".*** The certificate also provided, in the preprinted form fine print, that ***"Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies."*** However, the actual "additional insured" endorsement on the policy was more restrictive in that it extended additional insured coverage to Granite "but only with respect to liability arising out of operations performed for such insured [Granite] by or on behalf of the named insured [Brown]." Bituminous denied defense to Granite on the basis that the claims against Granite did not involve operations performed for Granite by or on behalf of Brown.

The Amarillo Court of Appeals rejected Granite's argument that, even if it was not covered by the terms of the endorsement, it was entitled to coverage under the broad terms of the certificate of insurance which purported to extend coverage to Granite for all of its work in Texas without any restriction. The court held that "the certificate itself did not manifest the insurance coverage afforded Granite as the insured" but rather the certificate merely "evidenced Granite's status as an insured and, by its very language, specified that the insurance coverage was that provided by, but subject to the terms, exclusions and conditions of , the named insurance policies." *Granite*, 832 S.W.2d at 429. The court then went on to address whether the allegations against Granite triggered a defense under the terms of the additional insured endorsement and held that they did not.

In *C &W Well Service v. Sebasta,* 1994 WL 95680 (Tex. App.—Houston [14th Dist. 1994, no writ)(unpublished) the court, relying on Granite, similarly held that a certificate of insurance containing similar

"disclaimer" language could not be relied upon to argue that the policy covered the certificate holder as an additional insured for a claim that in fact was excluded from coverage by the terms of the policy. See also, *Amoco Prod. Co. v. Hydoblast Corp.*, 90 F.Supp.2d 727, 734 (N.D. Tex. 1999) (same).

In *Sabine Towing & Transportation Co. v. Holliday Ins. Agency, Inc.*, 54 S.W. 3d 57 (Tex. App.—Texarkana 2001, rev. denied) Sabine received a certificate of insurance confirming coverage for SuperIn. with whom Sabine had contracted. The certificate stated that Sabine was an additional insured on the policy but contained the same standard "disclaimer" language stating that the certificate did not amend or otherwise change the policy terms. Nine months after Sabine authorized SuperIn to commence work under the contract, Sabine sent a letter to the insurer attempting to get confirmation of its additional insured status on the policy and only then learned that, in fact, it had never been added as an additional insured on the policy.

The issue on appeal was whether the "discovery rule" applied to toll limitations in Sabine's suit **against the agent**, Holliday, that had issued the incorrect certificate. In the course of that discussion the court concluded that Sabine had failed to exercise reasonable diligence in that it had failed for 9 months to make any inquiries of the insurer to verify coverage beyond just the certificate when the certificate itself specifically put Sabine on notice that the certificate did not change the policy and that, therefore, Sabine needed to review the policy itself. Thus the court held that limitations began to run when Sabine received the certificate of insurance and not a year later when it received the denial of coverage from the insurer.! *Sabine*, 54 S.W.3d at 62. The court distinguished other cases holding that limitations did not start running until the denial of coverage on the basis that each of those cases involved a denial of coverage to the direct insured on the policy rather than to a third party that had no direct relationship with the insurer. *Id.* at 64-5.

Thus, under *Sabine*, not only does the disclaimer language in the certificate of insurance not allow the certificate holder to rely on the certificate as any assurance that it is actually covered as an additional insured, the disclaimer language may actually create an affirmative duty on the part of the certificate holder to find out what the policy actually covers and may trigger the immediate running of limitations with respect to any inaccuracy in the certificate.

The Texas Supreme Court seems to have most recently eliminated any doubts about whether a certificate holder can rely on the certificate as an assurance that it is covered in *Via Net v. TIG Insurance Co., 211 S.W.3d 310 (Tex. 2006)*. In *Via Net*, the court held that a certificate of insurance that represented that the certificate holder was an additional insured but also containing the standard disclaimer language stating that the certificate did not modify or alter the policy, did not give rise to the "discovery rule" exception to the statute of limitations. The *Via Net* court, instead held that limitations began to run on the certificate holder's breach of contract claim against the named insured for not naming the certificate holder as an additional insured on the policy almost immediately after the contract was signed and no additional insured endorsement was added. The court held that limitations barred the breach of contract claim even though the suit was filed less than 4 years from the insurer's denial letter. In other words, a certificate holder cannot even wait to get the denial from the insurer before being charged with an obligation to review the actual policy to see if the named insured has complied with its contractual duty to name the certificate holder as an additional insured.

a. Does the answer depend on whether Sloppy is a local recording agent or otherwise has binding authority on behalf of Always Fair?

Possibly, but it is not at all clear that the status of the agent necessarily affects the outcome.

The *TIG v. Via Net* case discussed supra was the suit by the certificate holder and TIG, its own carrier (via subrogation) against the agent that issued the incorrect certificate (as well as the other party to the contract that was required to cover the certificate holder as an additional insured). *TIG v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002) (Tex. Law) involved the certificate holder's initial suit against Kemper and the broker/agent to get coverage under the terms of the Kemper policy as an additional insured.

The *TIG v. Sedgwick* court did examine the nature of the agency contract between Kemper and Sedgwick and the Sedgwick's level of binding authority and held that Sedgwick was a soliciting agent authorized to solicit insurance and issue certificates of insurance on behalf of Kemper and to bind coverage but not to modify the terms of the policies. *Sedgwick*, 276 F. 3d at 760. The court looked to the terms of the agency agreement that did allow

Sedgwick to bind coverage but not to modify the policies. The court then held that under those circumstances, the certificate of insurance issued by Sedgwick that purported to make the certificate holder an additional insured was controlled by the disclaimer language and thus could not modify the terms of the actual policy. Thus the certificate holder was not an additional insured. *Id.* at 760. The court then went on to examine apparent authority and held that the disclaimer language negated any apparent authority that Sedgwick had to modify the terms of the policy. *Id.* at 760-1.

In short, *TIG v. Sedgwick* arguably would support a different result if the agent issuing the certificate of insurance had blanket authority to bind in the sense of a true local recording agent. In that case, if the agent issues a certificate of insurance that incorrectly states that the certificate holder is an additional insured, then the certificate holder has a decent argument that the certificate of insurance operates to extend additional insured coverage even if the policy by its own terms does not.

As a caveat, there is perhaps an equally valid and strong argument that if the certificate of insurance contains disclaimer language, then that language is part and parcel of what any local recording agent "bound" by issuing the certificate of insurance and that, at least as to the coverage of the policy itself vis a vis the insurer, even a certificate issued by a local recording agent cannot modify the terms of the policy, even if the agent is subject to suit for misrepresentation.

3. Can Mega argue that it is covered for this claim on the Cheap Insurance policy notwithstanding the hot tar/membrane roofing exclusion on the Cheap Insurance policy in light of the certificate of insurance?

No. See discussion above.

4. Can Mega argue that the Always Fair policy is subject to reformation to make it an additional insured on the grounds of mutual mistake?

Possibly, but only if Sloppy, the agent had authority to bind Always Fair to coverage for additional insureds.

The court in *TIG v. Sedgwick* addressed a similar argument. The court held that in order to establish reformation based on mutual mistake, the evidence must show that there was an antecedent agreement that the certificate holder be added as an additional insured by and among all parties, including the insurer, and that there was a subsequent mutual mistake in reducing the agreement to writing. TIG v. *Sedgwick*, 276 F.3d at 761-2. The court noted, however, that there was no evidence that either Lumbermans also intended that the certificate holder be added as an additional insured or that Sedgwick had the actual, statutory or apparent authority to alter the terms of the underlying policy. *Sedgwick*, 276 F. 3d at 762. Accordingly, the court rejected the reformation argument.

5. Does Mega have viable cause of action against either of the agents for issuing certificates of insurance if, in fact, Mega is not covered on either policy?

Possibly as against Sloppy, but probably not against the other agent. See *Sabine*, discussed above for possible causes of action.

6. Does Mega have viable causes of a action against Fly by Night or Radical if Mega is not covered as an additional insured?

Yes for at least breach of contract, if the subcontracts required Fly by Night and Radical to provide specific amounts and types of insurance to Mega that were not, in fact, provided.

As a caveat, if the Defendants could show that the certificates of insurance that were in fact issued did not conform to the contract requirements but that Mega allowed the subs to begin work anyway, then the Defendants could possibly have a waiver argument. In this connection, in *Bott v. J.F. Shea Co., Inc.*, 388 F.3d 530 (5th Cir. 2004) the applicable contract required that a joint venture be named as an additional insured but due to sloppy administration by the contract administrator for the joint venture, a form was used to request the certificate of insurance that only required that one member of the joint venture be covered. The additional insured endorsement was issued in response to this request and a certificate issued confirming the coverage for the member of the venture but not for the joint venture itself.

In the later suit against the named insured that was supposed to procure coverage for the joint venture, the defendant argued waiver and the court agreed that by allowing the work to commence and never requiring a certificate that complied with the terms of the contract to be issued, the plaintiff joint venture waived its contract claims.

