

FILED
SUPREME COURT
STATE OF WASHINGTON
1/11/2019 1:21 PM
BY SUSAN L. CARLSON
CLERK

No. 96500-5

CERTIFICATION FROM THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT
IN

T-Mobile USA, Inc.,

Plaintiff-Appellant,

v.

Selective Insurance Company of America,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT T-MOBILE USA, INC.

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I. INTRODUCTION

Plaintiff-Appellant T-Mobile USA, Inc. (“T-Mobile” or “T-Mobile USA”) respectfully submits this reply in support of its position on the question certified to this Court by the Ninth Circuit Court of Appeals.

The certified question asks the Court to resolve whether insurers like Defendant-Appellee Selective Insurance Company of America (“Selective”) are bound by the express representations of their authorized agents contained in COIs or whether boilerplate disclaimer language present in virtually all commercial general liability COIs voids those representations and allows insurers to escape all liability for their agents’ representations. As set forth in T-Mobile’s Opening Brief, the reasons why the Court should answer the certified question in the affirmative are simple and straightforward.

First, the boilerplate language at issue was not intended to address the type of additional affirmative representations at issue here, and the only way to harmonize the language of both the general disclaimer and the specific representation at issue is to limit the reach of the disclaimer to the circumstance that it was intended to address—a situation where a party claims insured status solely by virtue of possession of a COI or claims that the COI somehow obviates the application of the substantive policy terms governing the scope of coverage.

Second, limiting the reach of the disclaimer language at issue does not in any way contravene this Court's 1986 ruling in *Postlewait*, as *Postlewait* did not include a COI issued by an authorized agent and did not address the type of additional, affirmative representation at issue in this case.

Third, holding Selective to its authorized agent's representations in the 2012 COI is consistent with the long-standing principle of Washington law that an insurer is bound by the acts of its agent when the agent is acting within the scope of its authority—authority that the Ninth Circuit's Certification Order found to exist and asks the Court to assume here as a result.

Fourth, giving effect to the affirmative representation in the 2012 COI is also consistent with the holdings of courts in virtually every other jurisdiction that has addressed this issue. Indeed, Selective has failed to cite any compelling counter-authority or provide the Court with any rationale that supports its position in this case.

Fifth, there are strong policy reasons why the Court should answer the certified question in the affirmative and hold that express representations in COIs do in fact have legal effect, as a ruling to the contrary would call into question the literally thousands of existing COIs

issued throughout the State of Washington and would frustrate the basic functioning of the state's liability insurance industry.

Selective's Answering Brief fails to directly address, or rebut, any of these arguments. Selective instead mischaracterizes the record before the Court in a number of material respects and raises a series of irrelevant and misleading issues in an attempt to distract the Court from the relatively straightforward legal issue raised by the certified question. Even when Selective purports to address the certified question, it fails to provide the Court with any rational justification for not binding it to its authorized agent's express representations in the 2012 COI. Selective instead urges the Court to adopt a reading of the COI that would only give life to the general boilerplate language present *in every single COI issued on the ACORD 25 form*—and would effectively void the specific representation of its agent confirming that T-Mobile was an additional insured. Selective's position violates Washington's long-standing rule of construction that requires courts to give meaning to each and every term in insurance documents (and contracts generally) when possible.

Selective also engages in an extended discussion of the Court's decision in *Postlewait* and Division One's more recent decision in *ABCD Marine* (as well as a host of similarly inapposite cases from other jurisdictions) that stand for the general proposition that COIs are “not the

equivalent of an insurance policy.” Selective conflates the general result in those cases with the specific circumstances before the Court, where its authorized agent, acting within the scope of its authority, expressly represented that T-Mobile was an additional insured. Selective also ignores the policy implications of its proposed interpretation of the 2012 COI, effectively asking the Court to invalidate one of the most basic and commonplace elements of Washington’s insurance industry without offering guidance as to how Washington businesses are expected to demonstrate compliance with contractual insurance requirements going forward.

For the reasons set forth herein and in T-Mobile’s Opening Brief, the Court should reject Selective’s transparent and unfair attempt to escape its own agent’s representations upon which T-Mobile relied to its detriment, and answer the certified question in the affirmative.

