

FILED
SUPREME COURT
STATE OF WASHINGTON
12/13/2018 4:54 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.

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

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I. ISSUE CERTIFIED TO THE SUPREME COURT

Under Washington law, is an insurer bound by representations made by its authorized agent in a certificate of insurance with respect to a party's status as an additional insured under a policy issued by the insurer, when the certificate includes language disclaiming its authority and ability to expand coverage?

II. STATEMENT OF THE CASE

This case is before the Court on a certified question from the Ninth Circuit Court of Appeals. The underlying appeal originated from the United States District Court for the Western District of Washington's erroneous decision that Defendant-Appellee Selective Insurance Company of America ("Selective") was not bound by its authorized agent's representation in a certificate of insurance ("COI") issued to the T-Mobile corporate parent entity, T-Mobile USA, Inc. ("T-Mobile" or "T-Mobile USA"). Specifically, Selective's agent represented to T-Mobile that "T-Mobile USA" was the correct T-Mobile "additional insured" covered under the Selective policy at issue (the "Policy"). Despite that clear representation that T-Mobile USA was an additional insured and T-Mobile's undisputed reliance upon that representation when tendering its claim, Selective asserted below that it was free to deny T-Mobile's claim because the tender did not reference a different, wholly owned subsidiary of T-Mobile USA, T-Mobile Northeast, LLC ("T-Mobile NE").

The record before the Court is undisputed on each of the key factual issues underlying the certified question. The Ninth Circuit has already determined that Selective's agent was acting within the scope of its

authority when it made the representation at issue to T-Mobile. It is also undisputed that T-Mobile tendered its claim for coverage on behalf of T-Mobile USA because of that representation. Indeed, Selective's own claims examiner admitted under oath that T-Mobile's submission of its tender on behalf of T-Mobile USA was reasonable given the agent's prior representation that T-Mobile USA was the correct additional insured.

While this Court has not specifically addressed whether insurers like Selective are bound by the representations of their agents made within COIs, it has already recognized that insurers are bound by the representations of their agents in virtually every other context. Moreover, courts in many other jurisdictions have specifically held that insurers are bound by the representations of their agents in COIs, regardless of whether those certificates contain the type of boilerplate disclaimers at issue in this case. The strong public policy of protecting Washington insureds repeatedly recognized by this Court dictates the same result here.

For all of these reasons, the Court should answer the certified question in the affirmative and hold that Selective is bound by its agent's express representation that "T-Mobile USA" was "an additional insured" under the Policy.

A. T-Mobile's Longstanding Contract with Innovative Engineering, Inc.

T-Mobile USA provides cellular services to customers across the United States. T-Mobile USA and its regional subsidiaries throughout the United States regularly hire contractors to install telecommunications

equipment on rooftops, towers, and other appropriate fixtures in order to ensure adequate cellular coverage for T-Mobile USA's customers. Beginning in the year 2000, T-Mobile¹ and its predecessors employed a contractor named Innovative Engineering, Inc. ("Innovative") to provide antenna installation services in the New York area. T-Mobile did so pursuant to a series of "Field Services Agreements" ("FSAs") between Innovative and T-Mobile NE, T-Mobile USA's wholly owned regional subsidiary.

The FSAs imposed various defense and indemnity obligations on Innovative by way of what is commonly referred to within the insurance industry as a "Defense and Indemnification Agreement" or "D&I Agreement," *i.e.*, an agreement by Innovative to: (1) defend and indemnify T-Mobile NE and its subsidiaries and affiliates from all exposure arising from Innovative's services; (2) secure insurance coverage sufficient to cover any such exposure; (3) ensure that T-Mobile NE and its subsidiaries and affiliates were named as additional insureds under such policies so that Innovative's insurers had a direct obligation to defend any such claims asserted against T-Mobile; and (4) provide COIs issued by its insurer to T-Mobile to confirm that the required coverage was in place. ER 504-05, 511-12. For example, Paragraphs 7.1 and 7.2 of the FSA from 2010 ("2010 FSA") in effect during the work at issue in the Underlying Action expressly obligated Innovative to secure general liability insurance covering its

¹ Where T-Mobile USA intends to refer to both entities, or to T-Mobile's business generally, T-Mobile USA refers simply to "T-Mobile."

operations that included a “waiver of subrogation in favor” of T-Mobile and “its affiliates and subsidiaries” and “Certificates of Insurance” naming T-Mobile “as an additional insured” under that insurance. ER 504-05.

B. Selective Issued the Insurance Policy at Issue in This Litigation to Innovative.

Selective issued the Policy at issue in this case to Innovative under policy number S1643491, with an effective policy period from January 16, 2012 to January 16, 2013. *See* ER 518-639. The Policy is relevant to this appeal in two key respects:

First, as required by the 2010 FSA, the Policy contains an endorsement titled the “Additional Insured—Owners, Lessees or Contractors—Completed Operations—Automatic Status when Required in Construction Agreement with You” (the “AI Endorsement”). The AI Endorsement automatically extends additional insured status to any entities with whom Innovative enters into a written D&I Agreement, a fact not disputed by Selective in this case:²

SECTION II — WHO IS AN INSURED is amended to include as an additional insured any person or organization whom you have agreed in a written contract or written agreement to add as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for “bodily injury” or “property damage” caused, in whole or in part, by “your work” performed for that additional insured and included in the “products-completed operations hazard”.

ER 576.

² *See* ER 1000, 1006.

Second, the Policy contains language that excludes coverage for losses arising out of an insured's provision of "professional architectural, engineering or surveying services" (the "Professional Services Exclusion"). Critically, verbatim language to this effect was present in several places in both the body of the policy (and thus applicable to the primary insured under the Policy, Innovative) and in the AI Endorsement (and thus applicable to additional insureds), meaning that the scope of the coverage limitation provided by the Professional Services Exclusion was identical for both primary insureds like Innovative and additional insureds like T-Mobile USA. *Compare* ER 567 ("Exclusion—Engineers, Architects or Surveyors Professional Liability," excluding coverage for claims "arising out of the rendering of or the failure to render any professional services by you or any engineer, architect or surveyor . . ."); *with* ER 584 (exclusion for "Professional Services," excluding coverage for claims "due to rendering or failure to render any professional service"); *and* ER 598 ("Engineers, Architects or Surveyors Professional Liability Exclusion," excluding coverage for claims "arising out of the rendering of or the failure to render any professional services . . . including . . . [s]upervisory, inspection or engineering services") *with* AI Endorsement, ER 576 (excluding coverage for claims "arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services, including . . . "[s]upervisory, inspection, architectural or engineering activities").

In short, if a primary insured like Innovative was entitled to coverage or a defense under the Policy, an additional insured like T-Mobile

was as well. Selective's failure to appreciate this point is directly relevant to Selective's wrongful denial of coverage detailed *infra*.

C. Selective's Authorized Agent Issuance of a COI Representing That T-Mobile USA Was an Additional Insured.

Selective issued the COI at issue in this case to T-Mobile USA in 2012 (the "2012 COI") through its authorized agent at the Van Dyk Group, Inc. ("VDG"). *See* ER 831. Critically for purposes of this appeal, the 2012 COI contained an affirmative representation that "T-Mobile USA" was the correct additional insured under the Policy—the representation that subsequently led T-Mobile to tender the claim at issue on behalf of T-Mobile USA instead of T-Mobile NE. Specifically, the 2012 COI identified the "Certificate Holder" as "T-Mobile USA Inc., [and] its Subsidiaries and Affiliates." *Id.* The 2012 COI went one step further and expressly represented that the "Certificate holder"—again, "T-Mobile USA"—was "*included as an additional insured*" under the Policy. *Id.* (emphasis added).

