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SUPREME COURT OF THE STATE OF WASHINGTON

No. 17-35932

United States Court of Appeals for the Ninth Circuit

T-Mobile USA, Inc.,

Plaintiff-Appellant,

v.

Selective Insurance Company of America,

Defendant-Appellee.

Defendant-Appellee, Selective Insurance Company of America's, Answering Brief

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I. QUESTION CERTIFIED

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. INTRODUCTION

This Declaratory Judgment Action arises out of T-Mobile USA, Inc.'s ("T-Mobile USA") request for additional insured coverage from Selective Insurance Company of America ("SICA"). The United States District Court for the Western District of Washington granted SICA's Motion for Summary Judgment on June 27, 2017, and correctly held that T-Mobile USA is not an additional insured under the SICA Policy. T-Mobile USA appealed that ruling to the United States Court of Appeals for the Ninth Circuit, which in turn presented the above question to this Honorable Court on November 9, 2018. This Court accepted certification of the question presented on November 14, 2018.

The SICA policy under which T-Mobile USA seeks coverage is a commercial general liability insurance policy issued to a professional services and engineering company, Innovative Engineering, Inc. ("Innovative"). It is undisputed that T-Mobile USA is not an additional

insured under the SICA policy. For T-Mobile USA to qualify as an additional insured under the SICA policy, it would have to be a party to a written agreement with Innovative. It is not a party to a written agreement with Innovative. Omnipoint Communications, Inc. ("Omnipoint") entered into a written agreement with Innovative in 2000 entitled "Professional Services Agreement" ("PSA"). Omnipoint's successor in interest, T-Mobile Northeast, LLC ("T-Mobile NE"), a distinct corporate entity that was a subsidiary of T-Mobile USA, entered into a separate written agreement with Innovative in 2010 for the performance of professional services entitled "Field Services Agreement" ("FSA"). Ironically, the FSA, through which T-Mobile USA seeks additional insured status under the SICA policy, expressly states:

> 5.2 Contractor [Innovative] expressly acknowledges and agrees that <u>T-Mobile USA, Inc. is not a party to this Agreement</u> and that in no event will T-Mobile USA incur any liability of any type or character under this Agreement.

(Emphasis added).

In 2013, T-Mobile USA was sued by Virginia Properties in the United States District Court for the Southern District of New York ("Underlying Action"). In its complaint, Virginia Properties alleged that a building it owned in New York sustained property damage allegedly caused by Omnipoint's negligent rooftop construction of a cell tower in

2005. Omnipoint retained Innovative to provide professional engineering services on that project. In 2014, T-Mobile NE[1] was added as the proper party in interest to the Underlying Action, and all claims against T-Mobile USA were dismissed. For reasons unknown, and certainly not adequately supported by any evidence within the record before this Court, T-Mobile USA, not T-Mobile NE, tendered an additional insured claim to SICA. The disclaimer of T-Mobile USA's tender by SICA was rightful and properly denied because T-Mobile USA did not qualify as an additional insured under the express terms of the SICA Policy.

In 2012, six years after Innovative completed its professional services work for Omnipoint, SICA's independent agent, the Van Dyk Group ("Van Dyk"), issued a Certificate of Insurance ("COI") that incorrectly identified T-Mobile USA as a certificate holder and an additional insured. The essence of the question presented to this Court is whether an independent agent's error can effectively negate the unambiguous disclaimer language of the COI, which unequivocally and unambiguously declares that the COI cannot amend, extend, or alter the coverage afforded under the insurance policy identified in the document.

[1] Selective commenced an action against T-Mobile NE in the United States District Court of New Jersey bearing case number 2:17-cv-06420-MCA-MAH after T-Mobile Northeast sought coverage under the same policy for the same damages in June 2017. That action is pending.

SICA respectfully submits that when the clear and unambiguous language of the COI is given its ordinary meaning, it renders an error regarding additional insured status within the COI as having no legal effect. Indeed, the disclaimer language in the COI clearly alerts the recipient that the COI is intended for "information" purposes only and that it "does not" amend, extend, or alter the actual policy coverage.

The 2012 COI explicitly informed T-Mobile USA that:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S) AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

T-Mobile USA's elaborate plea in its brief that it was justified in relying on the erroneous COI rings hollow because it ignores the plain language of the COI, conflicts with Washington jurisprudence concerning agency law, and is contrary to Washington authority analyzing the legal effect, or lack thereof, of erroneous COI statements regarding coverage. Indeed, the Ninth Circuit's learned distillation of Washington law on the interpretation of COIs is consistent with courts across the country holding that the issuance of a COI is limited to providing information and that the

disclaimer language must be afforded the full weight of its plain meaning. T-Mobile USA's continued misguided reliance on the testimony of fact witness Michael Parlin with respect to these issues is equally baseless, as upheld by both the Ninth Circuit and District Court.

T-Mobile USA is a sophisticated multi-national corporation well-versed in the importance of language contained in contracts, insurance coverage, and documents like the COI. As such, it cannot claim reasonable reliance in the face of the COI's plain disclaimer language stating that additional insured coverage can only be conferred through the terms and conditions of the SICA Policy. Moreover, prior to commencing this declaratory judgment action, T-Mobile USA plainly understood that it was not an insured and did not qualify as an additional insured under Innovative's policy.

In August 2015, T-Mobile USA's Insurance and Claims Manager, Lisa Bauer, asked SICA about its denial of T-Mobile USA's tender. Selective responded to Ms. Bauer's inquiry through counsel, advising that T-Mobile USA was not an additional insured. T-Mobile USA understood SICA's position (it knew it was not a party to a written agreement with Innovative and Ms. Bauer had or should have had a copy of the SICA policy showing that T-Mobile USA did not qualify as an additional insured) yet T-Mobile USA persisted in filing the declaratory judgment

action now before this Court. Indeed, in T-Mobile USA's August 25, 2015, letter to the Washington Office of the Insurance Commissioner and in paragraph 19 of T-Mobile USA's September 2015 declaratory judgment complaint, T-Mobile USA makes clear that it understood SICA's coverage position:

> After [T-Mobile USA] requested a substantive explanation for Selective's contradictory coverage position a second time, Selective's representative eventually confirmed that the only reason Selective had denied coverage was because Selective had reached the erroneous conclusion that "[T-Mobile USA] does not appear in the Selective Policy named as an insured" and "does not qualify as an additional insured" under the Policy.

Set against the foregoing factual backdrop, SICA respectfully submits that as a matter of law, the clear words of disclaimer on the 2012 COI cannot be ignored simply because SICA's agent erroneously stated that T-Mobile USA was an additional insured when, under the terms of the SICA Policy, it was not. The Washington pattern jury instruction on agency and apparent authority provides a helpful distillation of governing authority and guidance on how this Court should analyze the intersection between the plain COI disclaimer language and Van Dyk's act of issuing COI incorrectly naming T-Mobile USA as a certificate holder and additional insured. In evaluating whether Van Dyk's act will bind SICA, the following questions would be relevant:

> First, that the words or conduct of [SICA] conveyed to [T-Mobile USA] that [Van Dyk] had the authority to perform the particular act on [SICA's] behalf;
>
> Second, that the words or conduct of [SICA] actually led [T-Mobile USA] to believe that [Van Dyk] had the authority to so act; and
>
> Third, that the words or conduct of [SICA] would have led a reasonably careful person under the circumstances to believe that [Van Dyk] had the authority to so act.

