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# Wash. Ruling Offers Key Safeguards For Additional Insureds

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It is common in certain commercial relationships for contracting parties to agree that one will obtain insurance and name the other as an "additional insured" on the policy. For example, these arrangements are often seen in the construction industry, between vendors and vendees, and between service providers and manufacturers.

The obvious benefit to the additional insured is the protection of coverage that it does not have to purchase on its own behalf. However, because the additional insured is outside of the relationship between insurer and policyholder, the additional insured usually does not have access to all policy-related documents.

In order to demonstrate that the other party did, in fact, procure the contractually required coverage, it is common for the additional insured to receive a certificate of insurance, or COI, that sets forth the limits of coverage and identifies parties insured under the policy. The COI may be issued by the policyholder's insurance broker or by the insurance company's agent.

Where there are inaccuracies on the COI — where the COI indicates that coverage exists beyond the scope of the actual policy — the additional insured could be at risk. The question of coverage for a would-be additional insured, as indicated on a COI but not in the policy, has been hotly litigated.

The Supreme Court of Washington, in T-Mobile USA Inc. v. Selective Insurance Company of America, recently strengthened the protections afforded to an additional insured where the inaccurate COI was issued by the insurance company's agent. In T-Mobile, the Supreme Court of Washington answered, in the affirmative, the following question certified from the United States Court of Appeals for the Ninth Circuit: "Whether an insurance company is bound by its agent's written representation — made in a certificate of insurance — that a particular corporation is an additional insured under a given policy."

T-Mobile Northeast engaged a contractor to assist with the construction of a rooftop cell phone tower. Pursuant to the contract between T-Mobile Northeast and the contractor, the contractor was to obtain general liability insurance, to provide T-Mobile Northeast with COIs evidencing the coverage on an annual basis, and to name T-Mobile NE as an additional insured under the policy.

The contractor purchased such a policy from Selective Insurance Company of America. The policy included a provision extending coverage to third parties, like T-Mobile Northeast, to whom the contractor obligated itself in a separate contract to add as additional insureds under its insurance policy.

T-Mobile Northeast's parent company, T-Mobile USA, was not a party to the contract between T-Mobile Northeast and the contractor, although T-Mobile USA did approve the contract as to form. The terms of the policy therefore did not confer additional insured status on T-Mobile USA. However, Selective's agent issued numerous COIs over approximately seven years to "T-Mobile USA Inc., its Subsidiaries and Affiliates" stating that they were "included as an additional insured" for certain coverages under the policy.

The COIs were industry-standard forms with industry-standard disclaimers including, in bold capital letters, that the COI

- "is issued as a matter of information only and confers no rights upon the certificate holder";
- "does not affirmatively or negatively amend, extend or alter the coverage afforded by the" insurance policy; and
- "does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder."

Further, the COI stated in bold letters, "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)."

The agent signed the COIs as the "Authorized Representative" of Selective. Selective never objected to the COIs, which the agent indicated it issued based on information from the insured contractor.

Later, a dispute arose regarding the construction of the rooftop cell phone tower, and the rooftop's owner sued both the contractor and T-Mobile USA (but not T-Mobile Northeast). Both T-Mobile USA and the contractor tendered the owner's claim to Selective, who accepted the contractor's and rejected T-Mobile USA's. T-Mobile USA sued Selective over the costs it incurred defending itself in the underlying construction litigation.

After Selective prevailed against T-Mobile USA on summary judgment, T-Mobile USA appealed. The Ninth Circuit certified the following question to the Washington 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?

In posing this question, the Ninth Circuit had already decided certain underlying issues, including that the agent acted with apparent authority but that the agent's representation was inconsistent with the policy. The Ninth Circuit further had found that the certificate included broad disclaimers regarding the certificate's ability to "amend, extend or alter the coverage afforded by" the policy.

The Washington Supreme Court answered the certified question in the affirmative on four grounds: (1) that an insurer is generally bound by its agent's representations; (2) that generic disclaimers could not

override specific language on the COI; (3) that precedent holding a COI is not the equivalent of a policy was distinguishable; and (4) that public policy supported holding insurers to their agents' representations.

First, the court applied the general rule that an insurance company is bound by agent representations made within the scope of the agent's apparent authority, where the recipient of the agent representations, acting in good faith, has no actual or constructive knowledge of private instructions to the contrary. The Ninth Circuit had already ruled that Selective's agent had acted with apparent authority when it issued the COI, and thus necessarily decided that T-Mobile USA's reliance upon the COI was reasonable.

Second, the court disposed of arguments regarding the standard-form disclaimers on the COI. Because the representation that T-Mobile USA was an additional insured had been specifically written into the COI it trumped the general, preprinted, boilerplate disclaimers. In addition, the purpose of a COI is to inform an additional insured of its status under the policy, and to allow the disclaimers to overcome the specific representations in the COI meaningless would make the entire COI pointless. The court characterized such an outcome as rendering the COI entirely lacking in informational value, and allowing it to set a trap for the certificate holder.

Third, the court distinguished prior authority holding that the COI, although informing the recipient that insurance has been obtained, is not the equivalent of an insurance policy. That authority arose in the context of COIs that were issued by the policyholder's broker — not the insurer's agent — and did not purport to confer additional insured status.

This case involved explicit representations of additional insured status, made by the insurer's agent, and the fact that those representations were made in a COI was incidental. As the court reiterated, "An agent's authorized or apparently authorized representation is a representation, whether it is transmitted via letter, e-mail, certificate of insurance, or something else."

Finally, the court disagreed with public policy arguments raised by the American Property and Casualty Insurance Association, which filed an amicus brief asserting that fundamental contract certainty would be undermined by allowing a COI to supplant policy terms. To the contrary, the court held that public policy was better advanced by binding insurance companies to the representations of their agents made with actual or apparent authority.

T-Mobile offers a commonsense approach to analyzing the impact of a COI furnished by the insurer's agent. Contracting parties frequently negotiate for one party to procure insurance that benefits the other. Because the would-be additional insured is outside of the insurer-policyholder relationship, that party commonly has no choice but to rely upon representations — such as those found in the COI in T-Mobile — regarding its coverage status.

Although in T-Mobile, the additional insured status was conferred on an entity that was not a party to the underlying contract with the policyholder, its holding that the agent of the insurer's specific representations overcomes boilerplate form disclaimers is a win for policyholders and entities asserting additional insured status. The opinion not only provides protection for such parties in Washington, but also lays out principled arguments that potential additional insureds may use to pursue their contractual rights in other jurisdictions.

Would-be additional insureds are advised to request COIs or other written representations from the

insurer's agent to reap the greatest potential benefit from this decision. As discussed above, however, that may not always be possible because COIs are not always issued by the insurer's agent — they might instead be issued by the policyholder's broker. Despite this decision, a best practice for would-be additional insureds is to obtain not just a COI, but the actual additional insured endorsements, or the entire policy itself, and to analyze those to make sure they are consistent with the coverage being requested from the contracting party.

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