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No. 96500-5

**SUPREME COURT
OF THE STATE OF WASHINGTON**

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

T-MOBILE USA, INC.,

Plaintiff-Appellant,

v.

SELECTIVE INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

**AMICUS CURIAE BRIEF OF ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON**

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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY AND INTEREST OF <i>AMICUS</i>	1
II. ARGUMENT	2
A. The Construction Industry Has Long Relied on Certificates of Insurance as Proof of Coverage and Evidence of Compliance with Contractual Insurance Requirement	2
B. Public Policy—to Say Nothing of Equity—Strongly Supports Binding an Insurer to Representations Made by its Authorized Agent, Regardless of the Medium in Which Those Representations Are Made	5
C. The Court Should Answer “Yes” to the Certified Question under Basic Agency and Contract Law	9
III. CONCLUSION.....	13

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.</i> , 170 Wn.2d 442 (2010)	9
<i>Blake Sand & Gravel, Inc. v. Saxon</i> , 98 Wn. App. 218 (1999)	12
<i>Chicago Title Ins. Co. v. Wash. State Office of Ins. Com’r</i> , 178 Wn.2d 120 (2013)	6
<i>Debentures, Inc. v. Zech</i> , 192 Wn. 339 (1937)	12
<i>Diamaco, Inc. v. Aetna Cas. & Sur. Co.</i> , 97 Wn. App. 335 (1999)	12
<i>Fittro v. Lincoln Nat. Life Ins. Co.</i> , 111 Wn.2d 46 (1988)	3, 4, 6
<i>Keodalah v. Allstate Ins. Co.</i> , 3 Wn. App. 2d 31 (2018)	6
<i>Merriman v. Am. Guarantee & Liab. Ins. Co.</i> , 198 Wn. App. 594 (2017)	9
<i>Postlewait Const., Inc. v. Great Am. Ins. Companies</i> , 106 Wn.2d 96 (1986)	12
<i>Reverse Now VII, LLC v. Oregon Mut. Ins. Co.</i> , 341 F. Supp. 3d 1233 (W.D. Wash. 2018).....	7
<i>Stuart v. Am. States Ins. Co.</i> , 134 Wn.2d 814 (1998)	5
<i>Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co. of Georgia</i> , 337 F. Supp. 2d 1339 (N.D. Ga. 2004)	passim

TABLE OF AUTHORITIES

	<u>Page</u>
<i>T-Mobile USA Inc. v. Selective Ins. Co. of Am.</i> , 908 F.3d 581 (9th Cir. 2018)	7
Statutes	
RCW 48.01.030	5
RCW 48.17.060	5
RCW 48.17.160	5
RCW 48.17.170	5
RCW 48.17.270	6
RCW 48.17.470	6
RCW 48.18.090	6
RCW 48.30.010	6
Other Authorities	
Restatement (Third) of Agency § 5.03 (2006).....	8

I. IDENTITY AND INTEREST OF *AMICUS*

The Associated General Contractors of Washington (“AGC”) is the oldest and largest professional trade association of commercial, industrial, and public works contractors in Washington. Since 1922, the AGC has represented the interests of member contractors and worked to create a better climate for construction in this State.

The AGC’s membership in Washington encompasses more than 600 general contractors, subcontractors, construction industry suppliers, and service providers. AGC members employ many of the State’s 186,000 construction industry workers. The construction community is the single greatest contributor of sales tax receipts to the State general fund and is the third largest contributor of B&O taxes. As Washington’s principal professional trade association, the AGC is uniquely situated to describe to this Court some of the broader implications raised by the Certified Question at issue in this case.

The AGC relies on the statements of fact presented by the parties. This *amicus curiae* brief focuses on an issue of critical importance to the construction industry in Washington: whether industry members will be able to continue their decades-long practice of relying on Certificates of Insurance as proof of insurance coverage and evidence of compliance with contractual insurance requirements.

II. ARGUMENT

A. **The Construction Industry Has Long Relied on Certificates of Insurance as Proof of Coverage and Evidence of Compliance with Contractual Insurance Requirement**

Certificates of Insurance are critically important documents in the construction industry. They are widely and routinely accepted as evidence of both insurance coverage and compliance with contractual insurance requirements. *See, e.g., Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co. of Georgia*, 337 F. Supp. 2d 1339, 1347 (N.D. Ga. 2004) (citing expert testimony that “it is the practice in the construction industry to rely on certificates of insurance to confirm one’s status as an additional insured.”). Certificates are provided to customers, subcontractors, and suppliers to demonstrate that the parties named in the Certificates have obtained insurance and, therefore, have appropriately and responsibly managed the risks inherent in construction activities.

