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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 13-0670

IN THE
SUPREME COURT OF TEXAS

IN RE DEEPWATER HORIZON

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF REHEARING

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INTRODUCTION AND SUMMARY: THE COURT SHOULD GRANT REHEARING

Uncertainty is anathema to business. But uncertainty is what the Court's opinion engenders. The Court's opinion significantly departs from four well-established and certain principles governing additional-insured coverage, leaving in their stead only uncertainty and the specter of increased litigation:

1. External terms are incorporated into an insurance policy only by an explicit reference leaving no doubt as to the intention of the parties. Contrary to this rule in place in Texas for more than a century, the Court's opinion incorporates terms of the drilling contract into the policies without any explicit reference, thus endorsing incorporation by implication.

2. Limitations on coverage must be expressed in clear and unambiguous policy language. Here, the Court's opinion does just the opposite, limiting liability even while recognizing that the insurance policies contain no language explicitly limiting the scope of additional-insured coverage.

3. The scope of additional insured coverage is determined by the policy and not by the underlying contract. The Court's opinion looks to the underlying contract between two insureds rather than the insurance policies to determine the scope of coverage.

4. A certificate of insurance is for information purposes only; it does not confer or abrogate rights. Incorrectly distinguishing this case from *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.* based on the existence of a certificate of insurance, the Court's opinion gives new and unprecedented legal significance to such certificates.

These departures will have a serious adverse effect on NAM's members, who rely on the plain language of insurance policies, the certainty of rules governing incorporation by reference and additional-insured coverage, and the clear separation between insurance coverage and indemnity obligations. The

Court's opinion eliminates clear rules in favor of uncertainty. Uncertainty will mean more litigation over additional-insured coverage for NAM's members.

The Court's decision in this case may have been colored by the perception that BP is seeking a windfall of $750 million in insurance coverage for which it did not bargain with Transocean. That perception is faulty for numerous reasons. But, more importantly, the reach of the Court's opinion is not limited to BP and the catastrophic oil spill presented in this particular case. It will set precedent for all policies that include an additional-insured endorsement.[1]

NAM respectfully urges the Court to grant rehearing and, on rehearing, to hold that the language in the policies written by the insurers here did not expressly incorporate any limitations from the drilling contract between BP and Transocean.

[1] *See* Bruce Wilkin, *Ticking Time Bombs in Indemnity and Insurance Obligations*, TEX. LAWYER (April 7, 2015) ("While this case involved the indemnity and insurance provisions in a drilling contract, the court's holding was not specific to the oil and gas industry. After *In re Deepwater Horizon*, a party must pay close attention to the interplay between the indemnity/insurance obligations in any type of contract and the insuring language in the applicable polices."); Michael A. Orlando & Mike A. Orlando, Jr., *In re Deepwater Horizon: Additional Insured Questions Resolved*, http://www.irmi.com/expert/articles/2015/orlando03-insurance-maritime-law.aspx (Mar. 2015) ("The court's decision carries broad implications/lessons for not just energy and marine insurers but to all who deal with the scope and interpretation of additional insured issues in liability policies generally.").

INTEREST OF AMICUS

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

NAM's members, both in Texas and nationwide, have a vital interest in the predictable and consistent interpretation of insurance policies and thus in maintaining the clear rules in place for more than 125 years. Any change to those rules will have an adverse effect on the manufacturing industry.

Amicus has no direct financial interest in the outcome of this litigation. The BP Appellants are members of NAM. No financial contributions have been or will be made to amicus by the BP Appellants or their affiliates in connection with the preparation of this brief. The fees for this brief will be paid solely by amicus.

ARGUMENT IN SUPPORT OF REHEARING

1. The Court's opinion conflicts with the rule that external terms are incorporated into an insurance policy only by an explicit reference leaving no doubt as to the intention of the parties; the Court instead condones incorporation by implication.

The law in Texas has been clear for more than a century:

> The policy is the contract; and if outside papers are to be imported into it, this must be done *in so clear a manner as to leave no doubt* of the intention of the parties.

Goddard v. East Tex. Fire Ins. Co., 1 S.W. 906, 907 (Tex. 1886) (emphasis added); *accord Urrutia v. Decker*, 992 S.W.2d 440, 442 (Tex. 1999) (external terms are incorporated into an insurance policy only "by an *explicit reference clearly indicating* the parties' intention to include that contract as part of their agreement") (emphasis added).