7. When does limitations start to run on claims that Mega may have against the insurers, brokers or subcontractors?

Probably almost immediately after the obligation to name Mega as an additional insured arose.

As already discussed, in *Sabine Towing & Transportation Co. v. Holliday Ins. Agency, Inc.*, 54 S.W. 3d 57 (Tex. App.—Texarkana 2001, rev.denied) Sabine received a certificate of insurance confirming coverage for SuperIn, with whom Sabine had contracted. The certificate stated that Sabine was an additional insured on the policy but contained the same standard "disclaimer" language stating that the certificate did not amend or otherwise change the policy terms. Nine months after Sabine authorized SuperIn to commence work under the contract, Sabine sent a letter to the insurer attempting to get confirmation of its additional insured status on the policy and only then learned that, in fact, it had never been added as an additional insured on the policy.

The issue on appeal was whether the "discovery rule" applied to toll limitations in Sabine's suit against the agent, Holliday, that had issued the incorrect certificate. In the course of that discussion the court concluded that Sabine had failed to exercise reasonable diligence in that it had failed for 9 months to make any inquiries of the insurer to verify coverage beyond just the certificate when the certificate itself specifically put Sabine on notice that the certificate did not change the policy and that, therefore, Sabine needed to review the policy itself. Thus the court held that limitations began to run when Sabine received the certificate of insurance and not a year later when it received the denial of coverage from the insurer. *Sabine*, 54 S.W.3d at 62. The court distinguished other cases holding that limitations did not start running until the denial of coverage on the basis that each of those cases involved a denial of coverage to the direct insured on the policy rather than to a third party that had no direct relationship with the insurer. *Id.* at 64-5.

Thus, under *Sabine*, the disclaimer language may actually create an affirmative duty on the part of the certificate holder to find out what the policy actually covers and may trigger the immediate running of limitations with respect to any inaccuracy in the certificate.

According to the Texas Supreme Court in *Via Net,* the "discovery rule" is inapplicable to a breach of contract case by the certificate holder against the other party based on the other party not taking steps to add the certificate holder as an additional insured to the policy. The court held that limitations begins to run on a breach of contract claim from the moment of breach and suggests that this means that limitations begins almost immediately upon the obligation to name the additional insured. Under *Via Net*, waiting till the accident happens or the certificate holder receives a denial letter from the carrier informing it that no additional insured endorsement naming it on the policy is dangerous.

8. What is the effect of the certificate of insurance issued by Sloppy after the accident?

None under the facts of the hypothetical. A certificate of insurance, like an insurance policy, issued after a loss has already occurred is *generally* of no effect under basic principals of insurance such as the lack of fortuity and the "known loss" rule as well as under the common sence notion that no one could have relied on a certificate of insurance that was not issued until the accident occurred to believe that there was insurance for that accident. See, Certain *Underwriters at Lloyds v. Oryx Energy Co.*, 957 F. Supp. 930, 936-7 (S.D. Tex. 1997).

Note however, that if the facts had been different such that it was clear that there was not any "after the fact" attempt to manufacture insurance coverage for the accident and the delay in requesting the certificate had been merely a few days in the normal course and the accident had happened before the certificate actually got requested or issued, the result could be different. In *Atofina Petrochemicals Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005) the contract terms between the general and subcontractor were orally agreed to on August 12 and the certificate of insurance was requested that very day and work begin on August 14. The certificate of insurance required by the terms of the contract was not actually issued however until August 18, and the accident happened on August 14, i.e. the very first day of work. Under these circumstances, the court held that while the more prudent

practice is to obtain a certificate of insurance before allowing the work to begin, here it was clear that no one was trying to manufacture insurance after the fact so that the delay in issuing the certificate was of no consequence, particularly since it contained the required disclaimer language establishing that it did not affect the coverage under the policy any way.

III.

PRACTICAL POINTERS

1. Never completely rely on a mere certificate of insurance as assurance that you are in fact covered as an additional insured. At a minimum, require a copy of the additional insured endorsement as issued by the carrier showing the policy number etc.

2. Understand that a certificate of insurance generally is construed as not affecting any exclusions or other limitations on coverage contained in the policy; therefore, if it is important that the policy extend coverage for any particular factual scenario, then you better review the actual insurance policy.

3. Similarly, understand that just because you have received a certificate of insurance that purports to confirm coverage does not mean that you are not still under a duty to investigate or discover what coverage is actually afforded before the statute of limitations runs on any suit that you may need to bring.

4. Understand the difference between receiving a certificate of insurance that merely purports to confirm the coverage available to the insured and receiving a certificate of insurance that purports to confirm that, in addition, you are an additional insured on the policy.

5. Finally, understand that not all additional insured endorsements by which you may be covered as an additional insured are created equal; on the contrary some are very broad and others severely restrict additional insured coverage to fairly narrow ranges of circumstance and may not, for example, depending on the wording, cover the additional insured for its own direct negligence.

6

IN THE SUPREME COURT OF TEXAS

No. 03-0647

EVANSTON INSURANCE COMPANY,
PETITIONER,

v.

ATOFINA PETROCHEMICALS, INC.
RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued April 13, 2005

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE WILLETT joined, and in which JUSTICE HECHT and JUSTICE JOHNSON joined as to Parts I, II.A–II.D, and II.F.

JUSTICE HECHT filed an opinion concurring in part and dissenting in part, in which JUSTICE JOHNSON joined.

Rehearing is granted. We withdraw the opinion and judgment previously issued in this case and substitute the following opinion.

In this case, we examine the interplay between a contractual indemnity provision and a service contract's requirement to name an additional insured. More particularly, we must decide whether a commercial umbrella insurance policy that was purchased to secure the insured's

indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party. In addition, we must decide whether the insurer is bound to pay the amount of an underlying settlement between the additional insured and a plaintiff. Finally, we must determine whether article 21.55 of the Texas Insurance Code, the "Prompt Payment of Claims" statute, authorized the imposition of penalties and attorney's fees for the insurer's failure to pay the claim timely. We conclude that the umbrella policy provides coverage for liabilities arising from the additional insured's sole negligence, that the settlement agreement binds the insurer to the amount recited therein, and that the additional insured is not entitled to penalties for untimely payment of claims. We affirm the judgment of the court of appeals to the extent that it resolves the coverage dispute in favor of the additional insured, and to the extent that it binds the insurer to the amount recited in the settlement agreement, but we reverse the court of appeals' judgment regarding damages and attorney's fees under article 21.55 and render judgment that the additional insured is not entitled to recovery of such damages and fees.

I

ATOFINA Petrochemicals, Inc.[1] contracted with Triple S Industrial Corporation to perform maintenance and construction work at ATOFINA's Port Arthur refinery. The service contract contained an indemnity provision and a requirement that Triple S carry certain minimum levels of liability insurance coverage. Triple S agreed to indemnify ATOFINA from all personal injuries and property losses sustained during the performance of the contract, "except to the extent that any such

[1] ATOFINA is the successor company to FINA Oil and Chemical Company, which originally executed the independent contractor agreement with Triple S. For purposes of this opinion, we shall refer to FINA and ATOFINA, without distinction, as ATOFINA.

loss is attributable to the concurrent or sole negligence, misconduct, or strict liability of [ATOFINA]." Triple S also agreed to carry at least $500,000 of primary comprehensive general liability (CGL) insurance, "[i]ncluding coverage for contractual liability insuring the indemnity agreement," and an excess (or "umbrella") liability policy "following form for [the CGL policy]" of at least $500,000. Finally, the contract required Triple S to furnish certificates of insurance to ATOFINA evidencing the required insurance coverages and showing ATOFINA as an additional insured on the policies. Triple S complied with its contract obligations by purchasing a $1 million CGL policy from Admiral Insurance Company and a $9 million commercial umbrella policy from Evanston Insurance Company, and by furnishing the required certificates of insurance.

Matthew Todd Jones, a Triple S employee working at the ATOFINA facility pursuant to his employer's contract with ATOFINA, drowned after he fell through the corroded roof of a storage tank filled with fuel oil. Jones's survivors sued Triple S and ATOFINA for wrongful death. Admiral tendered its $1 million policy limits. ATOFINA then demanded coverage from Evanston as an additional insured under the umbrella policy. Evanston denied the claim, and ATOFINA brought Evanston into the case as a third-party defendant for a declaration of coverage. ATOFINA then severed its suit against Evanston from the remainder of the Jones litigation. Both ATOFINA and Evanston moved for partial summary judgment in the severed action. While the motions were pending, the Jones case was settled for $6.75 million. ATOFINA seeks to recover from Evanston the $5.75 million not covered by Admiral.