II. REPLY ARGUMENT

A. Selective’s Answering Brief Mischaracterizes the Record—and Raises Irrelevant and Misleading Facts—in Key Respects.

In an apparent attempt to distract the Court from the limited and relatively straightforward question posed by the Ninth Circuit, Selective’s Answering Brief misstates the record before the Court and raises a number of irrelevant and misleading facts.

First, Selective makes repeated reference to the fact that T-Mobile Northeast, LLC (“T-Mobile NE”) was substituted as the defendant in the Underlying Action in early 2014 based on the fact that T-Mobile NE was the signatory on the agreement with the underlying plaintiff (not T-Mobile USA) and the fact that T-Mobile USA and T-Mobile NE are different entities. While this issue is irrelevant to the certified question because it relates to a different contract that is wholly unrelated to the 2012 COI, Selective appears to argue that T-Mobile’s claim for coverage should be denied because T-Mobile “never informed [Selective] that T-Mobile NE was the correct party in interest.” Answering Brief at 19, 21-22.

Even if this argument had any relevance to the certified question, it was already rejected by the trial court below. Judge Robart expressly denied Selective’s request to judicially estop T-Mobile from asserting a right to coverage as a result of its efforts to have the correct party in interest substituted in the Underlying Action. *See* ER 42-44 (“The court will not apply judicial estoppel because there is no inconsistency between T-Mobile USA’s positions in the underlying litigation and before this court.”); *see also* ER 376-79, 193-95 (parties’ briefing below on judicial estoppel issue). Moreover, because Selective did not cross-appeal this aspect of Judge Robart’s ruling, it is a verity on appeal. *See State v. Strauss*, 119 Wn.2d 401, 422, 832 P.2d 78 (1992) (Anderson, J., concurring) (issues decided

against respondent and not cross-appealed become law of the case). Most fundamentally, this argument has no bearing on the issue raised by the certified question.

Second, a significant portion of the Answering Brief attempts to relitigate the question of whether Selective's broker at the Van Dyk Group ("VDG") acted with actual or apparent authority at the time it issued the 2012 COI to T-Mobile, asserting more than a dozen times (with no support) that VDG's representation that T-Mobile qualified as an additional insured was made "incorrectly" or "erroneously." *See* Answering Brief at 3, 4, 6, 9, 15, 22, 23, 28, 29, 30, 34, 36, 40, 42, 44, 45. This argument misses the basic premise of the certified question and the Ninth Circuit's own findings, which expressly ask the Court to *assume* that the 2012 COI was issued by Selective's "authorized agent" based on the Ninth Circuit's determination that VDG had at least apparent authority to issue the 2012 COI. *See* Certification Order at 8 n.5 ("There is thus no genuine dispute of material fact over whether VDG acted with at least apparent authority in issuing the COI that clearly lists T-Mobile USA as an additional insured under the policy."). Indeed, Selective's attempt to relitigate this issue contravenes this Court's jurisprudence regarding the permissible scope of argument on certified questions. *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133, 196 P.3d 664 (2004) (in answering certified questions, the

Court “must presume” all factual premises dictated by the certifying court); *see also Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (“Where an issue is not within the certified question[], and is within the province of the federal court, this court will not reach the issue.”). Selective’s attempt to depart from the Ninth Circuit’s well-reasoned determination that VDG was acting with Selective’s authority at the time it issued the 2012 COI—and that the representations contained therein are thus presumptively binding on Selective—is improper.

Third, Selective repeatedly questions the reasonableness of T-Mobile’s reliance on the 2012 COI, raising yet another issue outside the scope of the certified question. Even if this issue were properly before the Court, however, Selective’s argument fails as a matter of law. The Ninth Circuit’s finding that VDG acted “with at least apparent authority” when it issued the 2012 COI is dispositive on the issue because Washington’s standard for apparent authority necessarily requires that the conduct at issue be objectively reliable. *See Fair Price House Moving Co., Inc. v. Pacleb*, 42 Wn. App. 813, 819, 714 P.2d 321 (1986) (“Facts and circumstances are sufficient to establish apparent authority only when a person exercising ordinary prudence, acting in good faith and conversant with business practices and customs, would be misled thereby, and such person has given due regard to such other circumstances as would cause a person of ordinary