Nothing in Transocean's policies met this standard. No language expressly incorporated the terms of the drilling contract into the policies. In fact, reviewing a similar policy, the Houston First Court of Appeals concluded that the terms of a contract were *not* incorporated into an insurance policy and did not impact the scope of additional-insured coverage. *Phillips Petroleum Co. v. St. Paul Fire & Marine Ins. Co.*, 113 S.W.3d 37, 44 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (policy providing that Phillips was an additional insured under the policy "as required by contract" with the named insured did not evidence a clear intent to incorporate the terms of the external contract into the policy). The Court's

opinion, however, does not even mention the contrary and well-reasoned holding in *Phillips*. The Court's opinion should address the contrary authority and, in light of it, hold that the drilling contract was not expressly incorporated into the contract. At the very minimum, the Court should explain why *Phillips* is not persuasive and either distinguish or disapprove its holding, because its holding is in direct conflict with this Court's opinion.

In fact, nowhere in its opinion does the Court explain exactly where or how the drilling contract was expressly incorporated into the policies. This omission has prompted commentators to question just how the Court reached this result:

- The Court "did not explain at length how Transocean's policies directed the court to consider the terms of the drilling contract in relation to limitations on the scope of coverage."[2]

- The decision imposes coverage limitations even though the policy extended coverage to any person or entity that the insured is obligated by contract to provide insurance "without expressly directing the insurer or a court to any limitations on coverage for persons or entities meeting this requirement."[3]

- "Transocean's policies did not explicitly state that the coverage afforded under the additional insured provisions was limited in scope such that it matched the scope of Transocean's obligation to procure insurance for BP as stated in the drilling contract."[4]

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[2] Orlando & Orlando, *In re Deepwater Horizon: Additional Insured Questions Resolved*.

[3] Micah Skidmore, *Additional-Insured Concerns Surface In Deepwater Horizon*, Law 360, http://www.law360.com/insurance/articles/ 624479?nl_pk=7d1d12fd-a91a-4ad0-8e97-84f5c1a173db&utm_source= newsletter&utm_medium=email&utm_campaign=insurance (Feb. 25, 2015).

[4] Orlando & Orlando, *In re Deepwater Horizon: Additional Insured Questions Resolved*.

Here, instead of requiring an express intent to incorporate an external document in so clear a manner as to leave no doubt, the Court instead condones incorporation by drive-by reference, by mention, by implication – the exact opposite of clear and express.[5] The Court has thus substituted uncertainty for certainty, rewritten insurance law in Texas, and invited coverage litigation under every policy that mentions an external document:

- "The Texas Supreme Court's *Deepwater Horizon* decision will also prompt questions about how explicit a reference within an insurance policy must be or what nexus that reference must have with a coverage limitation before additional-insured status is circumscribed."[6]

- "'[The opinion] begs the question: Given the standard that's been applied, how direct does the policy have to be in pointing to another document, or how clearly does the policy have to specify a limitation for the court to say it will limit coverage?'"[7]

NAM respectfully urges the Court to grant rehearing and to return Texas to a century of case law requiring express incorporation of external documents.

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[5] 2 COUCH ON INSURANCE § 18.23 (3d ed. updated Nov. 2014) (elec. version) ("Separate documents may become a part of a contract of insurance by . . . a clear reference in the policy that they are intended to be a part thereof. *To have this effect, the intent to incorporate them should be plainly manifest and not dependent upon implication*.") (emphasis added).

[6] Skidmore, *Additional-Insured Concerns Surface In Deepwater Horizon*.

[7] Jeff Sistrunk, *Deepwater Horizon Ruling Keeps Policyholders on Toes*, Law360, http://www.law360.com/articles/621723/deepwater-horizon-ruling-keeps-policyholders-on-toes (Feb. 13, 2015) (quoting Micah Skidmore, insurance partner at Haynes & Boone).

2. The Court's opinion conflicts with the rule that limitations on coverage must be expressed in clear and unambiguous policy language; taking the opposite approach, the Court limits coverage even though recognizing that the insurance policies contain no language explicitly limiting the scope of additional-insured coverage.