WPI 50.02.01. To state the jury instruction against the COI disclaimer language is to refute, as a matter of law, T-Mobile USA's arguments in this action.

T-Mobile USA argues that the "words" in the COI that "T-Mobile USA" is an additional insured should be binding on SICA. T-Mobile USA asks this Court to acknowledge those words, yet simultaneously permit it to ignore the "words" of disclaimer in the same document. SICA's "words" on the COI, when read together, as a matter of law cannot prove:

1. That Van Dyk had the authority to perform the <u>particular</u> act (the ability to perform the act is refuted within the document);

2. That SICA's words actually led T-Mobile USA to believe Van Dyk had the authority to act (no reasonable corporation in the position of T-Mobile USA could "believe" that Van Dyk had the authority to make T-Mobile USA an additional insured when the document itself and the SICA

Policy both refute any such reasonable "belief"); and

3. That SICA's words led a reasonably careful person under the circumstances to believe that Van Dyk had the authority to act (a reasonably careful person, let alone an insurance claims professional such as Ms. Bauer, could not form such a belief under the circumstances).

At some point, the COI was received by T-Mobile USA's in-house insurance claims professional, Ms. Bauer, who did not know whether Van Dyk was SICA's agent or Innovative's broker when she reviewed the document and when she made the tender. What Ms. Bauer did know, and therefore, what T-Mobile USA knew, was that the "words" and "conduct" of SICA and/or Van Dyk were as follows:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION <u>ONLY</u>**
>
> **THE CERTIFICATE CONFERS NO RIGHTS UPON [T-MOBILE USA].**
>
> **THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY <u>AMEND</u> THE COVERAGE AFFORDED BY THE [SICA] POLICIES BELOW.**
>
> **THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY <u>EXTEND</u> THE COVERAGE AFFORDED BY THE [SICA] POLICIES BELOW.**
>
> **THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY <u>ALTER</u> THE COVERAGE AFFORDED BY THE [SICA] POLICIES BELOW.**

> **THIS CERTIFICATE OF INSURANCE <u>DOES NOT CONSTITUTE A CONTRACT</u> BETWEEN VAN DYK/SICA AND [T-MOBILE USA].**

No "reasonably careful" Insurance/Claims Manager employed by one of the world's largest telecommunications corporations could ever conclude that the COI actually conferred additional insured coverage despite the disclaimer language boldly stating that the document was for "information only," conveyed no "rights" upon the certificate holder, did not "amend" coverage, did not "extend" coverage, and did not "alter" coverage. Further, the COI explicitly informs T-Mobile USA that if the certificate holder purports to be an additional insured, the policy must be "endorsed" and that a "statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)." T-Mobile USA knew or should have known that the SICA Policy did not contain any endorsement conferring additional insured coverage to T-Mobile USA.

Accordingly, SICA urges this Court to answer the certified question in the negative and follow the majority of jurisdictions in the United States that uphold the disclaimer language over an agent's conflicting error.

III. STATEMENT OF THE CASE

A. The SICA Policy Issued to Innovative Engineering

SICA issued a commercial general liability insurance policy to Innovative bearing policy number S 1643491 that was in effect from January 16, 2012, to January 16, 2013 ("SICA Policy"). Excerpt of Record ("ER") 518-639. The SICA Policy contains forms and endorsements that modify the definitions contained within "SECTION II-WHO IS AN INSURED" within the CGL Coverage Form. In pertinent part, the SICA Policy contains an "Additional Insured-Owners, Lessees, or Contractors-Completed Operations-Automatic Status When Required in Construction Agreement With You" Endorsement (CG 79 21 01 10), which states:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> This endorsement modifies insurance provided under the following"
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> A. 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".

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

"Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional, architectural, engineering or surveying services, including:

(1) The preparing, approving, or failing to pre-pare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(2) Supervisory, inspection, architectural or engineering activities[2].

This coverage shall be excess with respect to the person or organization included as an additional insured by its provisions; any other valid and collectible insurance that person or organization has shall be primary with respect to this insurance, unless this coverage is required to be primary and/or not contributory in the contract or agreement referred to above.

ER 576 (emphasis added).

B. Written Agreements For Professional Services Between Innovative and Omnipoint/T-Mobile NE

1. Professional Services Agreement dated October 17, 2000

[2] Whether T-Mobile USA is an additional insured does not end the coverage analysis. There is no coverage for T-Mobile USA, or T-Mobile NE, by application of the professional services exclusion.

On October 17, 2000, Innovative entered into the PSA with Omnipoint. ER 303-309. Omnipoint was subsumed by T-Mobile NE, not T-Mobile USA, in 2009. ER 229. The PSA states, in pertinent part:

> 6. Insurance. [Innovative] shall maintain the following insurance coverages in full force during the term of this Agreement:
>
> * * *
>
> b. General Liability Insurance. [Innovative] shall carry comprehensive general liability insurance covering all operations by or on behalf of [Innovative] for bodily injury or death, personal injury and property damage liability in an amount not less than One Million Dollars ($1,000,000) aggregate.
>
> [Omnipoint], its officers, directors, and employees shall be named as additional insureds with a full waiver of subrogation by [Innovative] for such insurance.
>
> * * *
>
> d. Certificates of Insurance. Certificates of insurance, as evidence of the insurance required by this Agreement, shall be furnished by the Professional to the Company before any services are commenced. The certificates of insurance shall provide that there will be no cancellation without thirty (30) days prior written notice to the Company. An additional insured endorsement shall accompany the certificates of insurance designating the Company, its officers, directors, and employees as additional insures to the extent required herein.

ER 305. It is undisputed that T-Mobile USA is not a party to the PSA and that Innovative had no obligation to name T-Mobile USA as an additional insured under the terms of the PSA. ER 303-309. It is also undisputed that the PSA relates exclusively to Innovative's services as a

"Professional," consisting of architectural, engineering and/or surveying services that Innovative would provide to Omnipoint. *Id.*

These undisputed facts are material as set against the backdrop of the Underlying Action commenced by Virginia Properties against T-Mobile USA in 2013. ER 5. The work that Innovative performed for Omnipoint/T-Mobile NE that formed the basis for Virginia Properties' lawsuit was performed in 2005, and therefore, was performed pursuant to the terms of the PSA. ER 4. There is no evidence in the record before this Court that a COI was issued to T-Mobile USA relating to the work Innovative performed for Omnipoint in 2005. Therefore, no evidence exists in the record demonstrating that T-Mobile USA relied on a COI issued in connection with the work Innovative performed for Omnipoint in the Underlying Action.