If AGC members were no longer able to rely on Certificates, and instead had to request, obtain, and review complete insurance policies, the time and cost to enter into and comply with construction contracts would drastically increase. Each AGC member would be required to ask for and wait to obtain certified copies of insurance policies from whomever they were attempting to contract with. They would then need to have those policies reviewed by insurance professionals to ensure the coverage

mirrors that described in the Certificate and required by the construction contract. This would be extraordinarily cumbersome, inefficient, and expensive.

Our Supreme Court has previously refused to impose such practical hurdles on insureds. In *Fittro v. Lincoln Nat. Life Ins. Co.*, 111 Wn.2d 46 (1988), a group life insurance case, the Court was asked to decide whether an insurer is bound by representations in a Certificate where those representations conflict with terms of the actual insurance policy. The Certificate in *Fittro* included a disclaimer “stating that the certificate was not an insurance policy and did not alter or amend the provisions of the policy.” *Fittro*, 111 Wn.2d at 52. The Certificate also contained a statement about the duration of the coverage which conflicted with the actual policy language.

The insurer, relying on the Certificate’s disclaimer, argued that the policy language took precedence over the conflicting language in the Certificate. This Court rejected that argument, noting that “[a] clear majority of those courts that have considered similar disclaimer provisions in other certificates have *not* given effect to the disclaimer.” *Fittro*, 111 Wn.2d at 52 (emphasis in original). The Court also noted that if it enforced the disclaimer, the representations in the certificate would “set a trap for the insured.” *Fittro*, 111 Wn.2d at 53 (quoting *Riske v. National*

Cas. Co., 67 N.W.2d 385, 389 (Wis. 1954)). Finally, the Court pointed out that “[g]iving effect to disclaimer language in a certificate would require the insured to demand a copy of the policy in order to compare it against the certificate,” which is “too great a burden.” *Fittro*, 111 Wn.2d at 53.

Fittro should guide this Court’s consideration of the Certified Question. The practicalities facing individual insureds under group life policies are akin to those facing additional insureds under liability policies. In both cases, the Certificate is “the only document the insured is likely to see before incurring expenses for covered injuries.” *Id.* Likewise, in both cases, “[a] disclaimer is standard boiler-plate language in certificates,” and giving effect to the disclaimer would unduly burden additional insureds by making it necessary for them “to demand a copy of the policy.” *Id.* at 52-53.

In sum, requiring an individual insured to request, receive, and review the actual insurance policy to ensure it reflects the coverage described in the Certificate is just as impractical in the construction context as it is in the group life context. Thus, under *Fittro*, and in situations where Certificates are both commonly relied upon and typically the only evidence of coverage available, an insurer should be bound by the contents of the Certificate notwithstanding boilerplate disclaimers.

B. Public Policy—to Say Nothing of Equity—Strongly Supports Binding an Insurer to Representations Made by its Authorized Agent, Regardless of the Medium in Which Those Representations Are Made

The central purpose of insurance is protection against risk: in exchange for the payment of a premium, insurance companies contractually agree to assume financial risks on behalf of policyholders. *Cf. Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 818 (1998) (discussing the “fundamental protective purpose of insurance.”). Unlike other contractual relationships, our Legislature has elected to heavily regulate the business of insurance. It has done so for explicit, codified public policy reasons:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

RCW 48.01.030.

Among the regulated aspects of insurance are the relationships between (i) insurers and their agents, and (ii) agents and the policyholders to whom they market and sell insurance policies. Agents must go through a formal appointment process. RCW 48.17.160. They must pass an examination and be issued a license to sell insurance. RCW 48.17.060 and 48.17.170. They are required to disclose the form, nature, and amount

of their compensation for placing a policy, and must keep detailed records of all contracts consummated under their license. RCW 48.17.270 and 48.17.470. And they are prohibited from engaging in unfair methods of competition or unfair or deceptive acts or practices. *See* RCW 48.30.010. These laws are all aimed at furthering the public policy of promoting transparency and fairness in insurance transactions.