This Court has long adhered to the rule that limitations on coverage must be expressed in clear and unambiguous policy language. *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660, 668 (Tex. 2008); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). The Court abandons that rule in this case. In fact, in its opinion, the Court expressly recognizes that the policy does not meet this standard: "**Transocean's insurance policies contain no language explicitly limiting the scope of additional-insured coverage**." Op. at 9 (emphasis added).

The Court should not depart from well-established rules to deny coverage to BP in this case involving a catastrophic spill. Those rules have to work in everyday situations involving routine insurance claims. The Court should not imply limitations on the scope of additional-insured coverage not expressly stated in the policy. Insurers are immensely capable of writing policies that expressly limit additional-insured coverage. In fact, case law and form books show they

have been doing just that for more than a decade.[8] There is no need to imply into the policies here what the insurers could have expressly written.

The Court should grant rehearing and hold that the policies failed to contain language expressly limiting the scope of additional-insured coverage.

3. The Court's opinion conflicts with the rule that the scope of additional-insured coverage is determined by the policy and not the underlying contract.

The settled rule before the opinion issued in this case, in Texas and elsewhere, is that additional-insured coverage is determined by the language of the policy and not by the indemnification obligations in the contract between the named and additional insureds. This Court so held in the *ATOFINA* case, and that holding is in line with insurance law across the country:

- "[P]olicy terms, not underlying contract provisions, dictate the scope of additional insured coverage."[9]
- "[T]he [additional-insured] endorsement and policy wording, not the underlying business contract, dictates the scope of coverage."[10]

[8] *See, e.g.*, *Urrutia v. Decker*, 992 S.W.2d at 441 (policy expressly provided additional insured coverage "only to the extent and for the limits of liability agreed to under contractual agreement with the named insured"). The Insurance Service Organization (ISO), a leading developer of standardized insurance policy language, has issued additional insured endorsement forms that contain express language offering parties the option to limit the scope or amount of additional insured liability where so intended. Donald S. Malecki & Jack P. Gibson, THE ADDITIONAL INSURED BOOK 454-55 (7th ed. 2013).

[9] THE ADDITIONAL INSURED BOOK 2.

[10] *Id.* at 71.

- "[T]he additional insured enjoys the full benefits of the policy, despite any restrictions contained in a separate contractual agreement with the insured."[11]

Departing from that well-established standard, the Court's opinion injects new uncertainties into existing policies and subjects additional insureds like NAM's members to unexpected liability exposure. One commentator reviewing the Court's decision has aptly stated that "the gap in coverage [between the face of the policy and the insured contract] could be a **ticking time bomb** that no one expected."[12] NAM agrees. The clear language of the policy written by the insurer should determine coverage, not the indemnity obligations in the contract between the named and additional insureds.

NAM urges the Court to grant rehearing and return Texas law to the certainty established in *ATOFINA*.

4. The Court's opinion incorrectly distinguishes *ATOFINA* based on the issuance of a certificate of insurance and gives new and unprecedented significance to such certificates, which are issued for information-purposes only and cannot confer or abrogate rights.

In its opinion, the Court incorrectly distinguishes this case from *ATOFINA* based on the issuance there of a certificate of insurance. Under the Court's analysis, the issuance of a certificate of insurance in *ATOFINA* eliminated any

[11] 9 COUCH ON INSURANCE § 126:7 (2010 rev. ed.).

[12] Bruce Wilkin, *Ticking Time Bombs in Indemnity and Insurance Obligations*.

need to look to the underlying drilling contract to determine either the status or scope of additional-insured coverage:

> The existence of a certificate of insurance naming ATOFINA as an additional insured meant that, unlike *Urrutia* and the present case, there was no need to look to the underlying service contract to ascertain ATOFINA's status as "[a] person or organization for whom you have agreed to provide insurance as is afforded by this policy."

Op. at 13. That analysis is contrary to the record in *ATOFINA*, conflicts with industry treatment of such certificates, and invests certificates – which are issued for information-purposes only – with new and unprecedented legal effect.

The Court's distinguishing of this case from *ATOFINA* based on the issuance of a certificate of insurance there conflicts with the record in *ATOFINA*:

- The certificate of insurance issued to ATOFINA followed a standard form and contained a standard disclaimer: "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW."[13]

- The additional-insured endorsement in the primary insurance policy in *ATOFINA* did not provide for the addition of an additional insured by means of a certificate of insurance. That term does not even appear in the endorsement, which specifically extends additional-insured status to "ANY PERSON OR ORGANIZATION AS REQUIRED BY WRITTEN CONTRACT WITH THE NAMED INSURED."[14]

[13] 1 CR 21, *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, No. 03-0647 (Appendix A).