VDG was Selective's authorized agent at the time it issued the 2012 COI, an undisputed fact memorialized by the testimony of Selective's own claims examiner, the declaration of VDG's principal Daniel Wyrsh, and the 2007 "Agency Agreement" in which Selective expressly designated VDG as Selective's agent and delegated VDG "authority" to issue "certificates" of insurance on its behalf. ER 825-26; ER 1062-63. Indeed, VDG issued similar COIs to T-Mobile USA reflecting its additional insured status under Innovative's Selective policies in 2011, 2010, 2009, 2007, and 2006, COIs that Selective never objected to. *See* ER 641-52; ER 826-27.

As a result, the Ninth Circuit ruled that VDG had apparent authority to issue the 2012 COI on Selective's behalf and that the representation contained therein indicating that "T-Mobile USA" was an "additional insured" under the Policy was binding on Selective. 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.").

The primary Selective employee with responsibility for handling T-Mobile's claim, Michael Parlin, also admitted that: (1) Selective was fully aware of VDG's practice of issuing COIs to potential additional insureds like T-Mobile; (2) he was in direct contact with VDG during his evaluation and investigation of T-Mobile's claim; (3) the underwriting file he reviewed during his investigation of T-Mobile USA's claim contained various COIs issued by VDG; (4) VDG had the authority to issue the COIs—including the 2012 COI at issue in this case—on Selective's behalf; and (5) in light of the representation made by Selective's authorized agent in the 2012 COI that "T-Mobile USA" was an "additional insured" under Selective's policies, it was entirely reasonable for T-Mobile to believe that T-Mobile USA was the correct additional insured under the 2012 Policy and the correct T-Mobile entity for purposes of tendering its claim. ER 1015-18, 1019-20, 1022-23.

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D. Innovative and T-Mobile NE Are Sued by a Property Owner in the Southern District of New York and Tender their Claims to Selective.

In mid-2005, T-Mobile NE's predecessor, Omnipoint Communications, Inc. ("Omnipoint"), leased space for the installation of a rooftop cellular antenna in New York City from Virginia Properties, LLC. ER 679. Omnipoint contracted with Innovative to perform the work. ER 679-80.

In early 2013, the building owner notified T-Mobile USA and Innovative of property damage allegedly resulting from Innovative's work. Both T-Mobile USA and Innovative tendered the claims to Selective in early 2013. ER 684; ER 754. T-Mobile USA's agent, Sedgwick Claims Management Services, Inc. ("Sedgwick"), tendered the claim to Innovative on February 1, 2013 with a request that Innovative "immediately notify your insurance carrier." ER 684.

It is undisputed that Sedgwick tendered the claim "on behalf of T-Mobile USA Inc." instead of T-Mobile NE because: (1) the building owner initially threatened liability against T-Mobile USA (not T-Mobile NE); and (2) Selective's authorized agent represented in the 2012 COI that "T-Mobile USA" was the actual additional insured under the Policy. ER 122. Again, the 2012 COI expressly identified "T-Mobile USA Inc., [and] its Subsidiaries and Affiliates" as the "Certificate Holder" and indicated that "T-Mobile USA" was the relevant "additional insured" under the Policy. ER 684. There is no dispute that Selective received T-Mobile USA's tender in February of 2013. ER 708.

In April of 2013, the building owner claimed more than \$700,000 in damages and brought suit against Innovative and T-Mobile USA in the Southern District of New York, *Virginia Properties, LLC v. T-Mobile Northeast LLC*, S.D.N.Y. Case No. 13-cv-3493(AKH)(JCF) (the “Underlying Action”). ER 311-17. While the building owner initially named T-Mobile USA and Omnipoint as defendants, it amended its complaint in February of 2014 to name T-Mobile NE as a defendant. ER 678-79. T-Mobile NE subsequently incurred more than \$500,000 in defense costs, all of which were paid by T-Mobile USA. ER 817.

E. Selective’s Inconsistent Interpretation of the Policy and Admittedly Improper Denial of Coverage.

Selective acknowledged Innovative’s tender and agreed to defend Innovative pursuant to a reservation of rights letter issued by Mr. Parlin on July 23, 2013 (the “ROR Letter”). ER 754-68. Critically, the ROR Letter documented Selective’s conclusion that it was legally obligated to provide that defense despite the Policy’s Professional Services Exclusion. ER 754-68. Consistent with that conclusion, Selective fully funded Innovative’s defense. ER 1014. Unfortunately, Selective’s responded to T-Mobile’s virtually identical claim for coverage in a dramatically different fashion.

Selective initially assigned T-Mobile USA’s claim to a claims examiner named Kary Cyprian in February of 2013. Ms. Cyprian did not contact T-Mobile USA, Sedgwick, or VDG about T-Mobile’s claim, but instead: (1) reviewed the 2012 Policy and concluded that it created a potential for additional insured status if the underlying FSA contained a

D&I Agreement; (2) requested and reviewed copies of the FSA, confirming that it contained the type of D&I Agreement that triggered coverage; and (3) reached the conclusion by April 22, 2013 that T-Mobile was a “potential additional insured” under the Policy as a result. ER 721-22, 728, 735, 737, 742-43. Ms. Cyprian conceded during her subsequent deposition that she could not think of any reason why T-Mobile USA would not qualify as an additional insured where there was both a D&I Agreement requiring Innovative to name T-Mobile USA as an additional insured and a COI issued by Selective’s own agent identifying T-Mobile USA as an additional insured under the Policy. ER 723, 735-36, 738, 740. Indeed, Ms. Cyprian confirmed that the only piece of information needed to finish her investigation of T-Mobile USA’s claim was a copy of T-Mobile USA’s own insurance policy. ER 735-36.

Selective, however, subsequently transferred T-Mobile USA’s and Innovative’s claims to another claims examiner, Michael Parlin, on July 8, 2013. ER 1013, 1015. While the full extent of Mr. Parlin’s improper claims handling is set forth in detail in T-Mobile briefing below, *see* ER 1080-85, Mr. Parlin admitted under oath that he improperly delayed resolution of T-Mobile’s claim for nearly *two years* and ultimately denied coverage based on the very same Professional Services Exclusion that he had previously concluded (in analyzing the claim of its primary insured, Innovative) did *not* excuse Selective’s obligation to provide a defense—a fundamentally

inconsistent position that he later admitted was likely incorrect. ER 1001-02, 1046-47.³

Instead of discussing the claims with Ms. Cyprian, Mr. Parlin decided within hours of receiving both T-Mobile's and Innovative's claims that they were both potentially barred by the Professional Services Exclusion. ER 1012-13, 1021-23. Mr. Parlin requested a legal opinion from Selective's own in-house attorney regarding whether Selective was obligated to defend Innovative in spite of the Professional Services Exclusion, an opinion that he received on July 22, 2013. ER 1024-25. That opinion confirmed that Selective was obligated to provide a defense to its insureds in spite of the Professional Services Exclusion, a fact Mr. Parlin admitted during his subsequent deposition and evidenced by Mr. Parlin's

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- ³ Q: And as I think you indicated to me earlier, your conclusion that T-Mobile didn't qualify as an additional insured was based on your position that it wasn't an additional insured because of the professional negligence exclusion in the additional insured endorsement?
- A: Correct.
- Q: And you had reached the contrary decision with regard to the duty to defend the primary insured, Innovative, in that there was the same type of exclusion in the main body of the policy. But despite the presence of that exclusion, you reached the conclusion the defense was owed to Innovative, correct?
- A: Correct.
- Q: And you reached the inconsistent decision with regard to the same exclusion when it came to T-Mobile's defense, correct?
- A: Correct.
- Q: And I think you testified earlier that in retrospect, you're not very comfortable that [this] inconsistent decision was correct?
- A: Correct.

issuance of the ROR Letter agreeing to provide a defense to Innovative the very next day. ER 1026; ER 754-68.