2. Field Services Agreement dated July 8, 2010

On July 8, 2010, Innovative entered into the FSA with T-Mobile NE. ER 499-516. The FSA states:

> This Field Services Agreement ("Agreement") dated July 8, 2010 ("Effective Date"), is made by and between Innovative Engineering, Inc., a New Jersey Corporation ("Contractor"), and the following affiliate(s) or subsidiary(y)(ies) or T-Mobile USA, Inc., all of which are organized under Delaware law (individually and collectively, subject to the provisions of Section 5, below, "Owner"):

T-Mobile Northeast LLC

ER 499 (emphasis added). It is undisputed that the FSA is a written agreement between Innovative and T-Mobile NE, not T-Mobile USA. T-Mobile USA transparently seeks to blur the lines between it and T-Mobile NE by vaguely stating that "T-Mobile and its predecessors employed a contractor named Innovative Engineering, Inc. to provide antenna installation services in the New York area." *See* T-Mobile USA's Opening Brief at p. 3. T-Mobile USA did not employ Innovative. T-Mobile NE and its predecessor, Omnipoint, employed Innovative. Section 5 of the FSA states, in pertinent part:

> 5.2 Contractor expressly acknowledges and agrees that <u>T-Mobile USA, Inc. is not a party to this Agreement</u> and that in no event will T-Mobile USA, Inc. have or incur any liability of any type or character under this Agreement…

ER 503(emphasis added). The FSA expressly sets forth that T-Mobile USA is <u>not</u> a party to the Agreement, which clause is in harmony with the insurance provisions in the FSA. ER 503.

> 7. Insurance and Licenses
>
> 7.1 Contractor agrees to maintain the following insurance coverage in full force during the term of this Agreement or as otherwise directed"
>
> (a) **Commercial General Liability Insurance.** Contractor must maintain commercial general liability insurance, on an occurrence basis, covering all operations by or on behalf of Contractor against bodily injury (including death) and property damage (including

> loss of use), including premises/operations, personal and advertising injury, products/completed operations, and contractual liability. This commercial general liability insurance must provide coverage of not less than one million dollars ($1,000,000) combined single limit per occurrence and two million dollars general aggregate. Such commercial general liability insurance shall include a full waiver of subrogation in favor of Owner [T-Mobile NE], its affiliates and subsidiaries.
>
> * * *
>
> 7.2 **Certificates of Insurance**. Contractor must provide Owner [T-Mobile NE] with certificates of insurance evidencing the coverage required by this Agreement prior to commencing work hereunder. Thereafter, during the term of this Agreement, Contractor will provide Owner with renewed certificates of insurance annually or more frequently if requested by Owner. The certificates of insurance must provide that the policies will not be cancelled without thirty (30) days prior written notice to Owner. Owner will be named as an additional insured under the insurance policies that Contractor is required to maintain under subsections 7.1(a), (b) and (d) of this Agreement. All insurance policies and coverage that Contractor is required to carry and maintain under this Agreement will be primary and non-contributing with respect to any policies carried by Owner and any coverage carried by Owner will be excess insurance.

ER 504-05. T-Mobile USA is not a party to the FSA, a fortiori; none of the foregoing contractual obligations regarding insurance apply to T-Mobile USA.

C. Certificates of Liability Insurance Issued by the Van Dyk Group

On January 18, 2012, the Van Dyk issued a COI that incorrectly designated T-Mobile USA and its subsidiaries and affiliates (the "2012

COI") as the certificate holder. ER 831. The purpose and limitations of the 2012 COI is clearly and unambiguously set forth in bold and capital font at the top of the document:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

Id. (Emphasis in original). The COI further plainly states in bold font that:

> **IMPORTANT: If the certificate holder is an additional insured, the policy(ies) must be endorsed. … A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

Id. (Emphasis in original). Finally, the COI sets forth that:

> THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

Id. The 2012 COI disclaimer language makes reliance on information conveyed in the document itself, and specifically a representation that the certificate holder is an additional insured, objectively unreasonable. The 2012 COI directs the certificate holder to the insurance policy terms and conditions to determine whether it qualifies as an additional insured though an applicable endorsement, even where a statement in the document may appear to confer coverage. The 2012 COI also plainly establishes that information conveyed in the document cannot expand the scope of coverage afforded under the insurance policy itself. Therefore, T-Mobile USA's alleged reliance on the 2012 COI, issued <u>six years</u> after Innovative performed the subject work for Omnipoint, is unreasonable on its face.

D. The Underlying Action

On April 23, 2013, plaintiff Virginia Properties filed an action against T-Mobile USA and Omnipoint connected to an agreement to construct a cellular telephone tower on a portion of the rooftop of the building it owned in New York. ER 311-17. The agreement, entitled "Rooftop Lease," was entered into between landlord, Virginia Properties, and tenant, Omnipoint. ER 319-27. Although T-Mobile USA is listed as a party to be noticed under certain circumstances with respect to the lease, T-Mobile USA repeatedly represented that it was not a party to the lease,

and therefore, not a proper party in the Underlying Action. ER 238-40, 330.

T-Mobile USA and Omnipoint filed a Third-Party Complaint against Innovative on June 23, 2013. ER 329-44. Contrary to T-Mobile USA's contention, Selective did not fully defend Innovative. Instead, it is undisputed that SICA's defense of Innovative was offered under a Reservation of Rights Agreement and Partial Disclaimer, and the cost of Innovative's defense was split with CNA, Innovative's Professional Liability Insurer. ER 292. It is undisputed that the claims asserted against Innovative in the Third-Party Complaint arose out of Innovative's professional architectural and engineering services, and therefore, those claims against Innovative were not covered under the SICA Policy. ER 338 at ¶ 45.

On December 19, 2013, T-Mobile USA moved for summary judgment in the Underlying Action to Dismiss Virginia Properties' Complaint. ER 225-47. In pertinent part, T-Mobile USA argued that:

> … Plaintiff has sued the wrong entities. T-Mobile USA is not a party to the lease and has never been a tenant of the Building. Omnipoint is not a proper party because it was relieved of all obligations and liabilities when it permissibly assigned the lease to T-Mobile NE in 2009.

ER 229.

T-Mobile USA's Senior Corporate Counsel, Karen Crist, submitted a sworn declaration in support of T-Mobile USA's Motion for Summary Judgment. ER 249-53. In pertinent part, that declaration states that "T-Mobile USA is not a party to the Lease" and was "not (and has never been) a tenant of the Premises." ER 250 at ¶ 5. Ms. Crist also stated, under oath, that "T-Mobile USA, Omnipoint, and T-Mobile NE are separate and distinct legal entities." ER 251 at ¶ 9. As a result of the foregoing motion, T-Mobile NE was substituted for T-Mobile USA and Omnipoint as the correct party in interest on January 31, 2014. ER 678-79.