The trial court granted summary judgment in favor of Evanston. The court of appeals reversed the judgment, holding that the Evanston policy covered ATOFINA, and remanded the case to the trial court for determination of statutory penalties and attorney's fees.[2]

II

Evanston argues it should not have to indemnify ATOFINA for its contribution to the Jones settlement for several reasons. First, it says ATOFINA agreed in its service contract with Triple S that it would not seek indemnification for losses resulting from its own negligence. Evanston says the language of its policy similarly excludes coverage for such losses caused by ATOFINA's negligence. The umbrella policy was a "following form" policy as required by the service contract, meaning that its coverage was no broader than the underlying policy, which identified ATOFINA as an additional insured "only with respect to liability arising out of [Triple S's] ongoing operations performed for [ATOFINA], but in no event for [ATOFINA's] sole negligence." Second, Evanston says this court's decision in *Fireman's Fund Insurance Co. v. Commercial Standard Insurance Co.*[3] precludes ATOFINA from obtaining a judgment for insurance proceeds based on losses arising from its own negligence.[4] Finally, Evanston says the Jones settlement amount was unreasonable and is thus unenforceable. We address these arguments in turn.

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[2] 104 S.W.3d 247, 251–52 (Tex. App.—Beaumont 2003) (per curiam).

[3] 490 S.W.2d 818 (Tex. 1972).

[4] *See id.*

A

In its service contract with Triple S, ATOFINA disclaimed any right of indemnity for losses "attributable to [its] concurrent or sole negligence." Under the terms of the service contract, ATOFINA is not entitled to be indemnified by Triple S if the Jones loss was occasioned in any way by ATOFINA's negligence. But ATOFINA does not seek indemnity from Triple S; it claims instead that it is entitled to indemnification from Evanston by virtue of its status as an additional insured on the umbrella policy Evanston issued to Triple S.[5] Instead of looking, as the court of appeals did, to the indemnity agreement in the service contract to determine the scope of any coverage, we base our decision on the terms of the umbrella insurance policy itself.

In support of its insured status, ATOFINA points to part III of the Evanston policy, which defines who is an insured. Section III.B.6 states that an insured includes:

> A person or organization for whom you have agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you.

ATOFINA claims it is fully covered as an insured by virtue of this paragraph because it is a "person or organization for whom [Triple S has] agreed to provide insurance," because the Evanston policy is the kind of insurance that was intended to secure that obligation, and because the loss "respect[ed] . . . operations performed by [Triple S]."

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[5] We have held that an indemnity agreement will not be construed to cover an indemnitee's sole negligence absent express language to that effect. *Id.* at 822. Evanston urges us to take this rule and apply it to additional insured provisions as well. However, we have also noted that where an additional insured provision is separate from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity clause. *See Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 804 (Tex. 1992). In fact, we specifically declined to extend the rule in *Fireman's Fund* to contractual provisions other than indemnity agreements. *Id.* at 806.

But Evanston counters that ATOFINA fails to qualify as an additional insured under section III.B.6 because the language does not cover an additional insured for its own negligence. Although no fact finding has been made regarding who was responsible for Jones's death, Evanston contends that because Jones's death was caused solely by ATOFINA's negligence, the death did not "respect . . . operations performed by [Triple S]."

The courts of appeals have confronted these additional insured provisions on several occasions, producing divergent results. Like Triple S's policy, the insured contractor's policy in *Granite Construction Co. v. Bituminous Insurance Cos.*[6] provided for additional insurance "only with respect to liability arising out of operations performed for such insured."[7] *Granite* adopted a fault-based interpretation of "arising out of operations," recognizing coverage only if an insured's wrongful act during the operation caused the injury.[8] The *Granite* court held that the claim did not "aris[e] out of operations performed by" the insured because only the additional insured company was responsible for the injury.[9]

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[6] 832 S.W.2d 427, 428 (Tex. App.—Amarillo 1992, no writ).

[7] *Id.* Several courts recognize no material difference between the common term "arising out of operations" and the Evanston policy term "with respect to operations." *See McCarthy Bros. Co. v. Cont'l Lloyds Ins. Co.*, 7 S.W.3d 725, 730 n.8 (Tex. App.—Austin 1999, no pet.); *Miller v. Superior Shipyard & Fabrication, Inc.*, 2001-2907, p. 5–6 (La. App. 1 Cir. 8/20/03); 859 So. 2d 159, 162–64; *Acceptance Ins. Co. v. Syufy Enters.*, 81 Cal. Rptr. 2d 557, 561–62 (Cal. Ct. App. 1999); *Lim v. Atlas-Gem Erectors Co.*, 638 N.Y.S.2d 946, 946–48 (N.Y. App. Div. 1996); *Fla. Power & Light Co. v. Penn Am. Ins. Co.*, 654 So. 2d 276, 279 (Fla. Dist. Ct. App. 1995). We cite cases addressing both terms because, even if there is a difference, whatever qualifies as "arising out of operations" also qualifies under "with respect to operations," the broader term.

[8] *Granite*, 832 S.W.2d at 430.

[9] *Id.* According to the court:

> Under the Granite-Brown contract, the loading operation was the sole obligation of Granite, and Brown was not responsible for that operation. Measuring the policy coverage provided Granite by the

The First and Third Courts of Appeals reached different results under a more liberal causation theory of additional insured provisions. In those cases, the additional insured provisions created coverage only "with respect to liability arising out of" the named insured's operations, and in both cases the claimants alleged that the additional insured companies acted negligently.[10] In *Admiral Insurance Co. v. Trident NGL, Inc.*, the court concluded:

> [B]ecause the accident in this case occurred to a[n] [insured's] employee while the employee was on the premises for the purpose of performing preventive maintenance on the compressor that exploded, the alleged liability for the employee's injuries "arose out of [the insured's] operations," and, therefore, was covered by the "additional insured" provision.[11]

The court in *McCarthy Brothers Co. v. Continental Lloyds Insurance Co.* applied a similar theory to find that a worker's slip-and-fall injury while retrieving tools at the job site "arose out of" the insured subcontractor's operation, even for purposes of a negligence claim against the additional insured premises owner.[12]

We prefer the reasoning of *Admiral* and *McCarthy* to *Granite* for two reasons. First, *Granite* relied on an underlying service contract that made the additional insured company responsible for

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> allegations in Valchar's petition, it is at once obvious that Valchar's claim of Granite's liability arose out of the loading operations performed by Granite; it was not a claim "arising out of operations performed for [Granite] by or on behalf of [Brown]," the only operations for which Granite was insured.

Id.; *see also N. Ins. Co. of N.Y. v. Austin Commercial, Inc.*, 908 F. Supp. 436, 437 (N.D. Tex. 1994) (applying *Granite* to slip-and-fall cases).

[10] *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 453-54 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (emphasis omitted); *McCarthy*, 7 S.W.3d at 727 & n.4 (emphasis omitted).

[11] 988 S.W.2d at 455.

[12] 7 S.W.3d at 730–31.

the specific injury-causing act.[13] However, our decisions since *Granite* make clear that "the liability insurer is to determine its duty to defend solely from terms of the policy and the pleadings of the third-party claimant," and, accordingly, that "evidence outside the four corners of these two documents is generally prohibited."[14] Even if we examine the service contract here, we can easily distinguish this case from *Granite*. The service contract between Triple S and ATOFINA does not assign responsibility for maintaining the storage tank that caused Jones's injury. Rather, the contract gives Triple S the exclusive "power and authority to select the means, method and manner of performing" the operation, and provides that Triple S "shall have control of and be responsible for the WORK SITE." Far from shifting any responsibility to ATOFINA, the specific terms of the service contract make Triple S responsible for all operations.

Second, regardless of the underlying service agreement's terms, we do not follow *Granite* because the fault-based interpretation of this kind of additional insured endorsement no longer prevails.[15] Instead, we interpret "with respect to operations" under a broader theory of causation. Generally, an event "respects" operations if there exists "a causal connection or relation" between

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[13] 832 S.W.2d at 430.

[14] *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307–08 (Tex. 2006) (citing *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002), and *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997)). In this case, the principles triggering the insurer's duty to defend apply equally to the insurer's duty to indemnify.

[15] *See Admiral*, 988 S.W.2d at 454–56; *McCarthy*, 7 S.W.3d at 729–31 & n.9; *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 496–500 (5th Cir. 2000).

the event and the operations: we do not require proximate cause or legal causation.[16] In cases in which the premises condition caused a personal injury, the injury respects an operation if the operation brings the person to the premises for purposes of that operation.[17] The particular attribution of fault between insured and additional insured does not change the outcome.[18]

Our interpretation results, in part, from the ordinary and natural meaning of the phrase "with respect to."[19] It also results from our recognition that, had the parties intended to insure ATOFINA for vicarious liability only, "language clearly embodying that intention was available."[20] The majority of other courts facing the issue have reached a similar result.[21]

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[16] *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 155–56 (Tex. 1999) (determining whether "injuries were caused by an accident arising out of the use of [a] truck"); *accord Admiral*, 988 S.W.2d at 454–56; *McCarthy*, 7 S.W.3d at 729–31; *see also Utica Nat. Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 201–03 (Tex. 2004) (contrasting "arising out of" with "'due to,' [which] requires a more direct type of causation that could tie the insured's liability to the manner in which the services were performed.").