prudence to make further inquiry.” (quotation omitted)). Even if the Ninth Circuit’s finding that VDG acted with apparent authority were not dispositive of the question of T-Mobile’s reasonable reliance, the record before the Court demonstrates that T-Mobile’s reliance on the 2012 COI was more than reasonable, where: (a) the 2012 COI contains express representations about T-Mobile’s status as an additional insured that trump the COI’s boilerplate disclaimer language under any plain reading; (b) the 2012 COI was one of many issued to T-Mobile by VDG over the preceding decade without any objection by Selective; (c) T-Mobile’s Insurance & Claims Manager Lisa Bauer testified that T-Mobile tendered its claim to Selective in direct reliance on the 2012 COI—testimony which is unrebutted in the record; and most importantly, (d) Selective’s claims examiner Michael Parlin admitted under oath that it was reasonable for T-Mobile to believe that T-Mobile USA was an additional insured under the 2012 Policy and was the correct entity for purposes of tendering the claim in light of VDG’s express representations that “T-Mobile USA” was an “additional insured” under the Policy. ER 831; ER 641-52, 826-27; ER 121-22; ER 1019-23. At the very minimum, the question of whether T-Mobile’s reliance on the 2012 COI was reasonable presents an undecided question of fact that will be litigated in the District Court following the

Court's answer to the certified question.¹ Selective cannot litigate that factual issue to finality at this level of appeal.

Fourth, Selective attempts to inject an entirely new argument into this case—an argument not raised at the time it denied coverage, not raised before the District Court below, not raised before the Ninth Circuit, and not relevant to the question that the Ninth Circuit certified to this Court. Specifically, Selective intimates that T-Mobile tendered the claim under the wrong policy and that the COI is not relevant to T-Mobile's tender because it was issued "six years after Innovative completed" the work at issue in the Underlying Lawsuit. Answering Brief at 3 (emphasis in original); *see also id.* at 17, 36. Selective does explain how it can properly raise this issue for the first time before this Court or why Washington's doctrine of estoppel would not bar it from doing so.² Even if this argument were properly before the Court, however, it ignores the fact that the Selective Policy is a *claims made* policy and T-Mobile did not receive notice of the claim until early

¹ *See Sys. Tank Lines, Inc. v. Dixon*, 47 Wn.2d 147, 152, 286 P.2d 704 (1955) (reasonableness of party's reliance on other party's representations is a question of fact).

² As noted in T-Mobile's Opening Brief, Washington law estops insurers from raising coverage defenses not set forth in their initial denial. *See* Opening Brief at 33 n.12 and authority cited therein.

2013. ER 532; ER 311-17. T-Mobile thus could not have tendered the claim to Selective prior to 2013.

Fifth, in an effort to minimize the inconsistent coverage positions Selective took by acknowledging that its primary insured, Innovative, was entitled to a defense while at the same time denying T-Mobile's claim for coverage for the same underlying claims, Selective quibbles with the basic fact that it "fully defended" Innovative in the Underlying Action, arguing that it instead defended Innovative under a reservation of rights. Answering Brief at 18. This purported distinction is without a difference. It is undisputed that Selective provided a defense to Innovative and paid the attorney's fees associated with its defense—the exact same policy benefit sought by T-Mobile in this case. *See* ER 1014. Washington law is also clear that the duty to defend is broader than the duty to indemnify and that insurers that accept a defense under a reservation of rights are barred from later attempting to claw back defense costs, even where the insurer later obtains a declaration that coverage does not exist (which Selective did not do here). *See Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 886-88, 297 P.3d 688 (2013). Thus, the fact that Selective agreed to defend Innovative under a reservation of rights in no way limited the scope of the defense Selective was required to (or did in fact) provide to Innovative or the similar defense sought by T-Mobile in its tender. Selective's purported

“clarification” concerning the nature of its coverage position vis-à-vis Innovative is thus irrelevant to the certified question.

B. Selective’s Answering Brief Does Not Rebut T-Mobile’s Showing That the Court Should Answer the Certified Question in the Affirmative.