Our judicial branch has adhered to the foregoing legislative pronouncements. *See Chicago Title Ins. Co. v. Wash. State Office of Ins. Com'r*, 178 Wn.2d 120, 125 (2013) (“Washington State strictly regulates how insurance may be provided and marketed in order to protect the consumer.”). Washington courts have consistently issued opinions that protect the integrity of insurance by holding parties responsible for their own representations or those made by their agents. This protection runs both ways. Insurers are bound by the acts and omissions of their representatives. *See, e.g., Fittro*, 111 Wn. 2d at 53 (binding insurer to statements made in a Certificate “as matter of public policy”); *cf. Keodalah v. Allstate Ins. Co.*, 3 Wn. App. 2d 31, 37 (2018) (individual adjusters and third-party adjusting firms can be liable for bad faith). Similarly, policyholders can lose coverage if they—or those acting on their behalf—misrepresent facts during the application or claims process. *See, e.g., RCW 48.18.090* (“... no oral or written misrepresentation or

warranty made in the negotiation of an insurance contract, by the insured *or in his or her behalf*, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive.”) (emphasis added); *see also Reverse Now VII, LLC v. Oregon Mut. Ins. Co.*, 341 F. Supp. 3d 1233, 1240 (W.D. Wash. 2018) (imputing actions of public adjuster onto insured: “As a matter of public policy, an insured cannot be permitted to adopt a public adjuster’s acts when they benefit him, and disclaim them where they do not.”).

With these principles in mind, this Court should answer the Certified Question in the affirmative. There is no dispute that Selective’s agent was acting within the scope of his agency when he represented that “T-Mobile USA” was an Additional Insured under Selective’s policy. *See T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 908 F.3d 581, 586 n.5 (9th Cir. 2018) (“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.”) (emphasis in original). Even if this representation was a mistake, and even if Selective was unaware of it, Selective is responsible for its consequences. Much like a policyholder can be bound by the actions of its broker or public adjuster, Washington insurance jurisprudence—and the public

policy in which it is rooted—binds an insurer to its agent’s representations. This, of course, is the equitable result: Selective chose to formally appoint the agent as its representative, so it should not be allowed to disclaim his misrepresentations to avoid paying a claim. *See* Restatement (Third) of Agency § 5.03 (2006) (“By charging a principal with notice of material facts that an agent knows or has reason to know, imputation reduces incentives to deal through agents as a way to avoid the legal consequences of facts that a principal might prefer not to know.”).

The foregoing result should not change based on the means or medium of the agent’s representation. Consider, for example, a representation made by an insurance agent in a letter. Such letters frequently contain broad language stating things like “the terms of the policy control” and the insurer “reserves rights to amend or change its position if new facts are discovered.” No case holds that such rote language is sufficient to permit an insurer to disclaim the contents or impact of its agent’s written statements.

Why should the result be any different when the representation is made in a Certificate of Insurance rather than a letter? The answer, of course, is that it should not. It is neither equitable nor sensible to hold that it is permissible for an insurer to escape liability where its agent tells the policyholder something akin to: “You definitely have coverage under the

policy I'm selling you, but I am also quietly disclaiming that anything I am telling you is correct." *Cf. Merriman v. Am. Guarantee & Liab. Ins. Co.*, 198 Wn. App. 594, 625-26 (2017) ("[I]mposing a duty on the claims administrator safeguards against what might otherwise be an incentive for an unscrupulous insurer to engage an unscrupulous claims administrator who, by withholding information and cooperation, will prevent persons from ever discovering that insurance covers their loss."); *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 449-50 (2010) ("The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff's interests are entitled to legal protection against the defendant's conduct.").

C. The Court Should Answer "Yes" to the Certified Question under Basic Agency and Contract Law

A Certificate of Insurance should also bind an insurance company as a matter of basic agency and contract law. *Sumitomo*, 337 F. Supp. 2d 1339, is instructive. In that case, a developer ("SMG") hired a general contractor, which agreed to make SMG an additional insured under its liability policies. An agent issued Certificates that identified SMG as an additional insured under several of the contractor's policies, but two of the insurers never issued endorsements naming SMG as an additional insured.