[17] *Admiral*, 988 S.W.2d at 454–56 ("[I]t is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured."); *McCarthy*, 7 S.W.3d at 729–31; *Highland Park Shopping Vill. v. Trinity Universal Ins. Co.*, 36 S.W.3d 916, 918 (Tex. App.—Dallas 2001, no pet.). Our causation analysis is limited to these facts. Because the premises itself caused the injury in this case, we do not decide what level of causation, but-for or otherwise, would be required in a case where the additional insured's premises is merely the situs of the injury.

[18] *Admiral*, 988 S.W.2d at 454–56; *McCarthy*, 7 S.W.3d at 729–31; *Highland Park*, 36 S.W.3d at 917–18.

[19] *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1640 (Stuart Berg Flexner ed., 2d ed. unabr. 1987) (With respect to: "with respect to: referring to: concerning"); 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2512 (1971) (With respect: "with reference or regard to something.").

[20] *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 255 (10th Cir. 1993) (quoting *Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co.*, 721 F. Supp. 740, 742 (E.D. Pa. 1989)); *accord Mid-Continent Cas. Co. v. Chevron Pipe Line Co.*, 205 F.3d 222, 228–29 (5th Cir. 2000) ("[The insurer] easily could have limited coverage by including in the endorsement terms such as 'vicarious liability' or 'negligence of the named insured.'").

[21] *See Mid-Continent*, 206 F.3d at 497–99 (observing that "*Admiral* and *McCarthy* . . . are consistent with the majority view in other jurisdictions"); Steven D. Caley, et al., *The Scope of Additional Insured Coverage – A State Survey*, *in* INSURANCE LAW 2006: UNDERSTANDING THE ABC'S, at 149 (PLI Litig. & Admin. Practice, Course Handbook Series No. 741, 2006) (collecting cases); Douglas R. Richmond, *The Additional Problems of Additional Insureds*, 33 TORT & INS. L.J. 945, 956–65 (1998) (collecting cases and finding that the "liberal interpretation of the additional

Under section III.B.6 of the Evanston policy, the Jones injury "respect[ed] [] operations performed by [Triple S]" because Triple S employed Jones, who was performing the operation at the time and place of the injury. Although the pleadings in the underlying suit do not indicate whether or not Jones was performing a Triple S operation at the precise time of the accident, Jones was present at ATOFINA's facility for purposes of Triple S's operations when the accident occurred. As a result, even if ATOFINA's negligence alone caused Jones's injury, section III.B.6 of the Evanston policy provides direct insurance coverage to ATOFINA.[22]

B

Evanston and ATOFINA both look to section III.B.5 of the policy to support their respective positions regarding the scope of coverage under the Evanston policy. ATOFINA claims that section III.B.5 provides an independent basis for coverage, while Evanston argues that section III.B.5 does not apply. Section III.B.5 says an insured can be:

> Any other person or organization who is insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance.

This is a catch-all section that appears intended to bring within the policy coverage any "other" entities that are insured by the underlying policy but are not included within the preceding who-is-an-insured sections of paragraph III.B of the policy. Because ATOFINA cannot be an

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insured endorsement is fast becoming the majority rule").

[22] *See Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 939 S.W.2d at 141 ("[T]he general rule is that the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy.").

insured under sections III.B.1 through III.B.4, section III.B.5 applies in this case as long as ATOFINA was insured under the Admiral policy.

Evanston argues section III.B.5 establishes the policy's identity as a "following form" policy of the kind that was specified by the service contract, and that the nature of the policy precludes coverage.[23] Under section III.B.5, coverage cannot extend beyond what the underlying Admiral policy provides. Looking to the underlying policy, which specifically excludes coverage for ATOFINA's sole negligence, we conclude coverage under section III.B.5 is limited and excludes losses caused by ATOFINA's sole negligence.[24] On the record before us, we are unable to determine as a matter of law whether the Jones accident was the product of ATOFINA's sole negligence. The Jones family originally sued both ATOFINA and Triple S, alleging both parties were negligent. There were allegations in ATOFINA's pleadings that Jones himself was contributorily negligent. Triple S was eventually nonsuited, and the Jones's claim against ATOFINA was settled with no admission of liability by either party. Thus, without a determination of liability, it is impossible to

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[23] ATOFINA contends Evanston waived any argument regarding the impact of "following form" language in the insurance purchasing agreement by failing to raise this point in its cross-motion for summary judgment. While Evanston did not articulate this argument in precisely the same form as it is enunciated here, we note that Evanston did, in fact, argue before the trial court that the scope of its policy was bounded by the sole-negligence exclusion contained in the Admiral CGL policy. Furthermore, as the party that prevailed in the trial court, Evanston was not required to raise this issue before the court of appeals, as we do not normally require a party defending a judgment to raise every alternative theory on which the trial court could base its action. *See Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990).

[24] Endorsement 20 to the Admiral CGL policy, which has the same effective date as the Admiral policy itself, supports this interpretation. It states:

> WHO IS AN INSURED (Section II) is amended to include as an Insured [ATOFINA] but only with respect to liability arising out of [Triple S's] ongoing operations performed for [ATOFINA], but in no event for [ATOFINA's] sole negligence.

say whether ATOFINA's responsibility for the accident, if any, excluded it from coverage under section III.B.5 of the Evanston policy.

C

Evanston and ATOFINA disagree about the scope of coverage available in the event that ATOFINA qualifies as an insured under both sections III.B.5 and III.B.6 of the Evanston policy. ATOFINA favors a broader scope of coverage under section III.B.6, relying on the fact that it, unlike section III.B.5, does not expressly limit the coverage afforded to an insured to that provided by an underlying policy.

When interpreting an insurance contract, we "must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent."[25] "Exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured," and "[a]n intent to exclude coverage must be expressed in clear and unambiguous language."[26] Therefore, we must adopt ATOFINA's broad interpretation of coverage unless there is "clear and unambiguous" policy language requiring the limitations on coverage in section III.B.5 to also restrict the coverage available when section III.B.6 or any other who-is-an-insured clause independently provides coverage.

Reading paragraph III.B as a whole, we conclude that each who-is-an-insured clause operates to grant coverage independently. Nothing in paragraph III.B suggests that the limitations of one

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[25] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).

[26] *Id.*

section granting coverage should be read into another separate section granting coverage.[27] In fact, apart from section III.B.5, other paragraph III.B sections contain disparate limiting language in their definitions of "insured," suggesting that each grant of coverage in paragraph III.B can be read independently as a self-contained grant of coverage. For example, section III.B.1 covers employees as "an insured" but excludes coverage for certain bodily injury. For the same reason that we would not read the section III.B.1 bodily injury limitation into the broad coverage of section III.B.6, we refuse to read section III.B.5's exclusion of coverage beyond the scope of the Admiral policy into section III.B.6. Because ATOFINA is entitled to coverage under more than one who-is-an-insured clause in paragraph III.B, it is not unreasonable to conclude that the policy should be read to provide the broader measure of coverage available under the applicable clauses. We therefore hold that the Evanston policy provides the broader scope of coverage that does not exclude liabilities arising out of ATOFINA's sole negligence.

D

Evanston next contends that this Court's 1972 decision in *Fireman's Fund v. Commercial Standard Ins. Co.*[28] is dispositive because, applying that holding, ATOFINA cannot recover insurance proceeds based on losses arising from its own negligence. In *Fireman's Fund*, we

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[27] Evanston argues that section III.B.5's use of "under *this policy*" rather than "under *this provision*" expressly limits coverage regardless of the scope of coverage that may apply under another provision within paragraph III.B. We disagree. Such a reading would render any broader coverage provided by the Evanston policy illusory by always limiting coverage to the scope of the Admiral policy. We cannot adopt a construction that renders any portion of a policy meaningless, useless, or inexplicable. *ATOFINA Petrochemicals, Inc. v. Cont'l Cas. Co.*, 185 S.W.3d 440, 444 (Tex. 2005) (per curiam) (rejecting policy construction that would render coverage illusory); *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998).

[28] 490 S.W.2d 818 (Tex. 1972).

addressed the relationship between indemnity agreements and the requirement of liability insurance in service contracts.[29] In that case, General Motors Corporation contracted with Sam P. Wallace Co., Inc. to perform work on its Arlington assembly plant.[30] In the contract, Wallace agreed to indemnify GM for any losses arising out of its work and to obtain liability insurance to satisfy that obligation.[31] While performing under the contract, two of Wallace's employees were injured, and they sued GM for negligence.[32] After the case settled, a declaratory judgment action was filed by the involved insurance carriers to resolve a dispute over whether Wallace was required by its contract to indemnify GM for GM's negligence.[33] We followed the general rule in holding that "a contract of indemnity will not afford protection to the indemnitee against the consequences of his own negligence unless the contract clearly expresses such an obligation in unequivocal terms."[34] Wallace's indemnity agreement with GM failed to do that and thus we concluded that Wallace's insurance carrier was not required to indemnify GM.[35] In doing so, we noted that "all of the relevant provisions of the contract should be considered when arriving at its intent and meaning."[36] In its contract with GM, several provisions evinced Wallace's intent to indemnify GM only with respect

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[29] *Id.* at 822–23.