Despite T-Mobile USA's statements made to extricate itself from the Underlying Action, T-Mobile USA never informed SICA that T-Mobile NE was the correct party in interest. Instead, T-Mobile USA continued to demand coverage for itself as an additional insured under the SICA Policy based, allegedly, on the 2012 COI's representation of coverage. T-Mobile USA's position before this Court that it reasonably relied on the representations in the 2012 COI rings hollow and cannot be reconciled with the representations T-Mobile USA made to the court in the Underlying Action.

Virginia Properties' claims were eventually dismissed with prejudice as a result of its alleged serious discovery violations. The

dismissal was the subject of an appeal before the United States Court of Appeals for the Second Circuit. The Second Circuit reversed the dismissal and sanctions award, and remanded the Underlying Action back to the Southern District of New York. Shortly thereafter, Virginia Properties and T-Mobile NE participated in mediation, which resulted in a settlement between only those parties that was finalized on February 1, 2018.

E. T-Mobile USA's Tenders of Coverage to SICA

Through Sedgwick CMS ("Sedgwick"), T-Mobile USA tendered a claim for a defense and indemnification to Innovative on February 1, 2013. ER 684. The tender inaccurately references a contract between Innovative and T-Mobile USA where it states: "[i]n addition, your contract with T-Mobile, USA Inc.… requires that you obtain insurance covering not only you but T-Mobile, USA. Inc. for these claims." ER 684. It is undisputed that T-Mobile USA was the only entity requesting additional insured coverage. *Id.* The letter does not mention T-Mobile NE because only T-Mobile USA was a party to the Underlying Action at that time. *Id.*; ER 311-17. This fact is consistent with Judge Robart's finding that T-Mobile NE had not tendered a claim for AI coverage to SICA as of June 2017. ER 42, fn 16.

After receiving notice of the request for coverage, SICA wrote to Sedgwick on February 7, 2013, and requested "copies of all your

investigation, copies of contracts between our insured and T-Mobile, copies of your insurance policy and any other information that may assist us with the investigation of this claim." ER 346 (emphasis added). Although certain communications occurred between SICA and Sedgwick on behalf of T-Mobile USA in the interim, SICA again wrote to Sedgwick on April 15, 2013, and requested the identical documents, including a copy of T-Mobile USA's insurance policy that had not yet been provided. ER 348.

T-Mobile USA, via Sedgwick, renewed its tender and demanded that SICA pay the cost of its defense on February 25, 2015. ER 772-73. That letter only referenced T-Mobile USA, not "T-Mobile NE," despite the undisputed fact that T-Mobile NE had been substituted as a party in the Underlying Action as a result of T-Mobile USA's repeated contention that it had no connection to the contracts or issues. *Id.* Neither T-Mobile USA nor anyone acting on its behalf ever informed SICA of T-Mobile NE's involvement in the Underlying Suit.

On the following day, SICA properly denied T-Mobile USA's additional insured tender[3]. ER 292. On August 14, 2015, T-Mobile USA

[3] Regardless of whether T-Mobile USA and/or T-Mobile NE qualify as additional insureds under the SICA Policy, the Professional Services Exclusion incorporated into the applicable endorsement affirmatively bars coverage for either putative insured with respect to the Underlying Action.

questioned the basis of SICA's coverage denial. ER 294-95. The email from Ms. Bauer in this regard referenced T-Mobile USA in the subject line and did not reference T-Mobile NE. ER 294. Although the body of Ms. Bauer's email referred to "T-Mobile," there is nothing in the record indicating that T-Mobile USA or anyone acting on its behalf ever informed SICA that T-Mobile NE was the entity seeking AI coverage.

In response to Ms. Bauer's email, SICA's coverage counsel, Dan Kohane, informed T-Mobile USA that SICA was not providing coverage because T-Mobile USA was not an insured under the SICA Policy. ER 297. Thereafter, on August, 25, 2015, T-Mobile USA's coverage counsel, writing on "behalf of [SICA's] insured, [T-Mobile USA]…," threatened to file a lawsuit against SICA because T-Mobile USA was an additional insured. ER 800-01. Again, the only references in the letter were to T-Mobile USA while there is no mention of T-Mobile NE. *Id.* Notably, T-Mobile USA's August 25, 2015, correspondence plainly acknowledges that "Selective and its representatives have wrongfully refused to prove that defense to T-Mobile by incorrectly claiming that T-Mobile 'does not qualify as an additional insured' under the policy." ER 801.

SICA's Washington counsel responded on September 29, 2015, reiterating SICA's position that there was no coverage because T-Mobile USA was not an insured or additional insured under the SICA Policy. ER

803-06. This letter pointed out that Omnipoint may qualify as an additional insured under the PSA Agreement with Innovative. ER 805. Moreover, the letter confirmed that T-Mobile USA was tendering the claim on its own behalf, and not on behalf of Omnipoint, and indicated that if that was not the case, to advise SICA "immediately." *Id.* T-Mobile USA's coverage counsel did not inform SICA of any tender correction, and instead, filed the instant suit against SICA.

F. T-Mobile USA's alleged reliance on the 2012 COI

In support of the position that T-Mobile USA's request for additional insured coverage was the direct result of the erroneous representation in the 2012 COI, T-Mobile USA relies solely upon the Declaration of its Insurance & Claims Manager, Lisa Bauer. ER 121- 24. In pertinent part, Ms. Bauer declared: "The only reason that tender was made on behalf of 'T-Mobile USA' instead of TMNE was because the Certificates of Insurance issued to us by Selective's agent expressly identified 'T-Mobile USA Inc., its Subsidiaries and Affiliates' as the correct additional insureds under the Selective Policy at issue." ER 122 at ¶ 6. The language of the COI, Ms. Bauer's status as T-Mobile USA's professional insurance manager, her knowledge that T-Mobile USA had no written agreement with Innovative, her knowledge that SICA expressly told her that T-Mobile USA was not an insured, her knowledge of the

positions T-Mobile USA took in the Underlying Action, and the inquiry whether the tender was on behalf of Omnipoint, each individually and together collectively render T-Mobile USA's claim of reliance on the 2012 COI unreasonable as a matter of law.

IV. LEGAL ARGUMENT

A. THE CERTIFICATE OF INSURANCE DOES NOT CONFER COVERAGE OR ANY RIGHTS UNDER THE SICA POLICY TO T-MOBILE USA AS A MATTER OF LAW

It is unreasonable to conclude that T-Mobile USA was unable to comprehend the unambiguous boldly worded language of the 2012 COI. T-Mobile USA is one of the largest and most sophisticated telecommunications corporations in the world and employs dedicated Insurance & Claims Managers, such as Lisa Bauer. The bold, capital print on the 2012 COI plainly and unambiguously states:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

Id. (Emphasis in original). The COI further plainly states that:

> **IMPORTANT: If the certificate holder is an additional insured, the policy(ies) must be endorsed. … A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

Id. (Emphasis in original). The COI also sets forth that:

> THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

Id. This Court has recognized the clear and unambiguous character of this disclaimer language:

> the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy.
>
> *Postlewait Const., Inc. v. Great American Ins. Companies*, 106 Wash.2d 96, 100–01, 720 P.2d 805 (1986).