As set forth in detail in T-Mobile’s opening brief, Washington law is clear that insurers are bound by the representations of their authorized agents. That principle has been the law of this state since at least the 1930s, and has been endorsed by this Court consistently over the past 80-plus years. *Pagni v. N.Y. Life Ins. Co.*, 173 Wash. 322, 349-50, 23 P.2d 6 (1933) (“[A]n insurance company is bound by all acts, contract, or representations of its agent . . .”); *Lamb v. Gen. Assocs., Inc.*, 60 Wn.2d 623, 628, 374 P.2d 677 (1962); *Chicago Title Ins. Co. v. Wash. St. Office of Ins. Comm’r*, 178 Wn.2d 120, 136, 309 P.3d 372 (2013). Thus, the specific issue raised by the certified question is whether the mere fact that those otherwise-binding representations are made within a COI that also contains inapplicable, boilerplate disclaimers somehow negates the agent’s representations entirely. The answer is clearly no for several reasons.

First, Selective’s assertion that a “majority” of courts addressing the actual issue before the Court agree with its position is simply not correct. As noted in T-Mobile’s Opening Brief, almost all of the cases cited by Selective below (and again in its Answering Brief) did *not* involve the type

of additional representations at issue in this case. To the contrary, the case law cited by Selective instead involved inapposite fact patterns similar to those at issue in the Court's *Postlewait* decision, in which the plaintiff contended it was entitled to coverage merely because it *possessed* a COI, not because the insurer's authorized agent made *additional, affirmative* representations about the certificate holder's status under the relevant policy.³ The cases cited by Selective are simply inapposite and are irrelevant to the issue raised by the certified question.

³ Of the roughly 20 cases from other jurisdictions cited by Selective, many involved COIs that were not issued by the insurer's authorized agent but were instead issued by the contracting party's independent broker. *See, e.g., Ala. Elec. Co-op., Inc. v. Bailey's Const. Co., Inc.*, 950 So. 2d 280, 282 (Ala. 2006) (COI was issued by "independent broker" at direction of contracting party, not insurer); *Westfield Ins. Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 736, 948 N.E.2d 115 (Ill. App. Ct. 2011) (COI was not issued by insurer, but "instead appears to have been issued by an unrelated third party"); *Bradley Real Est. Trust ex rel. Lumbermens Mut. Cas. Co. v. Plummer & Rowe Ins. Agency, Inc.*, 136 N.H. 1, 2, 609 A.2d 1233 (1992) (COI was issued by contracting party's insurance broker); *Selective Ins. Co. v. Hospicomm, Inc.*, No. A-0485-12T1, 2014 WL 4722776, at *2 (N.J. App. Sept. 24, 2014) (same); *St. George v. W.J. Barney Corp.*, 270 A.D.2d 171, 171-72, 706 N.Y.S.2d 24 (N.Y. App. 2000) (same). Others were silent on the question of whether the broker at issue was an agent of the insurer and thus are not instructive in this case. *See, e.g., SLA Prop. Mgmt. v. Angelina Cas. Co.*, 856 F.2d 69, 73 (8th Cir. 1988) (no evidence that COI was issued by insurer's agent); *Granite Const. Co., Inc. v. Bituminous Ins. Cos.*, 832 S.W.2d 427, 428 (Tex. App. 1992) (same); *Cont'l Cas. Co. v. Signal Ins. Co.*, 119 Ariz. 234, 236, 580 P.2d 372 (Ariz. Ct. App. 1978) (same); *Hargob Realty Assocs., Inc. v. Fireman's Fund Ins. Co.*, 73 A.D.3d 856, 857-58, 901 N.Y.S.2d 657 (N.Y. App. 2010) (same); *Am. Motorist Ins. Co. v. Superior Acoustics Inc.*, 277 A.D.2d 97, 98, 716 N.Y.S.2d 389 (N.Y. App. 2000) (same); *Buccini v. 1568 Broadway Assocs.*, 250 A.D.2d 466, 467, 673 N.Y.S.2d 398 (N.Y. App. 1998) (same); *Kennelty v. Darlind Const., Inc.*, 260 A.D.2d 443, 445, 688 N.Y.S.2d 584 (N.Y. App. 1999) (same); *McGill v. Polytechnic Univ.*, 235 A.D.2d 400, 402, 651 N.Y.S.2d 992 (N.Y. App. 1997) (same); *Nautilus Ins. Co. v. S. Vanguard Ins. Co.*, 899 F. Supp. 2d 538, 545-47