[30] *Id.* at 820.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 822.

[35] *Id.* at 823.

[36] *Id.* at 822–23.

to losses occasioned by its own negligence, not GM's negligence.[37] For example, in one provision, Wallace assumed liability "for any injuries or damages occasioned by his agents or employees on the premises of the Owner."[38] In another, under a section entitled "Contractor's Responsibility," Wallace specifically excluded from its responsibility the "negligence of [the] Owner [GM]."[39]

In *Fireman's Fund*, Wallace's obligation to purchase insurance was to secure only its agreement to indemnify GM for Wallace's own negligence.[40] We held that GM was not entitled to indemnification because the contract did not specify that the indemnity agreement extended to GM's negligence.[41] However, it was never contended in *Fireman's Fund* that GM was an additional insured under Wallace's liability policy and was therefore entitled to coverage on that basis, a fact that distinguishes *Fireman's Fund* from this case. This case is similar to *Fireman's Fund* only in that Triple S was required to purchase liability insurance to secure its indemnity agreement. But Triple S was also required to add ATOFINA as an insured on its policies, which was not a requirement of the contract in *Fireman's Fund*.

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[37] *Id.* at 821.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 823.

[41] *Id.*

This case is more analogous to our 1992 decision in *Getty Oil Co. v. Insurance Co. of North America*.[42] In that case, Getty entered into a contract to purchase chemicals from NL Industries.[43] The contract included an indemnity provision and a broad insurance requirement which provided that "[a]ll insurance coverage carried by [NL] . . . shall extend to and protect" Getty "whether or not required [by other provisions of the contract]."[44] After an accident involving NL's product killed one of Getty's contractors, and a jury found that Getty was 100 percent responsible, NL's insurer refused coverage for Getty because the Texas Oilfield Anti-Indemnity Statute[45] prohibited indemnification for one's own negligence.[46] But we held that the insurance requirement of the contract was separate and independent from the indemnity provision and, consequently, the prohibition of the Anti-Indemnity Statute did not apply.[47]

Although the service contract in this case does not include an insurance requirement quite as clear as the one in *Getty*, it is clear enough—it requires that ATOFINA "shall be named as additional insured in each of [Triple S's] policies." Evanston argues that this "brief statement" in the contract is insufficient to extend insured status to ATOFINA for its own negligence because the insurance requirement and certificates of insurance cannot expand coverage beyond the language of

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[42] 845 S.W.2d 794 (Tex. 1992).

[43] *Id.* at 796.

[44] *Id.* at 804.

[45] TEX. CIV. PRAC. & REM. CODE §§ 127.001–.007.

[46] *Getty Oil*, 845 S.W.2d at 804.

[47] *Id.* ("[T]he additional insured provision of the contract does not support the indemnity agreement, but rather is a separate obligation.").

the policy.[48] While we agree that an insurance certificate merely evinces the holder's status as an insured and does not create coverage,[49] it is unmistakable that the agreement in this case to extend *direct* insured status to ATOFINA as an additional insured is separate and independent from ATOFINA's agreement to forego *contractual* indemnity for its own negligence. We disapprove the view that this kind of additional insured requirement fails to establish a separate and independent obligation for insuring liability.[50] We conclude that our *Fireman's Fund* decision does not bar ATOFINA from obtaining insurance proceeds for losses resulting from its own negligence.

E

Next we examine Evanston's obligation to pay $5.75 million of the $6.75 million settlement. Evanston argues that ATOFINA failed to meet its burden of showing that the amount was reasonable, and argues instead that its evidence proves the amount was unreasonable as a matter of law, entitling Evanston to summary judgment. ATOFINA asserts the opposite, contending that its summary judgment evidence proves the settlement amount was reasonable as a matter of law. Before reaching that question, we must address ATOFINA's additional contention that Evanston's denial of coverage bars it from challenging the reasonableness of the settlement.

Our last occasion to address this issue was *Employers Casualty Co. v. Block*,[51] in which we held that if an insurer wrongfully denies coverage and its insured then enters into an agreed

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[48] *See Granite Const. Co. v. Bituminous Ins. Cos.*, 832 S.W.2d 427, 429 (Tex. App.—Amarillo 1992, no writ).

[49] *See id.*

[50] *See Emery Air Freight Corp. v. Gen. Transp. Sys., Inc.*, 933 S.W.2d 312, 315 (Tex. App.—Houston [14th Dist.] 1996, no writ).

[51] 744 S.W.2d 940 (Tex. 1988).

judgment, the insurer is barred from challenging the reasonableness of the settlement amount.[52] Although this case presents some different facts, *Block*'s rule should apply nonetheless.

In *Block*, "[t]he basic issue before the trial court was the reasonableness of the damages recited in the agreed judgment" between the defendant roofing company and the plaintiff homeowners.[53] The *Block* court of appeals "concluded that once it was determined that [the insurer] wrongfully failed to defend its insured, [the insurer] was barred from collaterally attacking the final agreed judgment."[54] *Block* addressed two questions concerning the effect of the agreed judgment between the plaintiffs and the defendant roofing company.[55] First, did the agreed judgment bar the insurer from contesting the reasonabless of damages?[56] Second, did the agreed judgment bar the insurer from contesting the agreed judgment's factual recitations relating to coverage?[57] *Block*'s answer was clear:

> While *we agree with the court of appeals' conclusion that [the insurer] was barred from collaterally attacking the agreed judgment by litigating the reasonableness of the damages recited therein*, we do not agree with its conclusion that the recitation

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[52] *Id.* at 943.

[53] *Id.* at 942.

[54] *Id.*

[55] *Id.* at 943.

[56] *Id.*

[57] *Id.* The dispute between ATOFINA and Evanston concerns only the reasonableness of the settlement amount, and not any factual assertions within the settlement agreement text.

> in the agreed judgment that the damage resulted from an occurrence on August 6, 1980 is binding and conclusive against [the insurer] in the present suit.[58]

In this case, the plaintiffs sued ATOFINA. ATOFINA requested coverage from Evanston, and Evanston wrongfully denied coverage, citing the policy terms. ATOFINA brought Evanston into the case as a third-party defendant for a declaration of coverage, and Evanston continued to deny coverage in its pleadings. ATOFINA then settled with the underlying plaintiffs and litigated the remaining coverage issues against Evanston. Though this case differs from *Block* in several respects, none of the differences justify departing from *Block*.

First, the forms of settlement and policy claims differ. *Block*'s insurer violated the policy's duty to defend,[59] and while no duty to defend is implicated in this case, Evanston wrongfully denied all coverage under the policy.[60] In addition, *Block*'s plaintiff and defendant entered into an agreed judgment,[61] while ATOFINA and the wrongful death plaintiffs used a contractual settlement

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[58] *Id.* (emphasis added) (citations omitted); *see also W. Alliance Ins. Co. v. N. Ins. Co. of N.Y.*, 176 F.3d 825, 830 (5th Cir. 1999) (citing *Block*, 744 S.W.2d at 943) ("If an insurer breaches the duty to defend, it may not contest a determination that its insured was liable in the underlying settlement or verdict (or the amount of either)."); *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1495-96 (5th Cir. 1992) ("Texas law denies insurers like these a collateral attack on the settlement itself. . . . Recent opinions of both this Court and the Texas Supreme Court have confirmed that, unlike a request for allocation, an attempt to contest the reasonableness of a consent judgment entered into between the insured and an injured third party is unavailable to an insurer who has wrongfully breached its duty to defend.").

[59] 744 S.W.2d at 942.

[60] The dissent suggests that Evanston never breached any duty owed to ATOFINA. ___ S.W.3d at ___. Yet on multiple occasions *before the settlement*, Evanston explicitly rejected ATOFINA's claim for coverage under the policy. Evanston first denied ATOFINA's request for coverage by letter, and then consistently asserted the same in its pleadings throughout the coverage suit. Even if this conduct does not amount to an anticipatory breach of the contract, which it very well might, *see Murray v. Crest Constr., Inc.*, 900 S.W.2d 342, 344 (Tex. 1995); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515 (Tex. 1998), this kind of explicit, unqualified rejection of coverage surely operates to trigger the equitable principles in *Block*.