Despite receiving confirmation from Selective's own in-house attorney that Selective was obligated to provide a defense despite the Professional Services Exclusion and his agreement to provide a defense to Innovative, Mr. Parlin did *not* accept T-Mobile USA's tender or otherwise communicate Selective's coverage position to T-Mobile USA. Indeed, Mr. Parlin later admitted that he did nothing to address T-Mobile's claim for *more than 19 months* and that Selective's failure to communicate a coverage position to T-Mobile USA during that period constituted improper claims handling on its face. ER 1026-28.

Given Mr. Parlin's failure to respond, Sedgwick renewed its demand for coverage on February 25, 2015. ER 772-73. Mr. Parlin received the renewed tender the following morning, February 26, ER 1032, and issued an inconsistent and contradictory denial of coverage a few hours later. ER 775. Specifically, Mr. Parlin sent an email *denying* coverage and attaching a copy of Selective's ROR Letter to Innovative—again, the letter by which Selective *accepted* Innovative's defense—contradictorily indicating that, “[b]ased upon this letter, Selective must respectfully *decline* your request for defense and indemnification” ER 775-91 (emphasis added); *but see* ER 778.

Mr. Parlin subsequently admitted during his deposition that his entire “investigation” of T-Mobile USA's claim was limited to his brief evaluation on the morning of February 26. ER 1053-54. Critically, Mr.

Parlin also admitted that the Professional Services Exclusion was the *only* basis upon which he denied T-Mobile USA's claim, that his email denying coverage failed to provide an explanation of the basis for Selective's denial, and that his citation in that email to a letter by which Selective had contradictorily *accepted* a substantively identical claim from Innovative was not an adequate explanation of the basis for his *denial* of T-Mobile's claim. ER 1032-34, 1046-47, 1051, 1053.⁴ Mr. Parlin also admitted that, while the COIs issued by VDG to T-Mobile USA were relevant to his determination of whether T-Mobile USA qualified as an additional insured because they contained representations on the coverage issue by Selective's own agent, he failed to request or review them before denying coverage—meaning that he did not review or rely upon purported “disclaimer” language in the 2012 COI at the time he denied coverage. ER 1021-23. Finally, Mr. Parlin also admitted that the 2012 COI expressly identified “T-

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- ⁴ Q: Is there any discussion or analysis of the additional insured issue contained in this letter that you forwarded on to T-Mobile in February of 2015?
- A: No.
- Q: So, you didn't provide T-Mobile with any explanation of why it did not allegedly qualify as an additional insured under Selective's policy, did you?
- A: No.
- Q: You instead sent T-Mobile, who was seeking a defense under the Selective policy, a letter that indicated that you had concluded a defense was owed to someone else under the policy, right?
- A: Right.
- Q: Right. Was that an adequate explanation of your coverage determination?
- A: No. Looking back on it.

Mobile USA” as an additional insured and that it was reasonable for T-Mobile to rely on that representation by Selective’s own agent when tendering the claim on behalf of T-Mobile USA as a result. ER 1022-23.

In March of 2015, Sedgwick once again reiterated T-Mobile’s demand for coverage. ER 793. Selective did not substantively respond to that renewed demand. ER 1040-41.

Mr. Parlin later testified that his conduct violated the written procedures Selective adopted for its claims examiners to follow when investigating a claim. ER 998. Specifically, Mr. Parlin acknowledged that those claims handling procedures required him to undertake a reasonable and thorough investigation of T-Mobile USA’s claim, timely respond to T-Mobile USA within 30 days and, to the extent he denied coverage, provide a detailed explanation of the relevant policy language and explain the basis for such denial—an obligation that Mr. Parlin confirmed existed to provide an insured like T-Mobile the opportunity to understand and timely cure any alleged defect raised by Selective. ER 996-97, 1004, 1008-10. Mr. Parlin further testified that a delay of *more than 700 days*—the amount of time it actually took Selective to substantively respond to T-Mobile USA’s claim—was unreasonable, and that an additional insured like T-Mobile USA was generally entitled to coverage once the insurer concluded that coverage existed for a primary insured like Innovative. ER 998-1000, 1004, 1006.

In August of 2015, T-Mobile Insurance & Claims Manager Lisa Bauer sent an email to Mr. Parlin noting the inconsistency between

Selective's acceptance of Innovative's tender and its denial of T-Mobile USA's claim, requesting an explanation for the denial. ER 294. Mr. Parlin forwarded Ms. Bauer's email to Selective's outside coverage counsel Dan Kohane, who responded on August 19, 2015. ER 297. Once again, Mr. Kohane's response did not provide any explanation for Selective's inconsistent treatment of T-Mobile USA and Innovative, but instead simply set forth Selective's bald legal conclusion that T-Mobile USA did not qualify for coverage under the Policy without any explanation of *why* Selective reached that conclusion:

Innovative is the named insured under the Selective policy, S 164349108. T-Mobile is not. Selective is defending its insured pursuant to a reservation of rights/partial disclaimer.

T-Mobile does not appear in the Selective Policy named as an insured. It does not qualify as an additional insured. That is why Selective is not defending T-Mobile.

ER 297 (emphasis in original). Mr. Parlin confirmed during his deposition that Mr. Kohane's email did *not* provide any explanation of why Mr. Parlin denied coverage and that the failure to provide that explanation constituted improper claims handling. ER 1045-46.

In short, at no time during the handling of T-Mobile's claim did Selective explain the basis for its denial or assert that it was based on any alleged issue with T-Mobile's tender, including its later-asserted defense (in this litigation) that the tender was allegedly defective because it identified T-Mobile USA as the tendering party instead of T-Mobile NE. To the contrary, Mr. Parlin testified under oath that: (1) he had no issues

whatsoever with the sufficiency of T-Mobile's tender; (2) any such tender-related issues or defects played no role in his decision to deny coverage; and (3) he would have advised T-Mobile of any such issues had they actually played a role in his denial in order to provide T-Mobile an opportunity to cure any such defects. ER 1027-28, 1046-47, 1050, 1053-54.