Postlewait is widely recognized as the seminal decision in Washington standing for the proposition that "the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy." *Id.* at 807. In *Postlewait*, Postlewait Construction, Inc.

("Postlewait"), entered into an agreement to lease two cranes to P.K. Contractors ("P.K."). *Id.* at 805. The lease agreement required P.K. to maintain insurance during the lease term for the replacement value of the cranes. *Id.* The coverage was obtained through Great American Insurance Company ("Great American"). *Id.* at 805-06. COIs were issued to Postlewait certifying that the requisite coverage was in full force and effect. *Id.* Upon receipt and reliance on the COIs, Postlewait canceled its own insurance coverage for the cranes. *Id.* Both cranes were damaged while in P.K.'s care, and thereafter, Postlewait made claims directly with Great American. *Id.*

The COI in *Postlewait* did not identify Postlewait as an additional insured nor was it an additional insured under the Great American policy. Nevertheless, Postlewait sought coverage as a third-party beneficiary under the Great American policy. This Court asserted, even in those general circumstances, "the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy." *Id.* at 100-01; *citing United States Pipe & Foundry Co. v. United States Fid. & Guar. Co.,* 505 F.2d 88, 89 (5th Cir. 1974) (certificate of insurance does not constitute a contract between lessor and insurer); *Skezas v. Safway Steel Prods., Inc.,* 85 Ill.App.2d 295, 302, 229 N.E.2d 781 (1967)

(certificate was merely a description of coverage and did not constitute a contract).

T-Mobile USA seeks to make much of the fact that the COI in *Postlewait* did not designate that putative insured as an "additional insured." That fact, however, was immaterial to the conclusions this Court reached. Significantly, the actual COI at issue in *Postlewait* that T-Mobile USA places before this Court via its Motion to take Judicial Notice contains disclaimers that are located in the middle of the document and are not printed in capital or bold font. *See* Exhibit A to Sheridan Decl. in Support of Motion to take Judicial Notice. Based upon this Court's decision in *Postlewait* finding that a non-insured under that insurance policy could not rely on <u>that</u> COI to confer coverage, this Court should similarly find that the 2012 COI at issue here cannot confer coverage because the disclaimers in this COI are more prominently featured, are more specific in their limitations and scope, are placed in multiple places in the document including the top, and are set forth in capital and bold font. The prominently displayed disclaimers in bold and capital font make reliance on the COI at issue here unreasonable as a matter of fact and law, because T-Mobile USA's Insurance and Risk Manager, Lisa Bauer, had the COI with disclaimers before tendering the claim to SICA according to her own Declaration. ER 121-24.

Int'l Marine Underwriters v. ABCD Marine, LLC, 165 Wash. App. 223, 267 P.3d 479 (2011), aff'd, 179 *Wash.*2d 274, 313 *P.*3d 395 (2013), is material to Washington's analysis of erroneously issued COIs. ABCD Marine was retained to provide welding services to NSI and Naknek Barge Lines LLC. *Id.* at 480. In August 2001, Naknek required ABCD Marine to obtain additional insured coverage for Naknek Barge Lines LLC and a related company, Northland Holdings Incorporated. *Id.* ABCD Marine contended that it asked its insurance broker, Alliance, to obtain the required insurance on an International Marine Underwriters ("IMU") policy, but no such coverage was obtained. *Id.* In September 2004, a company related to Naknek and Northland Holdings, NSI, entered into a contract with ABCD Marine that also required it to name NSI as an additional insured. *Id.*

Boogaard, an employee of ABCD Marine, was injured in a forklift accident in October of 2004. *Id.* at 481. The forklift was driven by an NSI employee and Boogaard commenced an action against NSI and Northland Holdings. *Id.* NSI and Northland Holdings counterclaimed for indemnification and breach of contract for ABCD Marine's failure to name those entities as additional insureds. *Id.* at 481-82. Boogaard tendered to ABCD Marine's insurer, IMU. *Id.* at 482. IMU was never asked by ABCD Marine's broker, Alliance, to add NSI/Northland Holding

as additional insureds, however, Alliance issued COIs stating that both entities were additional insureds. The IMU declaratory judgment action ensued.

The *ABCD* appellate court analyzed the impact of the two erroneously issued certificates of insurance by succinctly disposing of the issue:

> From the faulty premise that Cronn was employed by Northland Holdings and/or Naknek, ABCD and Boogaard then argue Northland Holdings <u>and/or Naknek were additional insureds based upon two certificates issued by Alliance for the 2001–02 and 2002–03 policies</u>. As IMU points out, however, "the purpose of issuing a certificate of insurance is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy." Indeed, each certificate indicates that it "is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." <u>Additionally, it is undisputed that Alliance was ABCD and Boogaard's agent, not IMU's agent. ABCD and Boogaard's claim that Alliance was granted "permission" from IMU to add additional insured endorsements is not supported by the citations to the record</u>.

Id. at 484 (emphasis added) (internal citations omitted).

The Ninth Circuit Court of Appeals' decision focused on the last sentence of the above quote and determined that: "unlike the instant case, *ABCD Marine* did not present a question regarding how agency principles interact with the legal effect of COIs under Washington Insurance law."

United States Court of Appeals for the Ninth Circuit Order at p. 11. SICA respectfully submits that the Ninth Circuit has placed undue weight on that dictum from *ABCD*. The holding of *ABCD* stands firm whether Alliance was the broker for the insured, ABCD Marine, or the agent of the insurer, IMU because the "words" on the COI told the recipient of the document that the COI was for informational purposes only, was not the equivalent of an insurance policy, conferred no rights on the certificate holder, and that the certificate did not amend, extend, or alter coverage afforded by the policies identified in the COI.

Accordingly, the legal effect of the erroneously issued COI is the same whether it was issued by SICA's agent or Innovative's broker. T-Mobile USA's arguments to the contrary are unpersuasive, including those arguments that attempt to rehash the inapplicable and legally irrelevant testimony of fact witness, Michael Parlin. Moreover, any finding to the contrary directly conflicts with Washington's long-standing rule of law with respect to claims of estoppel that:

> One may not, by invoking the doctrine of estoppel or waiver, bring into existence a contract not made by the parties and create a liability contrary to the express provisions of the contract the parties did make. The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel.

* * *

> That rationale supports precluding waiver or estoppel in situations where the insured attempts to broaden coverage to protect against risks not stipulated in the policy or expressly disclaimed.
>
> *Saunders v. Lloyd's of London*, 113 Wash. 2d 330, 335–36, 779 P.2d 249 (1989); *citing Saunders v. Lloyd's of London*, unpublished opinion, noted at 52 Wash. App. 1082 (1988), quoting *Carew, Shaw & Bernasconi, Inc. v. General Cas. Co. of Am.*, 189 Wash. 329, 336, 65 P.2d 689 (1937).