Second, Selective’s extended discussion of this Court’s decision in *Postlewait* and Division One’s decision in *ABCD Marine* is equally irrelevant for the same reason. Like the other inapposite authority cited by Selective, *Postlewait* rejected the argument that the plaintiff was entitled to coverage solely on the ground that it *possessed* a COI. In rejecting that argument, the Court specifically held that (1) the COI was issued *by the policyholder’s own broker*—not by the insurer or the insurer’s agent—and

(N.D. Tex. 2012) (same); *United Stationers Supply Co. v. Zurich Am. Ins. Co.*, 386 Ill. App. 3d 88, 94, 102, 896 N.E.2d 425 (Ill. App. Ct. 2008) (no evidence that COI was issued by insurer’s agent; court also noted line of Illinois cases in which “courts found that the certificate language should govern the extent and terms of coverage”). Still others involved different types of insurance policies and are wholly irrelevant to the question before the Court. *See, e.g., Shenandoah Life Ins. Co. v. French*, 236 Va. 427, 431, 373 S.E.2d 718 (Va. 1988) (involving life insurance COI that did not contain representations about certificate holder’s status as additional insured); *Poling v. N. Am. Life & Cas. Co.*, 593 P.2d 568, 572 (Wyo. 1979) (same); *Modern Builders, Inc. v. Alden-Conger Pub. Sch. Dist. #242*, No. 04-1056-ADM-JSM, 2005 WL 2089195, at *4 (D. Minn. Aug. 30, 2005) (rejecting argument that COI conferred coverage on ground that builder’s risk policy under which coverage was sought was not included on COI listing liability, auto, and excess policies). Indeed, the only cases Selective was able to locate nationally in which a COI containing express representations by an insurer’s agent were not given legal effect were two cases from 1984 and 1998 that were decided under the law of New York—a jurisdiction that has since expressly rejected Selective’s position. *See Taylor v. Kinsella*, 742 F.2d 709, 710-12 (2d Cir. 1984); *Am. Ref-Fuel Co. of Hempstead v. Res. Recycling, Inc.*, 248 A.D.2d 420, 423, 671 N.Y.S.2d 93 (N.Y. App. 1998); *but see Lenox Realty Inc. v. Excelsior Ins. Co.*, 679 N.Y.S.2d 749, 750-51 (N.Y. App. 1998) (insurer estopped from denying coverage as a result of plaintiff’s reliance on COI issued by broker with authority to bind the insurer despite presence of disclaimer language); *Niagara Mohawk Power Corp. v. Skibeck Pipeline Co., Inc.*, 705 N.Y.S.2d 459, 461, 270 A.D.2d 867 (N.Y. App. 2000) (plaintiff entitled to coverage even though it was not an additional insured in underlying policy where insurer’s broker “acted within the scope of its actual or apparent authority in adding [plaintiff] as an additional insured”).

(2) there was no evidence in the record indicating that the parties intended to confer additional insured status on the plaintiff (as opposed to simply confirming coverage of the primary insured) or make the plaintiff a third-party beneficiary of the policy. *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 100-02, 720 P.2d 805 (1986). The COI at issue in *Postlewait* was *not* issued by the insurer’s authorized agent and did *not* contain any express representations about the certificate holder’s status under the relevant policy—the two key elements upon which T-Mobile’s reliance below was premised and the same elements that led the Ninth Circuit to refer the certified question to this Court. Indeed, the only express representation in the *Postlewait* COI was its statement that “such insurance policies as are indicated hereunder have been issued and are in full force and effect on the effective date of this certificate.” Sheridan Declaration, Ex. A at 5.⁴ The COI in *Postlewait* simply confirmed that a policy covering the primary insured had been issued—it did *not* contain specific representations regarding the certificate holder’s status as an additional insured as the 2012 COI did here.

⁴ As noted in T-Mobile’s Opening Brief, T-Mobile has requested that the Court take judicial notice of the affidavit from *Postlewait* containing the actual COI at issue pursuant to RAP 17.1 and ER 201. While Selective was unwilling to stipulate to the submission of this critical document to the Court as requested by T-Mobile, it did not oppose that motion, and the Deputy Clerk granted T-Mobile’s motion to take judicial notice on January 9, 2019.