[61] 744 S.W.2d at 942.

agreement and nonsuit. But neither the difference in policy claims nor the absence of a judgment memorializing the parties' settlement disrupts the *Block* principles here because *Block*'s rule is not derived from the nature of the violated policy term or the formality of agreed judgments. The cases barring insurers' challenges rest on principles of estoppel and waiver; what is most important in this context is notice to the insurer and an opportunity to participate in the settlement discussions.[62]

Some cases in this area bar an insurer's invocation of policy provisions as a defense, not what we have here—an insurer's invocation of the common law reasonableness requirement. However, the principles of notice to the insurer and an intentional choice to forego participation in settlement discussions operate the same no matter how the insurer chooses to attack the settlement. That is, the particular source of the insurer's later-raised attack on the settlement amount—be it a policy provision or a common law rule—does not control our inquiry. One case cited by *Block* noted that, "[h]ad [the insurer] accepted the defense, it would have had, of course, the opportunity to conduct the defense in the manner most likely to have defeated the plaintiffs' claim or at least to have reduced the amount of the damages."[63] Had Evanston not unconditionally denied coverage, it too

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[62] *See Gulf Ins. Co. v. Parker Prods., Inc.*, 498 S.W.2d 676, 679 (Tex. 1973); *Womack v. Allstate Ins. Co.*, 296 S.W.2d 233, 237 (Tex. 1956); *see also St. Louis Dressed Beef & Provision Co. v. Md. Cas. Co.*, 201 U.S. 173, 181 (1906) ("Moreover, the [insurer], by its refusal [to defend], cut at the very root of the mutual obligation, and put an end to its right to demand further compliance with the supposed term of the contract on the other side."); *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 29, 140 P.3d 1210, 1216; *Liberty Mut. Ins. Co. v. Wheelwright Trucking Co.*, 851 So. 2d 466, 476–78 (Ala. 2002); *D.E.M. v. Allickson*, 555 N.W.2d 596, 599–601 (N.D. 1996); *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 531–32 (Iowa 1995); *Fireman's Fund Ins. Co. v. Sec. Ins. Co. of Hartford*, 367 A.2d 864, 867–73 (N.J. 1976); *Theodore v. Zurich Gen. Accident & Liab. Ins. Co.*, 364 P.2d 51, 55 (Alaska 1961); *Albert v. Me. Bonding & Cas. Co.*, 64 A.2d 27, 29–30 (Me. 1949). We cite these additional cases for their use of the equitable waiver and estoppel decision frameworks generally, but not for their opinions of how the equitable balance should be struck.

[63] *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 167 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

would have been able to influence the amount of the settlement.[64] For these reasons, the difference in policy claims and the absence of a formal judgment do not persuade us to abandon *Block* here.[65]

In addition, this case's posture is different than *Block*'s. In *Block*, the underlying plaintiff sued the insurer as a judgment creditor, leading to some disapproval from this Court in *State Farm Fire & Casualty Co. v. Gandy*.[66] In *Gandy*, the Court said:

> In no event, however, is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee. We disapprove the contrary suggestion in dicta in *Employers Casualty Company v. Block*, 744 S.W.2d 940, 943 (Tex. 1988), and *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 954 (5th Cir. 1990).[67]

Gandy does not disrupt the application of *Block* to this case for two reasons. First, this case does not fall within *Gandy*'s holding. *Gandy*'s holding was explicit and narrow, applying only to

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[64] Admiral tendered its $1 million before the settlement, invoking Evanston's duties as an excess insurer. The Evanston policy gave Evanston the right to "associate with the insured in the defense and control of any 'claim' or 'suit' that we think may involve this policy." *Cf. Keck, Mahin & Cate v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 701 (Tex. 2000) (supporting an excess insurer's right to "interject itself into settlement negotiations before tender by the primary insurer").

[65] The dissent cites *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949 (5th Cir. 1990), for the proposition that "an insurer that *does* have a duty to defend is not estopped to contest the reasonableness of a settlement." ___ S.W.3d at ___. Though the Fifth Circuit did so hold, the dissent misapplies that case. Unlike Evanston, the insurer in that case *offered to supply the policy benefit* (in that case, the duty to defend) under a reservation of rights. *U.S. Aviation Underwriters*, 896 F.2d at 952. More importantly, unlike ATOFINA, the insured in that case *rejected the insurer's offer*. *Id.* As a result of those two facts, the Fifth Circuit explicitly distinguished its case from *Block* and other cases where a defense is neither tendered nor rejected. *Id.* at 954–55. For those latter situations, the Fifth Circuit concluded that "under Texas law an insurer which is obliged to defend its insured but flatly refuses to do so . . . cannot contest the reasonableness of a consent judgment agreed to between the insured and the injured party." *Id.* at 955. Thus, *United States Aviation Underwriters* supports our holding today, not the opposite.

[66] 925 S.W.2d 696 (Tex. 1996).

[67] *Id.* at 714.

a specific set of assignments with special attributes.[68] By its own terms, *Gandy*'s invalidation applies only to cases that present its five unique elements.[69] Here, *Gandy*'s key factual predicate is missing: ATOFINA made no assignment of its claim against Evanston; ATOFINA sued Evanston directly.[70] That removes this case from the formal bounds of *Gandy*. Second, *Gandy*'s rationale does not require disapproving *Block* in this setting. *Gandy*'s reason for invalidating assignments was simple: Those assignments made evaluating the merits of a plaintiff's claim difficult by prolonging disputes and distorting trial litigation motives.[71] But not all cases implicate *Gandy*'s concerns. "We should not invalidate a settlement that is free from this difficulty [of fairly evaluating a plaintiff's claims] simply because it is structured like one that is not."[72]

Barring Evanston's challenge here does not implicate *Gandy*'s concerns. Preventing insurers from litigating the reasonableness of a settlement does not extend disputes; by definition, it shortens them. Nor is there a risk of distorting litigation or settlement motives here. ATOFINA settled

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[68] We hold that a defendant's assignment of his claims against his insurer to a plaintiff is invalid if (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim.

Id. "We do not address whether an assignment is invalid when any element of the rule is lacking, such as when an insurer has not tendered a defense of its insured." *Id.* at 719.

[69] *Id.* at 715 ("In the present case we have focused on the validity of the assignment.").

[70] In addition, Evanston never tendered a defense, a fact *Gandy* purported to rely upon. *See id.* at 714.

[71] *Id.* at 707–19.

[72] *Id.* at 714. Even when it addressed assignments, *Gandy* did not present an absolute rule: "Not every settlement involving an assignment of rights in exchange for a covenant to limit the assignor's liability has the problems we have described." *Id.*

without knowing whether or not it would be covered by the policy, leaving in place its motive to minimize the settlement amount in case it became solely responsible for payment.[73] To accomplish *Gandy*'s goal of "fairly determin[ing]" the value of plaintiffs' claims, we apply the *Block* rule to this circumstance, which will encourage early intervention by the insurers who are best positioned to evaluate the worth of claims during settlement discussions. Thus, without relevant factual differences or *Gandy* concerns to dissuade us from following *Block*, we hold that Evanston's denial of coverage barred it from challenging the reasonableness of ATOFINA's settlement.[74] Evanston is, therefore, bound to pay the $5.75 million that remains of the settlement.

F

Finally, Evanston argues that the court of appeals erroneously awarded ATOFINA 18% per annum of the claim amount and attorney's fees for Evanston's failure to promptly pay claims under article 21.55 of the Texas Insurance Code.[75] Under article 21.55, a court may impose damages "[i]n all cases where a claim is made pursuant to a policy of insurance and the insurer liable therefore is not in compliance with this article."[76] "Claim" is defined as "a first party claim . . . that must be paid

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[73] *Cf. Guillen ex rel. Guillen v. Potomac Ins. Co. of Ill.*, 785 N.E.2d 1, 14 (Ill. 2003) ("[T]he risk of collusion and fraud can be lessened . . . , if not avoided altogether, by placing a requirement upon the plaintiff to prove that the settlement it reached with the insured was reasonable before that settlement can have any binding effect upon the insurer.").

[74] The denial does not bar Evanston from challenging coverage. *See Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) ("Even if a liability insurer breaches its duty to defend, the party seeking indemnity still bears the burden to prove coverage if the insurer contests it."); *Block*, 744 S.W.2d at 943–44.

[75] The "Prompt Payment of Claims" statute has been recodified without substantial change. *See* TEX. INS. CODE §§ 542.051–.061; *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 239 S.W.3d 236, 251–52 (Tex. 2007). For purposes of this opinion, we refer to article 21.55.

[76] TEX. INS. CODE art. 21.55 § 6.

by the insurer directly to the insured or beneficiary."[77] Evanston relies on the definition of "claim" in arguing that the statute does not apply to claims for reimbursement of settlement costs in the context of a liability insurer's denial of indemnity for a third-party claim against its insured.

Though the statute does not define first-party claims, we distinguish first-party and third-party claims based on the claimant's relationship to the loss.[78] "[A] first-party claim is stated when 'an insured seeks recovery for the insured's own loss,' whereas a third-party claim is stated when 'an insured seeks coverage for injuries to a third party.'"[79] A loss incurred in satisfaction of a settlement belongs to the third party and is not suffered directly by the insured.[80] This case in which ATOFINA seeks coverage for injuries sustained by a third party presents a classic third-party claim. Because the Legislature intended that article 21.55 apply to claims personal to the insured,[81] ATOFINA is not entitled to the article 21.55 damages or attorney's fees. We therefore reverse the portion of the court of appeals' judgment pertaining to article 21.55 damages and attorney's fees and render judgment that ATOFINA recovers no attorney's fees or damages under article 21.55.

III

We affirm the court of appeals' holding that ATOFINA is an insured under the Evanston insurance policy and is thus entitled to coverage for the Jones litigation settlement, and we affirm

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[77] *Id.* § 1.