Washington precedent regarding the interpretation of COIs and the long-standing legal principle that a claim for estoppel cannot create coverage where none otherwise exists under the policy dictate that this Court should uphold and apply the COI disclaimer language here and reject T-Mobile USA's claims against SICA.

B. WASHINGTON LAW'S TREATMENT OF CERTIFICATES OF INSURANCE IS CONSISTENT WITH THE MAJORITY POSITION ACROSS THE UNITED STATES

The majority of jurisdictions in the United States hold that a COI conveys information only, and that by its express terms and disclaimers, cannot confer any coverage or rights to the certificate holder under the policies identified in the document. *See Taylor v. Kinsella*, 742 F.2d 709, 711-12 (2d Cir. 1984) (language conferring additional insured status in a certificate of insurance did not expand the scope of coverage afforded

under the subject commercial automobile insurance policy) (Federal Court sitting in diversity applying New York law); *SLA Prop. Mgmt. v. Angelina Cas. Co.*, 856 F.2d 69, 73 (8th Cir. 1988) (despite erroneous designation on a certificate of insurance, it is clear that such an error is insufficient to create coverage under the subject policy where discrepancy exists between insurance policy and COI); *Alabama Elec. Co-op., Inc. v. Bailey's Const. Co.*, 950 So. 2d 280, 285-86 (Ala. 2006) (misrepresentation of additional insurance coverage in COI did not confer coverage because it was unreasonable to rely on the COI to confer coverage based upon its disclaimer language) *citing TIG Insurance Co. v. Sedgwick James of Washington*, 184 F.Supp.2d 591 (S.D.Texas 2001); *Granite Constr. Co. v. Bituminous Ins. Cos.*, 832 S.W.2d 427, 429 (Tex.Ct.App.1992); *Continental Cas. Co. v. Signal Ins. Co.*, 119 Ariz. 234, 238, 580 P.2d 372, 376 (1978) ("a Certificate of Insurance cannot contradict the terms of the policy; it only provides information as to the policy's contents"); *Westfield Ins. Co. v. FCL Builders, Inc.*, 948 N.E.2d 115, 120 (Ill. App. Ct. 2011) (where the COI disclaimer expressly refers to the policy terms and conditions, a third-party cannot rely on the certificate to establish additional insured coverage under the identified policy); *United Stationers Supply Co. v. Zurich American Insurance Co., et al.*, 386 Ill.App.3d 88, 896 N.E.2d 425 (App. Ct. 2008) (the express language of the certificate of

insurance disclaims any rights to the certificate holder, and expressly does not alter the insurer's liability on the policy); *Bradley Real Estate Trust, et al. v. Plummer & Rowe Insurance Agency, Inc.*, 609 A.2d 1233, 1235, 136 N.H. 1, 4 (NH 1992) (the disclaimers of liability in the COI are clear, rendering the certificate "a worthless document; it does no more than certify that insurance existed on the day the certificate was issued."); *Selective Ins. Co. v. Hospicomm, Inc.*, 2014 WL 4722776 (N.J. Super. App. Div. 2014) (a COI expressly confers no rights on the certificate holder even when it is designated as an additional insured in the document); *Hargob Realty Associates, Inc. v. Fireman's Fund Ins. Co.*, 901 N.Y.S.2d 657, 659, 73 A.D.3d 856 (2nd Dep't. 2010) ("[t]he USAI certificate of insurance proffered in opposition, listing the plaintiff as additional insured under the subject policy, was insufficient to alter the language of the policy itself, especially since the certificate recited that it was for informational purposes only, that it conferred no rights upon the holder, and that it did not amend, alter or extend the coverage afforded by the policy"); *Am. Ref-Fuel Co. of Hempstead v. Res. Recycling, Inc.*, 248 A.D.2d 420, 423-24, 671 N.Y.S.2d 93, 96 (2d Dep't 1998) (certificate of insurance issued by insurer's agent erroneously naming plaintiff as an additional insured did not confer coverage based on clear disclaimer language in certificate and because "the doctrine of estoppel may not be

invoked to create coverage where none exists under the policy"); *Shenandoah Life Ins. Co. v. French*, 373 S.E.2d 718, 720 (Va. 1988) (disclaimer language in the COI put the insured on notice that terms of the identified insurance policy controlled and misinformation in the certificate could not confer coverage); *Poling v. N. Am. Life & Cas. Co.*, 593 P.2d 568, 572 (Wyo. 1979) (a certificate of insurance is only evidence of coverage, and that policy language controls where there is a conflict with incorrect information set forth within the COI); Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 242:33 (3d ed. 1997) ("Where an entity requires another to procure insurance naming it an additional insured, that party should not rely on a mere certificate of insurance, but should insist on a copy of the policy. A certificate of insurance is not part of the policy—if it states that there is coverage but the policy does not, the policy controls."); Richard H. Glucksman & Glenn T. Barger, *Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation*, 21 Construction Law 30, 33 (Winter 2001) ("A developer or general contractor generally should demand more proof [than just a certificate of insurance], including a specific additional insured endorsement, to confirm their additional insured status"); Additional Insured Coverage: Avoid Liability and Indemnification Pitfalls Outline, TSXH02 ALI-CLE 29; *citing Sixty Sutton Corp. v. Illinois Union Ins. Co.*, 34 A.D.3d 386, 389

(1st Dep't. 2006) ("the certificate of [insurance]... is insufficient to confer coverage where the insurance policy itself does not cover the company."); *American Motorist Ins. Co. v. Superior Acoustics, Inc.*, 277 A.D.2d 97 (1st Dep't. 2000); *St. George v. W.J. Barney Corp.*, 270 A.D.2d 171 (1st Dep't. 2000); *Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, 225 A.D.2d 443 (1st Dep't. 1996); *Buccini v. 1568 Broadway Assoc.*, 250 A.D.2d 466 (1st Dep't. 1998); *Kennelty v. Darlind Constr., Inc.*, 260 A.D.2d 443 (2d Dep't. 1999); *McGill v. Polytechnic Univ.*, 235 A.D.2d 400 (2d Dep't. 1997); *see also Nautilus Ins. Co. v. Southern Vanguard Ins. Co.*, 899 F. Supp. 2d 538, 550 (N.D. Tex. Aug. 29, 2012) (in rejecting party's argument that it detrimentally relied on a certificate of insurance, the court noted "[t]he doctrine of estoppel cannot be used to create insurance coverage when none exists by the terms of the policy.") (internal quotations omitted); *Modern Builders, Inc. v. Alden-Conger Pub. Sch. Dist. # 242*, 2005 U.S. Dist. LEXIS 18736, at n.4 (D. Minn. Aug. 30, 2005) ("[a]n ACORD certificate of insurance containing such language which erroneously represents a party as an additional insured has been found not to be binding unless the policy is actually amended."); *Bituminous Cas. Corp. v. Aetna Life & Cas.*, 1998 U.S. Dist. LEXIS 23161, at *15 (S.D.W.V. Sept. 24, 1998) ("a certificate containing the disclaimer as quoted from the certificate of insurance in this case is

alone insufficient to bestow coverage upon one named as an 'additional insured' on the certificate when it is conclusively established that the individual or entity was not added as a named insured onto the policy itself.").