The same is true of *ABCD Marine*, which involved a COI that: (a) did not contain express representations that the certificate holder was an additional insured;⁵ and (b) was issued by the contracting party's private insurance broker, not the insurer's authorized agent. See *Int'l Marine Underwriters v. ABCD Marine, LLC*, 165 Wn. App. 223, 233, 267 P.3d 479 (2011) (“[I]t is undisputed that [the broker] Alliance was ABCD and [the contracting party] Boogard's agent, not [the insurer] IMU's agent.”). The COIs in these two cases thus stand in stark contrast to the additional, affirmative representations made by Selective's agent in the 2012 COI. ER

⁵ The Ninth Circuit appears to have mistakenly concluded that the COI at issue in *ABCD Marine* did contain such representations, noting that ABCD's broker “did, however, issue COIs to two companies related to NSI, noting that *they* were additional insureds under ABCD's policy.” Certification Order at 10 (emphasis in original) (citing *ABCD Marine*, 165 Wn. App. at 233, 267 P.3d 479). But the description of the COI at issue in the *ABCD Marine* opinion does not indicate that such representations were present, and instead notes only that the COI included the standard ACORD 25 disclaimer language:

From the faulty premise that Cronn was employed by Northland Holdings and/or Naknek, **ABCD and Boogaard then argue Northland Holdings and/or Naknek were additional insureds based upon two certificates issued by Alliance for the 2001-02 and 2002-03 policies.** As IMU points out, however, the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy. **Indeed, each certificate indicates that it “is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.”**

ABCD Marine, 165 Wn. App. at 233, 267 P.3d 479 (emphasis added, quotation and citation to *Postlewait* omitted).

831. There is simply no conflict between this Court’s holdings in *Pagni* and *Postlewait* as a result.

Selective’s only other argument based on *Postlewait* is that the disclaimers in the 2012 COI are “more prominently featured” than those in *Postlewait* because they appear at the top of the COI and are “set forth in capital and bold font.” Answering Brief at 27. Selective does not explain why those facts are significant enough to justify voiding the additional representations contained within the 2012 COI. Even if it had, however, Selective fails to reconcile the fact that Washington law requires the Court to give life to *all* of the language in the 2012 COI, harmonizing and interpreting the general, boilerplate disclaimers in a manner that also recognizes and gives life to the specific representation that T-Mobile USA was an additional insured. *See, e.g., Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009) (“Courts should not adopt a contract interpretation that renders a term ineffective or meaningless.”); *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 541-42, 94 P.3d 358 (2004) (rejecting proposed interpretation of two clauses of insurance policy where the interpretation “would render the former clause surplusage and violate the rules of contract construction”); *see also Ohio Sec. Ins. Co. v. Axis Ins. Co.*, 190 Wn.2d 348, 353, 413 P.3d 1028 (2018) (under rule of *generalia specialibus non derogant*, “the specific governs the

general”). It is not difficult to do so for the reason already explained in T-Mobile’s opening brief: while general disclaimers may operate to limit the conferral of rights by a party’s mere *possession* of a COI, Selective’s agent’s additional affirmative representation that “T-Mobile USA” was “an additional insured” remains binding on Selective. In short, nothing in *Postlewait* compels a different result or conflicts with this Court’s long-standing rule that representations like those at issue here remain binding on insurers.

Third, as discussed at length in T-Mobile’s Opening Brief, the fact that Selective’s authorized agent’s specific representation that T-Mobile USA was an additional insured is binding here is driven home by the reasoning employed by the majority of courts in other jurisdictions that have addressed the precise issue raised by the certified question—how to reconcile general disclaimers in COIs with specific, affirmative representations regarding the certificate holder’s status as an additional insured. Again, those courts hold that insurers are bound by such representations and cannot escape their coverage liabilities simply by pointing to general disclaimer language. *See, e.g., West Am. Ins. Co. v. J.R. Const. Co.*, 777 N.E.2d 610, 615, 334 Ill.App.3d 75 (Ill. App. 2002) (insurer bound by representation of insurer’s agent in COI that claimant was an additional insured despite identical disclaimer language); *Mtn. Fuel Supply*