[78] *Lamar Homes*, 239 S.W.3d at 253.

[79] *Id.* (quoting *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 n.2 (Tex. 1997)).

[80] *Id.*

[81] *Id.* at 255.

the court of appeals' holding that Evanston is bound to pay the $5.75 million settlement amount. We reverse the court of appeals' judgment permitting ATOFINA to recover attorney's fees and damages under article 21.55 of the Texas Insurance Code and render judgment that ATOFINA is entitled to no such damages or fees.

PAUL W. GREEN
JUSTICE

OPINION DELIVERED: February 15, 2008

IN THE SUPREME COURT OF TEXAS

No. 06-0868

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, APPELLANT,

v.

BEATRICE CROCKER, APPELLEE

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued January 25, 2007

JUSTICE WILLETT delivered the opinion of the Court.

This insurance-coverage case comes to us on certified questions from the United States Court of Appeals for the Fifth Circuit.[1] The principal issue is whether an insurer has a duty to notify an additional insured[2] of available liability coverage. On the facts presented, we conclude that Texas law imposes no such extra-contractual duty. We further hold that an insurer's actual knowledge that an additional insured has been served with process does not establish as a matter of law that the

[1] *See* TEX. R. APP. P. 58.1 (authorizing this Court to hear certified questions from any federal appellate court).

[2] The "additional insured" in this case might more properly be referred to as an "omnibus insured"; however, we use the term "additional insured" to conform our writing to the questions posed by the Fifth Circuit and that court's helpful analysis of the issues before us.

insurer has not been prejudiced by the additional insured's failure to notify the insurer of the receipt of process.

I. Background

Beatrice Crocker was a resident of Redwood Springs Nursing Home, which is owned by Emeritus Corporation. She filed suit in state court against Emeritus and Richard Morris, a nursing home employee, seeking compensation for injuries suffered when she was hit by a door swung open by Morris.[3] Crocker's claims against Emeritus were covered by a commercial general liability policy issued by National Union Fire Insurance Company of Pittsburgh, PA. Because Morris was acting within the course and scope of his employment when the accident occurred, he qualified as an additional insured under the policy.[4] National Union defended Emeritus, the named insured, but did not defend Morris even though the claims against him were covered by the policy and National Union knew he was a named defendant that had been served. As the Fifth Circuit points out, "Morris was not aware of the terms and conditions of the Emeritus policy [and] did not know that he was an additional insured under the policy."[5] National Union did not inform Morris that he was an insured, nor did it offer to defend him. Morris was served, but he "did not forward the suit papers to National Union or otherwise inform it that he had been sued, and did not request a defense from

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[3] The nursing home terminated Morris's employment shortly after this incident and before Crocker filed her lawsuit. *Crocker v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 466 F.3d 347, 349 n.2 (5th Cir. 2006).

[4] The policy provides: "You or your means the individual, partnership, or corporation designated as Named Insured in Item 1 of the Declarations, including any present or former employee . . . solely while acting in his or her capacity as such."

[5] *Crocker*, 466 F.3d at 349.

either National Union or Emeritus."[6] Morris never answered the suit and did not appear at trial. National Union attempted to contact Morris about Crocker's claims, both before and after Crocker filed her lawsuit, but to no avail—the certified mail was returned, and the repeated phone messages were not returned. Morris spoke privately with Crocker's attorney at a deposition, but Morris refused to speak in private with Emeritus's counsel.

After the evidence was presented, the state trial court granted Crocker's motion to sever the claims against Morris. The claims against Emeritus were submitted to the jury, which returned a take-nothing verdict, finding that Emeritus, acting "by and through its agents acting within the course and scope of their employment," including Morris, was not negligent. A few days later, however, the trial court entered a $1 million default judgment against Morris on the severed claims.[7]

Crocker sued National Union to collect the judgment, asserting she was a third-party beneficiary to the policy. National Union removed the case to federal court, and both parties moved for summary judgment. National Union argued that Morris never triggered the duty to defend because he failed to forward the suit papers or otherwise notify National Union that he had been sued and he did not ask National Union to provide a defense. The policy provides:

> Before coverage will apply, you must notify us as soon as possible of an occurrence or offense which may result in a claim or suit against you.
>
> Notice should include:
>
> - How, when and where the occurrence or offense took place;

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[6] *Id.*

[7] Crocker contends that the trial court actually granted the default judgment against Morris from the bench before the case was submitted to the jury.

- Names and addresses of any witnesses and injured people;
- Nature and location of any injury or damage.

Before coverage will apply, you must notify us in writing of any claim or suit against you as soon as possible. You must:

- immediately record the specifics of the claim and the date you received it;
- send us copies of all demands, suit papers or other legal documents you receive, as soon as possible.

National Union contends that, because Morris failed to comply with the notice provisions, he did not invoke coverage or the right to a defense under the policy, meaning that Crocker, who now purports to stand in Morris's shoes, cannot collect under the policy either.

Crocker responds that even though Morris did not comply with the notice-of-suit provision, National Union had actual knowledge of Crocker's suit, and hence was not prejudiced by Morris's failure to forward the suit papers. Crocker contends that National Union's actual knowledge of the suit coupled with its failure to notify Morris that he was covered amounted to a breach of its duty to defend Morris, thus making National Union liable to Crocker for the full $1 million default judgment.

The federal district court agreed with Crocker, concluding that Texas law required National Union to show prejudice in order to establish a notice-based policy defense. The court also found that National Union breached a duty to defend Morris by failing to notify Morris that it would defend him. Therefore, the court granted summary judgment in favor of Crocker and awarded her $1 million. National Union appealed to the Fifth Circuit, which certified three questions to us.

II. Discussion

A. First Certified Question

The Fifth Circuit first asks:

> Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage?[8]

We answer the question, no.[9]

Insurance policies are written contracts, and, as with other contracts, we interpret and enforce them according to settled rules of construction.[10] Most importantly, we must give the policy's words their plain meaning,[11] without inserting additional provisions into the contract.[12]

Our 1978 decision in *Weaver v. Hartford Accident & Indemnity Co.* governs today's case.[13] In *Weaver*, we held that an insurer was not liable to an additional insured's judgment creditor when the additional insured failed to notify the insurer that he had been served with process, even though the insurer knew about the suit, and the additional insured knew nothing about the policy.[14] Weaver

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[8] *Id.* at 359.

[9] The Fifth Circuit certified three questions to us. We answer the first and third questions but need not address the second question given our "no" answer to the first.

[10] *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003).

[11] *Puckett v. U.S. Fire Ins.* Co., 678 S.W.2d 936, 938 (Tex. 1984).

[12] *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007).

[13] 570 S.W.2d 367 (Tex. 1978).

[14] *Id.* at 368, 370 (Greenhill, C.J., dissenting).

sued Hartford, an insurer, to recover under an automobile liability policy on the basis of a default judgment obtained against an additional insured. Hartford had issued the policy naming J.C. Thomas Enterprises as the insured. The policy defined "insured" to include any person using a vehicle owned by Thomas Enterprises with its permission. One of Thomas Enterprises's employees, while driving a company vehicle, had an accident with Weaver.

Weaver sued the employee and later added Thomas Enterprises as a co-defendant. Thomas Enterprises notified its insurer of the suit, and an answer was filed on its behalf, denying that the employee had permission to use the vehicle. During the insurer's investigation of the accident, the employee told the insurer that he did not have permission to use the vehicle at the time of the accident. He also acknowledged that he never notified Hartford of the lawsuit, filed an answer, or had an answer filed on his behalf. Weaver nonsuited Thomas Enterprises and was granted a default judgment against the employee.[15]

After winning the judgment, Weaver sued Hartford to collect under the policy as a third-party beneficiary, alleging that Thomas Enterprises gave its employee permission to drive the vehicle. Despite the employee's previous statement that he did not have permission to drive the vehicle, the jury found that he was an additional insured. The policy provided that an insured's failure to forward suit papers to Hartford relieved it of any liability to an injured third party, but the trial court entered judgment in favor of Weaver.[16]

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[15] *Id.* at 368.

[16] *Id.* at 368-69.

On appeal, we held that the liability insurer had no duty to volunteer to defend the additional insured.[17] We noted that one purpose served by the insured's obligation to forward suit papers "is to enable the insurer to control the litigation and interpose a defense."[18] We emphasized, however, that "a more basic purpose is to advise the insurer that an insured has been served with process and that the insurer is expected to timely file an answer."[19] Under *Weaver*, an insurer's knowledge that a suit has been filed against an additional insured does not satisfy this "more basic purpose" or require the insurer to "gratuitously subject[ ] itself to liability."[20] The insured's ignorance of any rights or obligations under the policy did not affect our analysis in that case. Put simply, there is no duty to provide a defense absent a request for coverage.

The similarities between this case and *Weaver* abound. First, both Morris and the employee in *Weaver* were additional insureds under the liability policies at issue.[21] Second, the injured party in each case sued both the named insured and the additional insured but did not recover anything from the named insured.[22] Third, both additional insureds failed to forward suit papers to the

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[17] *Id.* at 370.