Left with no other options, on August 25, 2015, T-Mobile USA served a notice of intent to sue under Washington's Insurance Fair Conduct Act, RCW 48.30 *et seq.* ("IFCA"). ER 800-01. Apparently recognizing that the asserted basis for Mr. Parlin's denial of coverage was indefensible—again, a denial based solely on his inconsistent application of the Professional Services Exclusion to one insured but not the other—Selective's counsel responded to T-Mobile's IFCA Notice on September 29, 2015 by claiming that Mr. Parlin had denied coverage on a *different* basis. ER 803-06. Specifically, Selective's outside counsel asserted in a letter of that date that Mr. Parlin had allegedly denied T-Mobile's claim because "Innovative did not enter into any written contract with T-Mobile requiring Innovative to name T-Mobile as an additional insured"—exactly what the 2010 FSA between T-Mobile and Innovative required. ER 805. That letter did not raise the disclaimer language present in the 2012 COI at issue on this appeal. *See id.*

When later asked at his deposition about the assertion in the September 29, 2015 letter that he had allegedly denied coverage on a basis other than the Professional Services Exclusion, Mr. Parlin denied that fact,

admitted that he had never seen the letter before,⁵ and admitted that it was inaccurate. ER 1048-53. Indeed, Mr. Parlin was forced to admit that the position asserted in that letter was contradicted by the contents of his own claim file, as that file contained a copy of the agreement the letter contended did not exist—the 2010 FSA. ER 1052.⁶

F. The District Court’s Erroneous Dismissal of T-Mobile USA’s Claims.

T-Mobile USA filed suit against Selective in the Superior Court of Washington for King County on September 15, 2015, asserting claims for breach of contract, declaratory judgment, common law insurance bad faith, common law attorney’s fees, violation of the Washington State Consumer Protection Act, RCW 19.86 *et seq.* (“CPA”), and violation of IFCA. ER 911-19. Selective removed the action to the United States District Court for the Western District of Washington on November 4, 2015. ER 902-09.

On March 23, 2017, after conducting written discovery and taking the depositions of Ms. Cyprian and Mr. Parlin, T-Mobile moved for partial summary judgment (the “Motion”). ER 957-82. T-Mobile argued that summary judgment in its favor was proper because, *inter alia*: (1)

⁵ Mr. Parlin also admitted that he had never spoken with any of the attorneys who apparently drafted the September 29, 2015 and that they instead drafted that letter without contacting him to verify the accuracy of the statements asserted therein, including the actual basis for his denial of coverage. ER 1048-50.

⁶ Q: And we know that that position is not true because we’ve already reviewed that “D&I” Agreement between T-Mobile and Innovative, correct?
A: Yeah, we—we reviewed that.
Q: Yeah. It was in your file, right?
A: Right.

Selective's claims adjusters had admitted that T-Mobile USA was entitled to additional insured coverage under the Policy; (2) Selective was equitably estopped from asserting coverage defenses not raised in Mr. Parlin's initial denial of the claim; and (3) the 2012 COI issued by Selective's own authorized agent expressly represented that T-Mobile USA was an additional insured under the Policy. ER 971-78.

Selective filed a cross-motion for summary judgment, arguing that: (1) T-Mobile USA did not qualify for additional insured status under the AI Endorsement; (2) the 2012 COI did not "confer coverage" on T-Mobile USA; and (3) it could escape liability entirely because of a claimed superficial "defect" in T-Mobile's tender: The fact that T-Mobile's tender referenced "T-Mobile USA" instead of "T-Mobile NE" as the tendering party (the "Tender Defense"). ER 365-79.

On June 27, 2017, the District Court denied T-Mobile's Motion and granted Selective's Cross-Motion. ER 22-63. The District Court ruled that: (1) Selective was not estopped from belatedly asserting the Tender Defense (even though it was not the actual basis for Mr. Parlin's denial); (2) the FSA did not qualify T-Mobile USA for coverage under the AI Endorsement because T-Mobile NE, not T-Mobile USA, was a party to the FSA; and (3) most importantly for purposes of the question certified to the Court, Selective was not bound by its agent's representation in the 2012 COI that T-Mobile USA was an additional insured under the Policy. ER 37-57. The District Court concluded that the representations contained in the 2012 COI were not binding on Selective primarily because of this Court's statement

in *Postlewait Construction, Inc. v. Great American Insurance Companies*, 106 Wn.2d 96, 720 P.2d 805 (1986) to the effect that COIs are “not the equivalent of an insurance policy,” further ruling that COIs “confer no rights” in light of *Postlewait* regardless of any representations contained therein.

T-Mobile moved for reconsideration of the District Court’s Order on July 11, 2017. ER 160-68. The District Court denied that motion on October 19, 2017 and entered judgment in Selective’s favor on the same day. ER 2-19; ER 1.

T-Mobile filed a notice of appeal on November 17, 2017 and the parties argued the appeal before the United States Court of Appeals for the Ninth Circuit on October 12, 2018. ER 97-99. The Ninth Circuit issued its initial decision referring the certified question to this Court on November 9, 2018. As noted above, the Ninth Circuit determined that VDG was Selective’s agent at the time it made the representations in the 2012 COI confirming that “T-Mobile USA” was the correct “additional insured” under the Policy. 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.”). On November 14, 2018, the Court accepted review of the certified question and set a briefing schedule in accord with RCW 2.60.030 and RAP 16.16.

III. SUMMARY OF ARGUMENT

For several reasons, the Court should answer the certified question in the affirmative and confirm that Selective is bound by its authorized agent's representations that T-Mobile USA was an additional insured under the Policy. First, Washington law is clear that the representations made by agents of an insurer like those at issue in this case bind insurers when the agent acts with actual or apparent authority—authority that the Ninth Circuit has already ruled existed here. Second, none of Selective's arguments justify departing from that bedrock principle of Washington law, including Selective's reliance on *Postlewait*—a case that did *not* involve a similar representation by the insurer's agent. Third, while the 2012 COI contains boilerplate “disclaimer” language, that general language is inapplicable on its face and VDG's specific representation that T-Mobile was an additional insured overrides that disclaimer even if it did apply. Fourth, the vast majority of jurisdictions that have addressed the precise question before the Court have given legal effect to statements that the holder of a COI is an additional insured when that representation was made by the insurer's agent and when the claimant justifiably relies on the representation—both of which are uncontested here. Finally, confirmation by this Court that the representations insurers and their agents make in COIs are enforceable will further Washington's clear public policy of protecting policyholders from the very type of inconsistent and misleading conduct evidenced by Selective in this case.

IV. ARGUMENT

A. Standard of Review.

Certified questions are matters of law that the Court reviews *de novo*. *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 722, 406 P.3d 1149 (2017). The Court considers the legal issues presented “based on the certified record provide by the federal court.” *Id.* (citing *Bradburn v. N. Cent. Reg’l Library Dist.*, 168 Wn.2d 789, 799, 231 P.3d 166 (2010)); RCW 2.60.030(2). In addressing certified questions, the Court considers the legal issues “not in the abstract but based on the certified record provided by the federal district court.” *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 126, 196 P.3d 664 (2008) (“*Onvia*”) (citation omitted).

B. Washington Agency and Insurance Law Dictates That Selective Is Bound by VDG’s Representations in the 2012 COI.

As set forth above, the Ninth Circuit has already determined that VDG was acting as Selective’s actual or implied agent and acting within the scope of its authority at the time it issued the 2012 COI to T-Mobile. *See* Certification Order at 8 n.5 (“VDG issued the 2012 COI pursuant to its delegated authority as Selective’s authorized agent, authority which expressly extended to ‘executing and issuing . . . certificates for insurance’ There is thus no genuine dispute of material fact over whether VDG acted with at least apparent authority in issuing the 2012 COI that clearly lists T-Mobile USA as an additional insured under the policy.” (emphasis omitted)). The determination that VDG was acting as Selective’s authorized agent is the law of the case and must be accepted as true for

purposes of answering the certified question as a result. *See Onvia*, 165 Wn.2d at 133, 196 P.3d 664 (in answering certified questions, the Court accepts all factual presumptions made by certifying court as true).⁷

The fact that VDG was acting as Selective’s agent when it expressly represented to T-Mobile USA that it was an additional insured under the Policy (and thus the correct party for purposes of tendering the claim at issue) is dispositive of the certified question. It is black-letter law in Washington that principals are bound by the acts and representations of their agents in such circumstances. *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 765, 145 P.3d 1253 (2006) (“An agent’s exercise of actual authority is binding on the principal.” (citation omitted)). VDG’s specific representation that the Certificate Holder—“T-Mobile USA Inc.”—was “an additional insured” under the Policy is binding on Selective as a result.