C. THE UNDISPUTED FACTS WITHIN THE RECORD BEFORE THIS COURT ARE DISTINGUISHABLE FROM THE INSTANCES WHERE COURTS HAVE HELD THAT A COI CAN CONFER COVERAGE

T-Mobile USA relies on a COI issued six years after work was completed by T-Mobile NE's predecessor's professional services and engineering contractor, Innovative. T-Mobile USA knew it was not a party to any professional services written agreement with Innovative – indeed, it insisted that express language be included in the FSA stating that it was not a party to that agreement. ER 503. T-Mobile USA relied upon these undisputed facts to extricate itself from the Underlying Action through a motion for summary judgment in 2013. ER 225-47; ER 249-53.

The authority relied upon by T-Mobile USA for the proposition that an agent's error in a COI can impair the COI's disclaimer language is readily distinguishable from the undisputed facts within the record here. Each decision T-Mobile USA relies upon shares a material fact that is not present before this Court: a COI was issued to the putative additional insured in direct connection with permitting the named insured to

commence its work at a project, and the putative insured relied on that representation to its detriment. *See 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 2010 WL 681284, at *8 (W.D.N.Y. Feb. 19, 2010), *aff'd in part, rev'd in part and question certified*, 634 F.3d 112 (2d Cir. 2011) (COI issued by insurer's agent only days prior to when the named insured commenced its work at the project. In reversing the District Court's decision, the Second Circuit acknowledged that a split in authority existed in New York appellate courts regarding whether a COI could confer coverage, and that "the Third and Fourth Departments have held that a certificate of insurance can estop an insurance provider from denying coverage where the parties intended to provide coverage to the party seeking it if the certificate was issued by an agent within the scope of its authority, <u>and if the party seeking coverage reasonably relied on the certificate of insurance by, for example, beginning construction work</u>." *10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 122 (2d Cir. 2011) (emphasis added). The Second Circuit Court of Appeals certified the unresolved question to the New York Court of Appeals, however, before the issue was heard, the parties settled the action); *Bucon, Inc. v. Pennsylvania Mfg. Ass'n Ins. Co.*, 151 A.D.2d 207, 210, 547 N.Y.S.2d 925 (1989) (named insured subcontractor was not permitted to commence its work by the general contractor until a correct

COI was procured designating the general contractor as an additional insured. The putative additional insured's reliance on the representations in the COI was directly connected to permitting the named insured to begin its work under the subcontract agreement, as evidenced by the rejection of the first COI procured that did not contain the correct and required information); *see also Lenox Realty Inc. v. Excelsior Ins.* Co., 255 A.D.2d 644, 646, 679 N.Y.S.2d 749 (1998) (putative additional insured contractor permitted named insured to proceed with work under the contract based on its reliance on COI); *Marlin v. Wetzel Cty. Bd. of Educ.*, 212 W. Va. 215, 226, 569 S.E.2d 462, 473(2002) (putative additional insured reasonably relied on the representation in a COI to its detriment, resulting in letting the named insured perform construction work on the project. Because the third-party reasonably relied on the representation to its detriment in connection with the work the named insured performed for it, the insurer was estopped from denying coverage).

Contrary to the foregoing authority, it is undisputed here that T-Mobile USA had no connection to the professional services work Innovative performed for Omnipoint in 2005. It is therefore axiomatic that the 2012 COI upon which T-Mobile USA allegedly relies bears no connection to the commencement of Innovative's work or the events that form the basis of the Underlying Action. Indeed, the balance of the

authority relied upon by T-Mobile USA is inapplicable to the facts and issues presented to this Court. *See Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union Prop. & Cas. Co.*, 482 N.W.2d 600, 604 (N.D. 1992) (addresses representation made by insurer's agent in a COI that auto insurance coverage purchased by named insured was in effect on date of an auto loss); *Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co. of Georgia*, 337 F. Supp. 2d 1339, 1355 (N.D. Ga. 2004) (unlike the instant case where the Ninth Circuit has conclusively held that COIs cannot alter or amend provisions of the insurance policy itself, the parties in *Sumitomo* did not submit any authority to the court on the issue of whether the disclaimer language in the COI makes reliance unreasonable as a matter of law. The *Sumitomo* court based its decision, in pertinent part, on precedent standing for the proposition that the COI was intended to be incorporated into the subject insurance policy by virtue of the insurer's agent's representations. No such argument is advanced before this Court); *W. Am. Ins. Co. v. J.R. Const. Co.*, 334 Ill. App. 3d 75, 85, 777 N.E.2d 610, 618 (2002) (putative additional insured qualified as an insured under the subject insurance policy in a number of ways separate and apart from a blanket AI endorsement in the policy similar to the one at issue in this action. Thus, the *West Am.* court held that the COI alone did not confer coverage, but instead, "the certificate and the policy specifically

described therein, together with the confirmation made in the November 14, 1997, letter, and [the insurer's] own internal documents, we conclude, as a matter of law, that J.R. Construction was a named additional insured under the instant policy."); *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991) (recognizing that "[t]he majority view is that where a certificate of insurance, such as the ACORD certificate, expressly indicates it is not to alter the coverage of the underlying policy, the requisite intent is not shown and the certificate will not affect a change in the policy." The COI in *Mountain Fuel Supply* was different because it could be read to alter the policy terms and conditions).

Based on the foregoing, the authority that T-Mobile USA places before this Court is wholly inapplicable and readily distinguishable from the undisputed facts within the record here.

D. VAN DYK'S ISSUANCE OF THE 2012 COI CONTAINING ERRONEOUS INFORMATION DOES NOT VOID THE CLEAR AND UNAMBIGUOUS DISCLAIMER LANGUAGE IN THE COI AND THEREFORE, T-MOBILE USA'S ALLEGED RELIANCE ON THAT DOCUMENT IS UNREASONABLE AS A MATTER OF LAW

The Ninth Circuit observed that the rule of law announced in *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 178 Wash.2d 120, 309 P.3d 372 (2013) is at "loggerheads" with how Washington courts interpret COIs based upon *Postlewait* and its progeny.

SICA respectfully disagrees with that characterization of *Chicago Title* as applied to the language in the 2012 COI. The Ninth Circuit cites *Chicago Title* for the broad proposition that a principal should be bound by the acts of its agent when an agent acts with apparent authority. *Chicago Title*, however, dealt with an agent that violated several provisions of Washington's insurance code and regulations that were in place at the time, which violations were imputed onto the insurer. *Id.* at 379. The alleged violations involved the agent's unlawful solicitation of business. *Id.* The acts of the agent in *Chicago Title* are readily distinguishable from Van Dyk's act here of issuing a COI[4] that expressly advised the recipient that the document: was for informational purposes only; did not confer any rights on the certificate holder; did not amend coverage; did not extend coverage; did not alter coverage; did not constitute a contract between Van Dyk/SICA and T-Mobile USA; and that no additional insured coverage exists without the proper endorsement within the SICA Policy, even if the COI identifies the certificate holder as an additional insured.