v. Reliance Ins. Co., 933 F.2d 882, 889 (10th Cir. 1991) (insurer bound by representation in COI that plaintiff was an additional insured despite disclaimer stating that it “does not amend, extend or otherwise alter the terms and conditions of the insurance coverage in the policies above”); *Blackburn, Nickels & Smith, Inc. v. Nat’l Farmers Union Prop. & Cas. Co.*, 482 N.W.2d 600, 603 (N.D. 1992) (insurer bound by COI stating plaintiff was additional insured despite disclaimer language, noting that a COI “is an insurance company’s written statement to its customer that he has insurance coverage, and the insurance company is estopped from denying coverage that the Certificate of Insurance states is in effect”); *Lenox Realty*, 679 N.Y.S.2d at 750-51 (insurer estopped from denying coverage as a result of plaintiff’s reliance on COI issued by broker with authority to bind the insurer despite presence of disclaimer language); *Marlin v. Wetzel Cty. Bd. of Educ.*, 569 S.E. 2d 462, 472 (W. Va. 2002) (same); *10 Ellicott Sq. Court Corp. v. Mtn. Valley Indem. Co.*, No. 07-cv-053S, 2010 WL 681284, *9-11 (W.D.N.Y. Feb. 19, 2010) (plaintiff entitled to coverage based on insurer’s authorized agent’s issuance of COI despite disclaimer language and despite lack of qualifying construction contract under additional insured endorsement). Specifically, those courts have found that insurers are estopped from claiming that disclaimer language vitiates more specific, affirmative representations. *See, e.g., Sumitomo Marine & Fire Ins. Co. of*

Am. v. S. Guar. Inc. Co. of Ga., 337 F.Supp.2d 1339, 1355-56 (N.D. Ga. 2004) (estopping insurer from disputing representation by authorized agent that certificate holder was additional insured, while noting that identical disclaimer language to 2012 COI made certificate holder “an additional insured under defendants’ policies *with coverage to the extent of the policies as they existed at that time*” (emphasis added)); *Bucon, Inc. v. Penn. Mfg. Ass’n Ins. Co.*, 151 A.D.2d 207, 210-11, 547 N.Y.S.2d 925 (N.Y. App. Div. 1989) (identical disclaimer language “could only have been reasonably interpreted by plaintiff as referring to terms and conditions of the coverage actually provided both Marker and plaintiff under the policy and any exclusions from such actual coverage, not a warning that an examination of the policy would negate the existence of *any* coverage for plaintiff, the very fact certified to by PMA” (emphasis in original)). Washington law compels the same conclusion here in light of this Court’s pronouncements that an insurer’s agent’s representations bind the insurer and this state’s long-standing rule of construction requiring courts to adopt a reading of insurance documents that gives meaning to all language they contain. *Cambridge Townhomes*, 166 Wn.2d at 487, 209 P.3d 863; *Huston*, 123 Wn. App. at 541-42, 94 P.3d 358.

Selective’s Answering Brief does not substantively address these cases or provide an alternative reading of the 2012 COI that reconciles the

specific representation that T-Mobile is an additional insured with the general disclaimer language without reading it out of the COI entirely. There is none.

Fourth, Selective's only substantive response to the arguments set forth in T-Mobile's Opening Brief is the claim that T-Mobile is attempting to create coverage where it does not exist, citing *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335-36, 779 P.2d 249 (1989), for the "general rule" that "under no conditions can [] coverage or restrictions on the coverage [afforded by the relevant policy] be extended by the doctrine of waiver or estoppel." Answering Brief at 30-31. This argument fundamentally misapprehends the certified question and the position set out in T-Mobile's Opening Brief.

Specifically, T-Mobile is not seeking to expand or "extend" the substantive coverage available under the Policy. Indeed, the Court need not even reach the larger question of coverage under the Policy, an issue that will be litigated below. The certified question only requires the Court to resolve the limited question of whether Selective should be estopped from contesting an otherwise binding representation made by its agent because of the disclaimers at issue. The Court can resolve that question by: (1) reconciling and harmonizing all of the language present in the 2012 COI as discussed above and determining that the specific representation of

coverage is not impacted by the boilerplate disclosures at issue; or (2) applying the same tool this Court has traditionally employed in similar circumstances—the doctrine of estoppel—to hold that insurers like Selective may not assert hypertechnical deficiencies in a policyholder’s tender in order to avoid coverage where those alleged deficiencies are a direct result of the insurer’s own representations. In other words, the Court need only determine that VDG’s affirmative representations in the 2012 COI are binding for purposes of estopping Selective from raising a technicality with regard to T-Mobile’s tender—the fact that it referenced “T-Mobile USA” instead of “T-Mobile NE.”