⁷ The Ninth Circuit’s determination that VDG was acting as Selective’s agent is based on well-established Washington precedent confirming that insurers are bound by the acts of their agents and cannot rely on the terms of a private agreement to disclaim the agent’s actions, especially where a course of dealing between the agent and the principal supports the agent’s exercise of authority. *See Chicago Title Ins. Co. v. Wash. St. Office of Ins. Com’r*, 178 Wn.2d 120, 136, 309 P.3d 372 (2013) (“[W]here an agent acts within its authority, the principal cannot excuse itself from vicarious liability through an undisclosed private arrangement that purports to restrict that authority.”). Most importantly, the Ninth Circuit’s finding is also consistent with the undisputed facts in the record demonstrating that: (a) VDG’s agency agreement with Selective expressly authorized VDG to issue COIs; (b) VDG had issued many COIs to T-Mobile and others over the course of its decades-long relationship with Selective and had not received a single objection from Selective; and (c) VDG signed the 2012 COI as Selective’s “authorized representative.” ER 1063; ER 825-28; ER 831.

Selective attempted to address that bedrock principle of Washington law by arguing to the District Court and the Ninth Circuit that this Court's isolated statement in *Postlewait* that COIs are "not the equivalent of an insurance policy" stood for the global proposition that COIs and representations contained within them have no legal effect. *Postlewait* does not support that position.

Postlewait involved an insurance claim that arose out of damage to two cranes the plaintiff, Postlewait Construction ("Postlewait"), leased to a construction contractor, P.K. Contractors ("P.K."). *Postlewait*, 106 Wn.2d 96, 97, 720 P.2d 805 (1986). Postlewait's lease agreement with P.K. required P.K. to maintain property casualty coverage for the two cranes for the duration of the lease agreement. *Id.* The agreement did not require P.K. or its insurer to add Postlewait as an additional insured under the policies. *Id.* at 98, 720 P.2d 805. P.K. subsequently obtained coverage through its existing property insurer, Great American Insurance Companies ("Great American"). *Id.*

P.K.'s insurance broker issued the relevant COI, which merely confirmed that P.K. had purchased insurance covering the cranes. *Postlewait*, 106 Wn.2d at 98, 720 P.2d 805; *see also* Declaration of Kelly H. Sheridan in Support of Plaintiff-Appellant T-Mobile's Motion to Take Judicial Notice ("Sheridan Declaration"), Ex. A, at 5.⁸ Critically, as the

⁸ T-Mobile has filed a Motion to Take Judicial Notice concurrently with this opening brief, asking the Court to take judicial notice of the certified copy of the affidavit attaching the actual COI at issue in *Postlewait*.

Court can confirm for itself by reviewing the COI, *the COI at issue in Postlewait did not contain any representations regarding Postlewait's status as an insured*, such as an affirmative representation like that at issue here identifying “T-Mobile USA” as the correct “additional insured” under the Policy. *Id.*

Postlewait subsequently sought payment for the damage to the cranes directly from Great American—a position that presupposed a direct contractual relationship between Postlewait and the insurer—ultimately filing suit in Spokane County Superior Court. *Postlewait*, 106 Wn.2d at 99, 720 P.2d 805. The Superior Court dismissed Postlewait's claim based on the lack of evidence indicating that the parties intended to confer insured status on Postlewait. *Id.* Division III affirmed and this Court accepted review. *Id.*

The Court affirmed the dismissal of Postlewait's claim, holding that Postlewait was “not an intended third party beneficiary of the policy and may not directly sue the insurer for breach of the insurance contract represented by the policy” because it was “not named as an additional insured or as a loss payee on the lessee's insurance policy” *Postlewait*, 106 Wn.2d at 99, 720 P.2d 805. The Court rejected Postlewait's argument that the COI reflected Great American's intent to “assume a direct obligation” to Postlewait, noting that: (1) the COI was issued by *P.K.'s broker*—not by Great American or its own agent; and (2) there was no evidence in the record indicating that the parties intended to confer insured status on Postlewait. *Id.* at 100-02, 720 P.2d 805. Finally, the Court also

noted that “[o]ther courts likewise hold that the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, it not the equivalent of an insurance policy.” *Id.* at 100-01, 720 P.2d 805 (citation omitted). Accordingly, the Court affirmed dismissal of Postlewait claim.

While the Court’s opinion in *Postlewait* indicated that COIs are “not the equivalent of an insurance policy” under the facts of that case, that general statement does not support Selective’s attempts to negate the affirmative representation made by its agent in this case for several reasons.

First, the COI in *Postlewait* was not issued by the insurer’s agent. *Postlewait*, 106 Wn.2d at 100, 720 P.2d 805 (referencing Postlewait’s reliance “on the fact that it was issued certificates of insurers by lessee’s [P.K.’s] insurance broker”); *see also* Sheridan Declaration, Ex. A at 5 (COI in Postlewait signed on behalf of “Inland Insurance Associates, Inc.,” not Great American). There was no basis for contending that any representations in that COI were binding on the insurer, as there was no agency relationship between the issuing broker and the insurer. Unlike *Postlewait*, the Ninth Circuit has already determined in this case that the 2012 COI was issued by Selective’s “authorized agent” and is binding on Selective. Certification Order at 8 n.5

Second, the COI in *Postlewait* did *not* contain any representations regarding Postlewait’s status as an additional insured. *See* Sheridan Declaration, Ex. A at 5. As the Court can confirm for itself by reviewing the copy of the COI, the COI in *Postlewait* merely indicated that the policies

were “issued and are in full force and effect.” *Id.* It did not state that *Postlewait* was an additional insured or include any other representation about *Postlewait*’s status as an insured—the type of additional representation at issue in this case. Indeed, the *Postlewait* Court specifically noted that there had “been no showing” in the record “that the insurer intended to assume a direct obligation” to *Postlewait*. *Postlewait*, 106 Wn.2d at 101-02, 720 P.2d 805. Unlike *Postlewait*, the Ninth Circuit has already determined that Selective’s agent represented that “T-Mobile USA” was “an additional insured” under the Policy. Certification Order at 8 n.5 (confirming that there is “no genuine dispute of material fact” that Selective’s agent issued a “COI that clearly lists T-Mobile USA as an additional insured under the policy”). *Postlewait* is clearly distinguishable from this case as a result.