[4] SICA further notes for this Court that the 2012 COI was issued by a New Jersey independent agent, Van Dyk, with respect to a New York engineering project, and identified a CGL insurance policy issued in New Jersey by SICA, a New Jersey insurer, to Innovative, a New Jersey corporation.

T-Mobile USA's positions before this Court regarding its reliance on Van Dyk's error naming T-Mobile USA as an additional insured in the 2012 COI warrants careful legal and factual scrutiny. First, although the Ninth Circuit looks to *Chicago Title* as setting forth the parameters of Washington agency law, it is respectfully submitted that this State's pattern civil jury instructions provide a helpful synthesis of governing authority to guide this Court's analysis. WPI 50.02.01 states that a plaintiff must prove each of the following to demonstrate that an agent's act binds its principal:

> First, that the words or conduct of (principal's name) conveyed to the plaintiff that (agent's name) had the authority to perform the particular act on (principal's name)'s behalf;
>
> Second, that the words or conduct of (principal's name) actually led the plaintiff to believe that (agent's name) had the authority to so act; and
>
> Third, that the words or conduct of (principal's name) would have led a reasonably careful person under the circumstances to believe that (agent's name) had the authority to so act.

Stated differently, to prove that Van Dyk's error binds SICA, T-Mobile USA must prove that it "actually" believed that Van Dyk had the ability to confer additional insured status through the 2012 COI and that its belief was objectively reasonable. *King v. Riveland*, 125 Wash. 2d 500, 507, 886 P.2d 160, 165 (1994).

"Words" and "conduct" of the principal, here, SICA, are central to all three elements of a plaintiff's burden of proof. The "words" here are those contained in the 2012 COI. The "words" on the 2012 COI expressly inform the certificate holder, T-Mobile USA, that the document was for information only, conferred no rights on T-Mobile USA, did not alter, extend, or amend coverage, did not constitute a contract between T-Mobile USA and SICA/Van Dyk, and that no additional insured coverage existed without an endorsement conferring coverage within the SICA Policy, <u>even where the COI identifies the certificate holder as an additional insured</u>. No reasonably careful person/corporation in the position of T-Mobile USA could reasonably believe that Van Dyk could affect something contrary to SICA's clear and unambiguous "words" of disclaimer on the COI.

Here, the <u>sole</u> evidence within the record offered in support of the argument that T-Mobile USA reasonably "believed" that the 2012 COI conferred additional insured coverage is the Declaration of Insurance & Claims Manager, Lisa Bauer. ER 121- 24. In pertinent part, the Declaration states that: "The only reason that tender was made on behalf of 'T-Mobile USA' instead of TMNE was because the Certificates of Insurance issued to us by Selective's agent expressly identified 'T-Mobile USA Inc., its Subsidiaries and Affiliates' as the correct additional insureds

under the Selective Policy at issue." ER 122 at ¶ 6. Ms. Bauer's declaration is more noteworthy for its missing information than for the singular self-serving statement offered. It does not state:

- When T-Mobile USA received the 2012 COI;
- Who received the 2012 COI;
- From whom T-Mobile USA received the 2012 COI;
- When received, T-Mobile USA knew that the 2012 COI was issued by SICA's agent; and
- How T-Mobile USA knew that the 2012 COI was issued by SICA's agent.

Equally lacking explanation from Ms. Bauer, or anyone at T-Mobile USA, is why T-Mobile USA should be permitted to disregard all of the prominent, clear, bold, and capital disclaimer letters and instructions in the 2012 COI, and instead focus only on the incorrect statement in the 2012 COI that T-Mobile USA was an "additional insured." Moreover, Ms. Bauer tendered a claim on behalf of T-Mobile USA when she was in possession of the PSA, the FSA, and either had or should have had a copy of the SICA Policy, knowing T-Mobile USA was not a party to the written agreements, and therefore could not qualify as an additional insured. Even if Ms. Bauer did not know the foregoing, a reasonably careful claims professional under the circumstances would have heeded the warning in the 2012 COI that:

> **IMPORTANT: If the certificate holder is an additional insured, the policy(ies) must be endorsed. … A**

> **statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

ER 831(emphasis in original). Simply stated, a reasonably careful claims professional under the circumstances would have known that the error in the 2012 COI did not confer any rights or coverage where none otherwise existed under the SICA Policy.

Notwithstanding the foregoing, T-Mobile USA's position that it believed it was an additional insured based on the error within the 2012 COI warrants further scrutiny in light of the positions T-Mobile USA took in the Underlying Action. ER 225-47; 249-53. T-Mobile USA could not have a reasonable belief that it qualified as an additional insured while the same entity contemporaneously took the position before the Underlying Court that it had no legal or factual connection to that action. These vastly inconsistent positions substantially undermine the arguments advanced before this Court and the testimony set forth in Ms. Bauer's supporting declaration. The inconsistencies between the T-Mobile USA additional insured tender and T-Mobile USA's motion for summary judgment in the Underlying Action are striking.

Based on the foregoing, the "words" of clear disclaimer conveyed by SICA within the 2012 COI could not lead a reasonably careful person/corporation, such as T-Mobile USA, to believe it was an additional

insured under the SICA Policy, especially when considering the positions it took to extricate itself from the Underlying Action. Because SICA's "words" expressly state that the document cannot convey rights, is for information only, cannot amend, extend, or alter coverage, is not a contract between the certificate holder and the insurer or its agent, and that no additional insured coverage exists without the proper endorsement within the SICA Policy even where the COI lists the certificate holder as an additional insured, T-Mobile USA's arguments to the contrary herein should be summarily rejected.

V. CONCLUSION

For all of the foregoing reasons, SICA respectfully urges this Court to find that the COI does not confer any coverage or rights to T-Mobile USA.

RESPECTFULLY SUBMITTED this 2nd day of January, 2019.

BETTS, PATTERSON & MINES, P.S.

By *s/ Jeffrey S. Tindal*
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By *s/ Michael J. Marone*
Michael J. Marone, *Pro hac vice pending*

CERTIFICATE OF SERVICE

I, Karen Langridge, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101.

2) By the end of the business day January 2, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **SICA's Answering Brief; and**
- **Certificate of Service.**

Counsel for Plaintiff, T-Mobile USA	[ ] U.S. Mail
Michael A. Moore, Esq.	[ ] Hand Delivery
Kelly H. Sheridan, Esq.	[ ] Facsimile
Corr Cronin, LLP	[ ] Overnight
1001 Fourth Avenue	[X] ECF E-service
Suite 3900	
Seattle, WA 98154	

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

DATED this 2nd day of January, 2019.

/s Karen Langridge
Karen Langridge, Legal Assistant

BETTS, PATTERSON & MINES, P.S.

January 02, 2019 - 3:00 PM

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