The Certificates contained the same disclaimer language at issue here.¹ When the insurers refused to defend or indemnify SMG from a lawsuit arising out of the general contractor's work, SMG's assignee sued for a declaration that SMG was an additional insured under the insurers' policies.

The *Sumitomo* court explained that because the person who issued the certificates was an "agent" of the insurers, the insurers were "bound by the terms of those [c]ertificates" as a matter of agency law. *See Sumitomo*, 337 F. Supp. 2d at 1353–54 ("[T]he knowledge of an agent is imputed to the principal. [...] Thus, defendants had both constructive and actual knowledge of the Certificates of Insurance, and are bound by the terms of those Certificates of Insurance."). The court also pointed out that if the insurers disapproved of their agent's representation that SMG was an additional insured, that was a separate issue between the insurers and the agent. *See Sumitomo*, 337 F. Supp. 2d at 1356 ("Any dispute as to whether Hayes exceeded his authority should have been resolved between Hayes and defendants, not between defendants and SMG").

¹ *See id.* at 1343-44 ("This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter coverage afforded by the policies below.").

Finally, the *Sumitomo* court explained that whether the insurance policies had been modified to make SMG an additional insured turned on the contracting parties' mutual intent. Thus, notwithstanding the disclaimer language in the Certificates, the agent's assertion that SMG was an additional insured evinced the agent's intent to modify the policies to that effect. And, because this intent was imputed to the agent's principals, the policies incorporated the Certificate representations as a matter of contract law:

Defendants then point out that the Certificates of Insurance also expressly included a disclaimer that they are for information purposes only and do not amend the respective policies of insurance. The parties have not submitted any binding authority squarely on point.

In *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir.1981), the Tenth Circuit Court of Appeals held that ***where there is an affirmative manifestation of intent to incorporate the certificate of insurance (adding an insured) into an insurer's policy, the third party becomes a named insured by virtue of the certificate even though the certificate contains a disclaimer.*** That court found that there was a manifestation of intent that the certificate be incorporated within the policy because, in part, the agent who countersigned the certificate was the agent of the insurance company. . . .

[D]efendants' authorized agent, by issuing the Certificate of Insurance and naming SMG as an additional insured, manifested the intent to incorporate the Certificates of Insurance into defendants' policies. Thus, SMG was made an additional insured under defendants' policies with coverage to the extent of the policies as they existed at that time.

Sumitomo, 337 F. Supp. 2d at 1355-56 (emphasis added).

The same agency and contract laws that compelled the result in *Sumitomo* apply in Washington. See, e.g., *Blake Sand & Gravel, Inc. v. Saxon*, 98 Wn. App. 218, 223 (1999) (“When an agent has actual authority to act on behalf of the principal, the agent’s exercise of the authority binds the principal.”); *Debentures, Inc. v. Zech*, 192 Wn. 339, 347 (1937) (“It is entirely competent for parties to a contract by mutual assent to modify a contract . . .”). Washington agency law is particularly significant because it was not argued or considered in *Postlewait Const., Inc. v. Great Am. Ins. Companies*, 106 Wn.2d 96, 99 (1986). Rather, the *Postlewait* Court only considered whether the party seeking coverage was a third-party beneficiary of the insurance contract. See *id.* at 99 (“[T]he lessor is not an intended third party beneficiary of the policy”).¹

In sum, as a matter of basic agency and contract law, when an agent writes in a Certificate that someone is an additional insured under a

¹ Moreover, to the extent that the Certificate’s statement about additional insured status conflicts with the disclaimer—“I, the agent, represent to you on behalf of my principal that you are in fact an additional insured under the principal’s policy” versus “I disclaim what I just wrote to you about your additional insured status”—that simply creates an ambiguity that should be construed against the insurer. See, e.g., *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 338 (1999) (“Ambiguities in the insurance policy are strictly construed against the insurer.”).

policy issued by that agent's principal, the agent's representation binds the principal. The Court should answer "yes" to the Certified Question.

III. CONCLUSION

The Court should hold that insurers are bound by representations made by their authorized agents in Certificates of Insurance. Such a ruling will allow AGC's members to continue to rely on Certificates in the contracting process and foster Washington's public policy of promoting transparency and equity in insurance transactions.

Respectfully submitted this 1st day of April, 2019.

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