Third, because the COI in *Postlewait* was not issued by the insurer’s authorized agent and did not contain any express representations about the certificate holder’s additional insured status, the *Postlewait* Court’s statement that COIs are “not the equivalent of an insurance policy” has no bearing on the affirmative representation at issue in this case. T-Mobile does not contest the general proposition that receipt of a COI standing alone does not extend coverage to the recipient. That proposition is merely a reflection of the fact that most COIs are generated for the sole purpose of providing written confirmation to the third-party certificate holders that valid insurance between the insurer and the relevant insured exists—the very scenario at issue in *Postlewait*. See *Postlewait*, 106 Wn.2d at 100-01,

720 P.2d 805 (again confirming “that the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained” and noting the absence of any further representations about the insured status of the third-party certificate holder). The fact that a COI does not normally function as the equivalent of an insurance policy does not negate an express representation that a party qualifies as an additional insured. Indeed, the Selective employee responsible for handling T-Mobile’s claim addressed this very distinction during his deposition, admitting that while COIs normally only confirm the existence of insurance to a non-insured third-party, the 2012 COI was different because it went further and affirmatively represented that T-Mobile USA was an additional insured under the Policy. ER 1022.⁹

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- ⁹ Q: So, [a certificate of insurance is] a document that’s given to a third-party to prove the existence of coverage and the extent of coverage, correct?
- A: Correct.
- Q: . . . And there is a difference between just a certificate of insurance that’s provided to someone to prove that the party providing has insurance, and the certificate of insurance that’s provided to someone that lists that recipient as an additional insured, correct?
- A: Correct.
- [. . .]
- Q: You understand there is a distinction between a certificate of insurance and a certificate of insurance that lists someone, the recipient, as an additional insured?
- A: Yes.
- Q: Okay. In the listing of that person, the recipient as an additional insured, it’s essentially a representation that you have been listed as an additional insured under the policy, right? I mean, that’s the whole purpose in providing it?
- A: Yeah, correct.

Fourth, the distinction between COIs issued by independent brokers and agents of the insurer has been recognized by Illinois and California—two of the very same jurisdictions relied upon by the *Postlewait* Court in reaching its decision—in subsequent cases holding that insurers *are* bound by affirmative representations made by their agent in COIs. *Compare Skezas v. Safway Steel Prods., Inc.*, 85 Ill.App.2d 295, 229 N.E.2d 781 (Ill. App. 1967) (cited in *Postlewait*), *with West Am. Ins. Co. v. J.R. Const. Co.*, 334 Ill.App.3d 75, 777 N.E.2d 610 (Ill. App. 2002) (COIs conferred additional insured status when issued by insurer’s authorized broker); *compare also Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co.*, 103 Cal.App.3d 198, 162 Cal.Rptr. 720 (1980) (cited in *Postlewait*), *with MV Transp., Inc. v. Omne Staff Leasing, Inc.*, 378 F.Supp.2d 1200, 1206 (E.D. Cal. 2005) (“[Broker’s] certificates or endorsements may have the effect of amending the policy if they were issued by [broker] as [insurer’s] ostensible agent, even if [broker] was not authorized to do so.”).

In short, there is no conflict between this Court’s holding in *Postlewait* and the well settled proposition that insurers are bound by the affirmative representations of their agents made in COIs, as *Postlewait* did not address that issue in any way. That bedrock principle of Washington law remains sound and the mere fact that the representation at issue in this

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- Q: All right. And so when Selective is using the Van Dyk Group to issue a certificate of insurance to T-Mobile indicating that T-Mobile U.S.A. and its subsidiaries and affiliates are additional insureds, under this very Selective policy at issue, that’s a representation to that effect, right?
- A: Yes.

case was made within a COI does not alter the conclusion that it is binding on Selective.

C. The Boilerplate Disclaimer Language Relied upon by Selective Does Not Negate the Affirmative Representations of Its Agent.

For several reasons, the purported “disclaimer” language in the 2012 COI—boilerplate language indicating that it “confers no rights upon the certificate holder,” “does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below,” and “does not constitute a contract”—does not alter the conclusion that the representations at issue bind Selective. ER 831.

First, VDG’s specific representation regarding T-Mobile USA’s additional insured status trumps this type of general, boilerplate language. Washington law is clear that obligations set forth in specific provisions control over more general provisions or exclusions. *See 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*, specific language governs over general language). This is not an abstract principle: Washington Courts give effect to specific language in the insurance context because “in the case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.” *Foote v. Viking Ins. Co.*, 57 Wn. App. 831, 834-35, 790 P.2d 659 (1990) (quotation omitted). Thus, general exclusions or disclaimers do not negate specific grants of coverage. *See, e.g., Century Sur. Co. v. Helleis*, 367 F. App’x 765, 766 (9th Cir. 2010) (unpublished opinion) (“We also reject Century’s alternative

contention that the general exclusion of breach of contract injury swallows the specific coverage for wrongful eviction injury.”). Because the 2012 COI contains the specific and unambiguous representation that “T-Mobile USA [and] its Subsidiaries and Affiliates” are additional insureds, that statement trumps the more general disclaimer present in the standard ACORD 25 form.¹⁰

Second, that boilerplate disclaimer language is inapplicable to the type of specific representation made by Selective’s agent in this case by its own terms. Again, that boilerplate language present in all certificates issued on the ACORD 25 form merely disclaims the existence of rights conveyed *by virtue of being the certificate holder*. See ER 831 (confirming that the disclaimer confers “no rights upon the *Certificate Holder*”) (emphasis added). The disclaimer addresses the type of situation present in *Postlewait* in which a certificate holder claims rights as an insured merely because it possess a COI. For the reasons already detailed above and admitted by Selective’s own claims examiner, that disclaimer does not address the specific, additional representations made by Selective’s agent in the 2012 COI.

¹⁰ See Siber-Sanderowitz, Stevi, *More than Just a Piece of Paper? Considering the Potential Implications of Certificates of Insurance on Insurance Coverage*, DRI.ORG (July 8, 2016) (available at <https://community.dri.org/blogs/stevi-siber-sanderowitz/2016/07/08/certificates-of-insurance>) (noting that courts around the country have estopped insurers from avoiding representations in COIs “despite the presence of disclaimer language” in the “standard ACORD form,” ACORD 25, where the COI was issued by the insurer’s authorized agent or where the claimant reasonably relied on the COI).

Third, any argument that the disclaimer nullifies that additional representation is contrary to Washington’s long-standing rules of contract and statutory interpretation. Those rules require the Court to interpret the COI and the Policy in a way that gives effect to *all* of the language contained therein. *See, e.g., Ball v. Stokely Foods*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950) (“[E]very word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible.”); *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 suggested interpretation of two clauses of insurance policy where the interpretation “would render the former clause surplusage and violate the rules of contract construction”). While there is no Washington case directly on point, other jurisdictions have confirmed that those same rules of interpretation apply to COIs. *See, e.g., Shea v. Bay State Gas Co.*, 383 Mass. 218, 223-24, 418 N.E.2d 597 (1981).

In *Shea*, the Supreme Court of Massachusetts faced the question of whether a limitation of liability clause in a COI was enforceable. *Id.* Like Selective here, the party resisting the application of that clause contended that the COI was merely intended to provide proof of insurance and allegedly had no legal impact as a result. *Id.* The *Shea* Court rejected that argument, noting that interpreting the COI in that manner would render the limitation of liability clause surplusage and violate the Court’s obligation to

interpret the COI in a way that reconciled all of the language present in the COI. *Id.* Applying that reasoning here, the only way to reconcile and give life to both the disclaimer and the “additional insured” clause is to construe the disclaimer as limited by its own terms—meaning that it only disclaims rights arising solely from the certificate holder’s possession of the 2012 COI but does not impact the enforceability of the additional representation that T-Mobile USA was an additional insured under the Policy.