Estoppel exists to prevent the precise type of inequity underlying Selective’s position here. *See Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 10, 206 P.3d 1255 (2009) (estoppel remedy exists to “create a strong incentive for the insurer to act in good faith, and protects the insured against the insurer’s bad faith conduct” (quotation omitted)). Again, there is no dispute that: (1) VDG was Selective’s agent at the time it issued the 2012 COI; (2) VDG issued the 2012 COI in accord with a long-standing pattern and practice of identifying “T-Mobile USA Inc., its Subsidiaries and Affiliates” as “additional insured[s]” instead of naming each specific T-Mobile subsidiary (like T-Mobile NE); (3) Selective was aware of that practice and never objected

to it prior to this dispute; (4) T-Mobile tendered the claim to Selective on behalf of “T-Mobile USA” as a direct result of and in reliance upon the representation at issue in the 2012 COI; (5) Selective’s own claims handler has admitted that T-Mobile’s reliance on the statements in the 2012 COI was objectively reasonable and that the alleged deficiency in T-Mobile’s tender played no role in his initial denial of T-Mobile’s claim; (6) Selective’s claims handler also admitted that he had an affirmative obligation to notify T-Mobile of any alleged issues with the tender had they actually played a role in his decision to deny coverage; and (7) had he actually raised that issue with T-Mobile, T-Mobile could and would have easily corrected any alleged deficiencies with its tender by simply retendering the claim on behalf of T-Mobile NE directly.

Fifth, and finally, Selective does not even attempt to address the significant public policy concerns that would result if the Court were to actually endorse the premise that representations made in COIs are essentially meaningless under Washington law. As recognized by the Ninth Circuit and discussed in detail in T-Mobile’s Opening Brief, the Court’s ruling on the certified question is of critical public importance because it “potentially affects an untold number of Washington citizens and businesses” that rely on COIs as the only workable means of providing proof of insurance or their status as additional insureds. Companies

operating in the construction, retail, real estate, and many other industries throughout Washington rely on COIs and the very type of affirmative representation at issue here to provide proof of insurance because it would be unworkable for businesses to negotiate individual policy endorsements and obtain complete copies of insurance policies directly from their insurance carrier each and every time they entered into a contract containing an additional insurance requirement. Selective's position essentially asks this Court to issue a ruling permitting insurers to "hide behind a shield of ignorance" by avoiding the representations their authorized brokers make in COIs—a ruling that would frustrate the predictability and reliability that is critical to the insurance industry and would potentially jeopardize the coverage rights of untold citizens of this state. *See, e.g.*, Malecki, Donald S., *The Additional Insured Book* 341 (4th. Ed. 2000) (noting insurers' practice of creating "fictional insured syndrome" through use of authorized brokers to issue COIs and noting that "[t]his, of course, is really a matter of principal-agency liability and should not detrimentally affect the certificate holder"); Pearsall, Curtis M., *Certificates of Insurance and Agency Liability: What Agents Should Know*, WWW.INSURANCEJOURNAL.COM (Feb. 22, 2009) (available at <https://www.insurancejournal.com/magazines/mag-features/2009/02/22/157712.htm>) (noting insurers' "common practice" of prohibiting authorized brokers from sending copies of COIs so that "the

carrier can hide behind a ‘shield of ignorance’ if a problem arises by stating it knew nothing about the certificate”); *see also generally* RCW 48.01.030 (“The business of insurance is one affected by the public interest.”). In short, the Court should protect the rights of Washington policyholders and insureds by reaffirming the bedrock principle that insurers are bound by the express representations of their authorized agents and may not avoid the legal impact of those representations by relying on the type of boilerplate disclaimer language at issue in this case.

III. CONCLUSION

For the reasons set forth above and in T-Mobile’s Opening Brief, T-Mobile respectfully requests that the Court answer the certified question in the affirmative and hold that Selective is bound by its authorized agent’s affirmative representation in the 2012 COI that T-Mobile is an additional insured.

DATED this 11th day of January, 2019.

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January 11, 2019 - 1:21 PM

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Filed with Court: Supreme Court
Appellate Court Case Number: 96500-5
Appellate Court Case Title: T-Mobile USA, Inc. v. Selective Insurance Company of America

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