[18] *Id.* at 369.

[19] *Id.*

[20] *Id.* at 370.

[21] *Crocker v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 466 F.3d 347, 349 (5th Cir. 2006); *Weaver*, 570 S.W.2d at 368 & n.1.

[22] *Crocker*, 466 F.3d at 348; *Weaver*, 570 S.W.2d at 368. One ancillary point merits attention here. The jury rejected Crocker's claim against the nursing home because the jury refused to find Morris's actions negligent. Given the wording of the charge—which asked whether Emeritus had acted negligently "by and through its agents acting within the course and scope of their employment"—the jury's "no negligence" finding as to Emeritus, based on Morris' alleged misconduct, necessarily indicates it would have similarly concluded "no negligence" if asked about Morris himself. Stated differently, the alleged misconduct discussed at trial was Morris's. His actions were

insurers, so neither was defended by the insurer.[23] Fourth, both additional insureds lacked knowledge of the existence of the employers' liability policies and the notice-of-suit provisions.[24] Fifth, both insurers argued that they had no duty to inform the additional insured of the possibility of coverage.[25] While in *Weaver* we did not directly address the additional insured's ignorance of the policy, we nevertheless held that the insurer had no duty to inject itself gratuitously into a lawsuit by defending an additional insured who had not requested a defense and who failed to comply with the policy's forwarding conditions.[26]

We unanimously reaffirmed this holding several years later in *Harwell v. State Farm Mutual Automobile Insurance Co.*, where we said that the insurer did not have to "gratuitously subject[ ] itself to liability," until Harwell, the administrator of the estate of an additional insured, fulfilled her duty to notify the insurer of service of the suit against her.[27] We confirmed that *Weaver* remained the governing law and reaffirmed that "[o]ne of the purposes of a notice of suit provision in an insurance policy is to notify the insurer that the insured has been served with process and that the insurer is expected to defend the suit."[28]

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litigated notwithstanding his absence, and the jury granted a complete victory to the defense. Accordingly, the jury's findings are directly contrary to the default judgment entered against Morris on the severed claims.

[23] *Crocker*, 466 F.3d at 349; *Weaver*, 570 S.W.2d at 368. Both insurers defended the named insureds, who did comply with the respective notice-of-suit provisions.

[24] *Crocker*, 466 F.3d at 349; *Weaver*, 570 S.W.2d at 370 (Greenhill, C.J., dissenting).

[25] *Crocker*, 466 F.3d at 350-51; *Weaver*, 570 S.W.2d at 373 (McGee, J., dissenting).

[26] *Weaver*, 570 S.W.2d at 370.

[27] 896 S.W.2d 170, 172, 174 (Tex. 1995).

[28] *Id.* at 173 (citing *Weaver*, 570 S.W.2d at 369).

Both *Weaver* and *Harwell* turn on the recognition that notice and delivery-of-suit-papers provisions in insurance policies serve two essential purposes: (1) they facilitate a timely and effective defense of the claim against the insured, and more fundamentally, (2) they trigger the insurer's duty to defend by notifying the insurer that a defense is expected. Mere awareness of a claim or suit does not impose a duty on the insurer to defend under the policy; there is no unilateral duty to act unless and until the additional insured first *requests* a defense—a threshold duty that the insured fulfills under the policy by notifying the insurer that the insured has been served with process and the insurer is expected to answer on its behalf. In both cases, we declined to subject the insurer to liability for failing to perform "'the sentry duty of tracking back and forth to the court house to keep a check on if or when . . . [the insured] may be served with process.'"[29] Of course, an insurer that is aware an additional insured has been sued may, and perhaps should, choose to inform the insured that a defense is available; in this case, had National Union done so, a judgment against Morris and years of subsequent litigation would have been avoided. But an insurer that has not been notified that a defense is expected bears no extra-contractual duty to provide notice that a defense is available to an additional insured who has not requested one. The answer to the first certified question is, therefore, no.

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[29] *Id.* (alteration in original) (citing *Weaver*, 570 S.W.2d at 369 and quoting *Campbell v. Cont'l Cas. Co.*, 170 F.2d 669, 671 (8th Cir. 1948)).

B. Third Certified Question[30]

The Fifth Circuit questions *Weaver*'s applicability to this suit because of "changes in Texas insurance law" over the years,[31] including a mandatory endorsement issued by the Texas Board of Insurance (now the Texas Department of Insurance), which requires a showing of prejudice in certain suits before an insurer may use "late notice" to deny coverage.[32] The Fifth Circuit's third certified question asks us:

> Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?[33]

We also answer this question, no.

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[30] The second question asks:

> If the above question is answered in the affirmative, what is the extent or proper measure of the insurer's duty to inform the additional insured, and what is the extent or measure of any duty on the part of the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions?

Crocker, 466 F.3d at 359. We do not address this question because it is conditioned on an affirmative answer to the first question.

[31] *Id.* at 354.

[32] *Id.* The endorsement reads:

> As respects *bodily injury* liability coverage and *property damage* liability coverage, unless the company is prejudiced by the *insured's* failure to comply with the requirement, any provision of this policy requiring the *insured* to give notice of action, *occurrence* or loss, or requiring the *insured* to forward demands, notices, summons or other legal process, shall not bar liability under this policy.

State Bd. of Ins., *Revision of Texas Standard Provision for General Liability Policies—Amendatory Endorsement-Notice*, Order No. 23080 (Mar. 13, 1973), *available at* http://www.tdi.state.tx.us/commercial/pcck23080.html.

[33] *Crocker*, 466 F.3d at 359.

National Union was obviously prejudiced in the sense that it was exposed to a $1 million judgment. The question, however, is not whether National Union suffered exposure to a financial risk, but whether it should be estopped to deny coverage because it was aware that Morris had been sued and served and had ample time to defend him. The answer must be "no" based on the discussion above—National Union had no duty to notify Morris of coverage and no duty to defend Morris until Morris notified National Union that he had been served with process and expected National Union to answer on his behalf. "Because [National Union] was not under a duty to defend the suit against its insured when [it received notice of the claim], it is not estopped from asserting [the insured's] breach of the policy as a bar to its liability."[34] Absent a threshold duty to defend, there can be no liability to Morris, or to Crocker derivatively.

Recently, in *PAJ, Inc. v. Hanover Insurance Co.*, we held that tardy notice of a covered claim will not defeat coverage unless the insurer was actually prejudiced by the delay.[35] The issue in *PAJ* was whether a named insured's untimely compliance with the notice-of-suit provision is excused if the delay inflicts no prejudice on the insurer. There are fundamental differences, however, between *PAJ* and today's case: in *PAJ*, the named insured made a request for coverage under the policy, albeit several months after "as soon as [was] practicable." In the pending case, however, the additional insured's notice was not merely late; it was wholly lacking. PAJ's notice was tardy; Morris's was nonexistent.

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[34] *Harwell*, 896 S.W.2d at 175.

[35] ___ S.W.3d ___ (Tex. 2007).

More importantly, as we have said, the requirement that an additional insured provide notice that it has been served with process is driven by a purpose distinct from the purpose underlying the requirement for notice of a claim or occurrence. Notice of service of process lets the insurer know that the insured is subject to default and expects the insurer to interpose a defense. An insurer cannot necessarily assume that an additional insured who has been served but has not given notice to the insurer is looking to the insurer to provide a defense. Potential insureds, for a variety of reasons, might well opt against seeking a defense from an insurer. For example, an additional insured may opt against invoking coverage because it wants to hire its own counsel and control its own defense. Indeed, Emeritus's counsel believed that Morris had done just that in this case. Counsel for Emeritus testified that he had asked Morris before his deposition if he could speak to him and Morris "refused on the basis that he was waiting for a call from his attorney. [Emeritus's counsel] assumed that [Morris] had an attorney and did not want to talk to [Emeritus's counsel] on that basis."[36]

As explained above, despite its actual knowledge of a covered suit against and service of process on Morris, National Union did not incur a duty to inform Morris of available coverage or his entitlement to a defense or to sua sponte provide one without any indication from Morris, either explicit or implicit, that he wanted or expected to be defended. Neither TDI's 1973 endorsement, nor our recent decision in *PAJ*, nor any other changes to Texas law since *Weaver* alter that conclusion.

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[36] *Crocker*, 466 F.3d at 350.

III. Conclusion

Insurers owe no duty to provide an unsought, uninvited, unrequested, unsolicited defense. Consistent with our decision in *Weaver*, we decline to impose an extra-contractual duty on liability insurers that would force them to keep track of potential litigants who may or may not be additional insureds, may or may not be entitled to coverage, and may or may not expect a defense to a claim. Accordingly, because insurers need not provide coverage to additional insureds who never seek it, National Union had no duty either to inform Morris of available coverage or to voluntarily undertake a defense for him, and its actual knowledge did not establish lack of prejudice as a matter of law.

Don R. Willett
Justice

OPINION DELIVERED: February 15, 2008