Fourth, even if the disclaimer otherwise applied to the representation at issue, the undisputed record before the Court confirms that T-Mobile’s reliance on the 2012 COI was reasonable. T-Mobile’s Insurance & Claims Manager Lisa Bauer testified in the District Court that she relied on the representation that T-Mobile USA was an additional insured, tendered the claim on behalf of “T-Mobile USA” instead of T-Mobile NE as a direct result of that representation, and could and would have cured any alleged defect with that tender by re-tendering the claim on behalf of T-Mobile NE if Selective had timely raised the issue. ER 121-22. Selective never did so. ER 123-24. Given these undisputed facts, the Selective claims examiner responsible for T-Mobile’s claim was forced to admit that it was entirely reasonable for T-Mobile to rely on the representation contained within the 2012 COI and believe that T-Mobile USA was the correct entity to tender the claim. *See* ER 1021.¹¹ T-Mobile’s reliance was reasonable in spite of the disclaimer language as a result.

¹¹ Q: And that certificate was issued to T-Mobile U.S.A. and its subsidiaries and affiliates, correct?

Fifth, it would be highly inequitable to allow an insurer to use this type of boilerplate language to escape liability for its own error years after its initial denial—a fact driven home by this Court’s use of equitable estoppel in similar circumstances.¹² Again, the record is undisputed that

A: Correct.

Q: And that certificate was signed by Michelle Ortiz, a representative of the Van Dyk Group at the time the Van Dyk Group was representing Selective, correct?

A: Correct.

Q: And as we know from the review of the other additional insured certificates from earlier this afternoon, Selective was well aware that Innovative was issuing those certificates, correct?

A: Correct.

Q: So, it would have been reasonable upon T-Mobile U.S.A.'s receipt of this certificate of insurance to understand that it was an additional insured under the very Selective policy at issue in this case, wouldn't it?

A: Yes.

¹² Washington courts apply equitable estoppel or the “mend to hold” doctrine to bar insurers from asserting new or changed bases for denying coverage not raised in their initial denial. *See, e.g., Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 864, 454 P.2d 229 (1969) (“[I]t is the general rule that if an insurer denies liability under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape liability, provided that the insured was prejudiced by the insurer's failure to initially raise the other grounds.” (citation omitted)); *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 158 Wn. App. 91, 103, 241 P.3d 429 (2010), *rev'd on other grounds*, 174 Wn.2d 501, 276 P.3d 300 (2012) (“When an insurer denies coverage for one reason, with knowledge of other reasons for denying coverage, the insurer may be precluded from raising new grounds for denying coverage under traditional principles of estoppel.” (citation omitted)); *see also Ledcor Indus. Inc. v. Virginia Sur. Co., Inc.*, 09-cv-01807-RSM, 2012 WL 223904, at *2 (W.D. Wash. Jan. 25, 2012) (“When an insurer denies coverage for one reason, with knowledge of other reasons for denying coverage, the insurer may be precluded from raising new grounds for denying coverage under traditional principles of estoppel.”); *Karpenski v. Am. Gen. Life Cas.*, 999 F.Supp.2d 1235, 1245 (W.D. Wash. 2014) (“Under Washington law, the mend the hold doctrine may be invoked to preclude insurers from introducing new or changed bases for denying insurance coverage once litigation has begun.” (citation omitted)).

Selective's own agent affirmatively represented that "T-Mobile USA" was the correct "additional insured" under the Policy. ER 831; Certification Order at 8 n.5. The record is also undisputed that T-Mobile relied on that representation and tendered its claim on behalf of "T-Mobile USA." ER 121-22. It is also undisputed that Selective knew that its agent made that representation, never disclaimed it, and agreed it was entirely reasonable for T-Mobile to rely upon that representation as a result. ER 1015-23. Selective's claims examiner also admitted that the fact that the claim was tendered on behalf of T-Mobile USA instead of T-Mobile NE played no role in his decision to deny coverage. ER 1050. Under these facts, it would be inequitable to allow Selective to rely upon the disclaimer to escape liability for the error of its own agent literally years after its wrongful denial of coverage—a denial that Selective admits had nothing to do with that boilerplate language.

Sixth, and perhaps most importantly, courts outside of Washington presented with this same question have repeatedly held that insurers are bound by the representations of their agents notwithstanding the presence of boilerplate disclaimers of this type. For example, the Northern District of Georgia's decision in *Sumitomo Marine & Fire Ins. Co. of America v. Southern Guaranty Insurance Co. of Georgia*, 337 F.Supp.2d 1339 (N.D. Ga. 2004) ("*Sumitomo*") involved facts strikingly similar to this case. A housing developer named SMG required its contractor to name SMG as an additional insured under the contractor's CGL policies. 337 F.Supp.2d at 1342-43. The contractor obtained COIs from a broker who was an

authorized agent of the insurers. *Id.* Both COIs identified SMG as the “certificate holder,” stated that the certificate holder was an additional insured, and were signed by the broker as the insurers’ “authorized representative.” *Id.* at 1343-44. Like here, the COIs also contained a disclaimer indicating that they conferred “no rights upon the certificate holder” and did “not amend, extend, or alter coverage afforded” by the relevant policies. *Id.*

The defendants argued that the additional insured representation at issue was not binding because of those disclaimers. *Id.* at 1354. The *Sumitomo* Court rejected that position, holding that the agent’s issuance of the COIs expressly identifying SMG as additional insured trumped that general disclaimer language. *Id.* at 1355-56.

The New York Appellate Division’s decision in *Bucon, Inc. v. Pennsylvania Manufacturing Association Insurance Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (N.Y. App. Div. 1989), involved a similar fact pattern and identical disclaimer language stating that the COI at issue did not “amend, extend or otherwise alter the terms and conditions of insurance coverage contained in the policy.” *Id.* at 210, 547 N.Y.S.2d 925. The court rejected the insurer’s argument that this disclaimer language rendered the plaintiff’s reliance on the COI unreasonable, noting that the specific representation that the plaintiff was an additional insured trumped the general language of the disclaimer:

Moreover, this caveat 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. Thus, the elements of common-law estoppel against PMA's denial of coverage were established by plaintiff.

Id. at 210-11, 547 N.Y.S.2d 925 (italics in original).

Virtually every court to address this issue has reached a similar conclusion. *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 by 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 Inc. v. Excelsior Ins. Co.*, 679 N.Y.S.2d 749, 750-51 (N.Y. Ct. 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); *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).¹³

Selective has never addressed or rebutted the persuasive reasoning of these cases, instead relying almost exclusively on the Court's general statement in *Postlewait* that a COI is not the equivalent of an insurance policy. Indeed, the only authority from outside of Washington that Selective relied upon in the District Court and the Ninth Circuit was the Central District of California's decision in *Certain Underwriters at Lloyd's*

¹³ While not directly on point with the disclaimer issue before the Court, many jurisdictions have employed estoppel principles like those traditionally applied by this Court to hold that insurers cannot assert positions that contradict statements made by their authorized agents in COIs. See, e.g., *Duquesne Truck Serv. v. Workmen's Comp. Appeal Bd.*, 165 Pa. Cmwlth 145, 152-53, 644 A.2d 271 (Pa. Cmwlth. Ct. 1994) (COI issued with apparent authority conferred coverage, noting that "undisclosed rules known only to an insurer and its agent cannot be invoked to defeat the contract the agent had apparent authority to make"); *Criterion Leasing Grp. v. Gulf Coast Plastering & Drywall*, 582 So. 2d 799, 800-01 (Fla. App. 1991) (insurer estopped from denying workers' compensation coverage to subcontractor's employee where subcontractor was named as a coinsured on COI); *Bonner Cnty. v. Panhandle Rodeo Ass'n, Inc.*, 620 P.2d 1102, 1106-07 (Idaho 1980) (insurer estopped from denying coverage to claimant that was listed as additional insured in COI). Other jurisdictions have held that COIs issued by authorized brokers can expand the coverage afforded by the underlying policy where the issuing broker is acting as the insurer's agent. See, e.g., *Niagara Mohawk Power Corp. v. Skibeck Pipeline Co., Inc.*, 705 N.Y.S.2d 459, 461, 270 A.D.2d 867 (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"); *Int'l Amphitheater Co. v. Vanguard Underwriters Ins. Co.*, 532 N.E.2d 493, 500-02 (Ill. Ct. App. 1998) (insurer was estopped from asserting coverage exclusions that were contained in policy but not listed in COI); *Moore v. Energy Mut. Ins. Co.*, 814 P.2d 1141, 1144-46 (Utah Ct. App. 1991) (same).

of London v. American Safety Insurance Services, Inc., 702 F.Supp.2d 1169, 1174 (C.D. Cal. 2010).

American Safety has no bearing on the certified question for the same reason that *Postlewait* is inapposite: The broker that issued the relevant COI in *American Safety* was not an agent of the insurer and the court specifically noted that the broker had neither the actual nor apparent authority to bind the insurer. *Id.* at 1172-73. The facts of this case are clearly distinguishable for the reasons already detailed above.¹⁴

In short, the circumstances behind VDG's issuance of the COI to T-Mobile are virtually identical to those at issue in *Sumitomo, Bucon* and the other cases cited above. Innovative was required to name T-Mobile as an additional insured under the Policy and obtained a COI confirming that "T-Mobile USA" was an "additional insured" under that Policy—not merely to provide proof of insurance like in *Postlewait*. See ER 504-05; ER 831. Selective's claims examiner admitted that he was aware that VDG regularly issued COIs on Selective's behalf, that VDG had the authority to issue such COIs, that the 2012 COI issued by VDG at issue in this case contained the affirmative representation that "T-Mobile USA" was an "additional insured" under Selective's Policy, and that it was "reasonable" for T-Mobile

¹⁴ See Jean, Joseph D. and Collier, Sean, *Can You Trust A Certificate of Insurance?*, LAW360.COM (Dec. 21, 2010) ("[E]ach case is factually specific, and whether the insurer must provide coverage turns on several different factors, including the specific language of the COI, the language of the insurance policy, the detrimental reliance of the recipient on the representations of the party providing the COI, the authority of the party that issued the COI, and the involvement, if any, of the insurance carrier in issuing or approving the COI."); see also *Siber-Sanderowitz, supra*.

to rely on the 2012 COI and believe that T-Mobile USA was the correct party to tender the claim at issue. ER 1015-18, 1019-20, 1022-23. There is no basis for distinguishing the facts of this case from those at issue in *Sumitomo* and the other cases that apply the same reasoning. The Court should hold that Selective is bound by the representations contained within the 2012 COI as a result.

D. Public Policy Strongly Supports Holding Insurers to Representations Made by Their Authorized Agents, Including Those Made in COIs.

Washington’s Legislature has expressly declared that “[t]he business of insurance is one affected by the public interest.” RCW 48.01.030; *see also Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978) (RCW 48.01.030 is a “clear declaration” of public policy). In accord with this legislative directive, the Court has consistently adopted rules of policy construction, standards governing insurer conduct, and common law remedies designed to protect the rights of insureds at every turn: Ambiguous policy terms are construed in favor of coverage;¹⁵ exclusionary clauses are strictly construed;¹⁶ violations of Washington’s claims handling regulations are evidence of bad faith and *per se* CPA violations;¹⁷ and insureds that are forced to resort to litigation to obtain

¹⁵ *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 374, 917 P.2d 116 (1996) (en banc).

¹⁶ *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622 (1993), *as supplemented*, 123 Wn.2d 131, 865 P.2d 507 (1994).

¹⁷ *Onvia*, 165 Wn.2d at 129-32, 196 P.3d 664; *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 151, 930 P.2d 288 (1997).

policy benefits due to them are entitled to recover reasonable attorney's fees and costs.¹⁸ The Court should answer the certified question consistent with its history of protecting the rights of insureds and hold that insurers are bound by the specific statements their authorized agents make in COIs, especially where it is undisputed that an insured relied upon such representations in tendering its claim.

Practicality dictates the same result. Contracting parties throughout the State of Washington regularly rely on COIs as proof of insurance and evidence of compliance with contractual insurance requirements. *See Mtn. Fuel Supply*, 933 F.2d at 884 (“Many companies . . . require any hired company to present a certificate of insurance as evidence that the hired company has insurance.”); *see also* Alleman, Thomas B., *Insurance Litigation Strategies in Today's Economic Environment*, ASPATORE INSURANCE LAW 2014, 2014 WL 343150, at *5 (Feb. 2014) (COIs are often used in construction and retail industries as proof of insurance). The insurance industry relies on the brokers that interface directly with policyholders to issue COIs because the expense, delay and inconvenience of obtaining a complete policy with a new endorsement every time the policyholder enters into a contract would simply not be workable. A decision in Selective's favor—a ruling that representations contained within COIs essentially have no legal effect—would undermine the predictability that is critical to the insurance industry and open a significant loophole

¹⁸ *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 51-53, 811 P.2d 673 (1991).

whereby insurers could act through intermediaries to issue binders, policies, and COIs (and collect significant premiums for doing so in the process) but remain free to disavow the actions of those intermediaries at their choosing.¹⁹ Such a ruling would frustrate the effectiveness of insurance contracts and undermine Washington public policy.

Moreover, the result urged by Selective would also undermine confidence in the literally thousands of existing COIs throughout Washington confirming that existing contracts are insured. As the Ninth Circuit noted, the Court's decision on the certified question "potentially affects an untold number of Washington citizens and businesses who have been issued similar certificates of insurance, and it is therefore a matter of important public policy." Certification Order at 11 (citation omitted). If the Court does not hold insurers to the express representations of their agents when issuing COIs, that decision would have a significant adverse impact on general contractors, lessors, retailers, landowners, and dozens of niche markets across the state that rely on COIs as proof of insurance covering existing liabilities. The Court should protect the rights of

¹⁹ See 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"); see also 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").

policyholders and the integrity of the insurance industry generally and answer the certified question in the affirmative, holding that representations made in COIs by insurers' authorized agents are binding under Washington law.

V. CONCLUSION

For the foregoing reasons, as well as those set forth in T-Mobile's briefing in the District Court and the Ninth Circuit, T-Mobile respectfully submits that the Court should answer the certified question in the affirmative and rule that Selective is bound by representations made by its authorized agent in the 2012 COI with respect to T-Mobile's status as an additional insured under the Policy.

DATED this 13th day of December, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin LLP, attorneys of record for Plaintiff-Appellant T-Mobile USA, Inc.

2. On December 13, 2018, I caused a true and correct copy of the foregoing document to be served on the following attorneys of record in the manner indicated below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of December, 2018 at Seattle, Washington.

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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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