[14] 1 CR 129, *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, No. 03-0647 (Appendix B).

- In its briefing to the Court, ATOFINA disclaimed reliance on the certificate of insurance: "ATOFINA does not rely on the 'certificates on insurance,' which expressly state that they do not determine the scope of coverage. ATOFINA properly relies on the language of the policy itself."[15]

The certificate of insurance issued in *ATOFINA* had no legal effect and could not and did not impact the Court's analysis in that case. To the contrary, the Court there recognized that "an insurance certificate . . . does not create coverage." *ATOFINA*, 256 S.W.3d at 670. The existence of a certificate in *ATOFINA* thus provides no basis for distinguishing the facts of this case to reach a different result.

The record in *ATOFINA* reflects the realities of certificates of insurance. The standard-form certificate there disclaimed that the certificate had any legal effect and directed the reader to the policy itself to determine the status and scope of additional-insured coverage. The *ATOFINA* disclaimer is consistent with industry understanding that a certificate cannot confer or abrogate rights – that is the sole ambit of the policy itself:

- "[A] certificate of insurance alone does not create coverage or legal obligations between the insurer and the certificate holder. . . . [N]o additional insured relationship exists where a certificate of insurance has been issued . . . without corresponding language in the policy or endorsement thereto that would include that individual or entity as an additional insured."[16]

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[15] Respondent's Brief on the Merits of ATOFINA at 18, *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, No. 03-0647 (Appendix C) (record cite omitted).

[16] 3 COUCH ON INSURANCE § 40:31 (2010 rev. ed.).

- "Today, most courts interpret the boilerplate disclaimers . . . to mean that the certificate was not intended as an operative legal document making changes in policy terms, and that certificate holders generally do not have a right to rely on the information stated in the certificate."[17]

The Court's analysis in this case thus invests certificates of insurance with new and unprecedented legal effect, contrary to their express wording and industry practice. Not surprisingly, the opinion has already triggered the ringing of alarm bells by commentators and insurance practitioners:

- "'The reference to the insurance certificate in the *Atofina* case — suggesting it was relevant in determining whether the parties had to look at the underlying contract to determine insured status — may give insurance certificates new importance that they didn't have before,' Carnegie said. 'Normally, insurance certificates don't affect the scope of coverage and contain specific language to that effect.'"[18]

- "[T]his decision will inevitably prompt additional questions regarding the importance of 'certificates of insurance.'"[19]

- "In light of *In re Deepwater Horizon*, many legal commentators have recommended obtaining certificates of insurance."[20]

The impact of the Court's opinion will adversely affect both insurers and additional insureds. For both, the issuance or non-issuance of a certificate of insurance may either expand or restrict the scope of coverage under the policy.

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[17] THE ADDITIONAL INSURED BOOK 359.

[18] Sistrunk, *Deepwater Horizon Ruling Keeps Policyholders on Toes* (quoting Jack Carnegie, insurance partner at Strasburger).

[19] Skidmore, *Additional-Insured Concerns Surface In Deepwater Horizon.*

[20] Wilkin, *Ticking Time Bombs in Indemnity and Insurance Obligations.*

The Court should grant rehearing and, on rehearing, eliminate the discussion of the certificate of insurance as a basis for distinguishing *ATOFINA* from this case. The Court's current writing is contrary to the record in *ATOFINA*, the express language of certificates of insurance, and industry practice. It is an invitation to confusion and litigation.

CONCLUSION AND PRAYER

Amicus The National Association of Manufacturers urges this Court to grant rehearing and, on rehearing, to hold that the language in the policy written by the insurers here did not expressly incorporate any limitations from the drilling contract between BP and Transocean.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that: (1) the word count of this document is 3,086 words according to Microsoft Word 2010 and excluding those parts of the document specified in TEX. R. APP. P. 9.4(i)(1); and (2) this document has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes.

/s/ Pamela Stanton Baron

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I certify that, on April 22, 2015, I served a copy of this brief by e-service and/or e-mail on the following:

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ACORD **CERTIFICATE OF LIABILITY INSURANCE** ESR JS TRIPL-1 | DATE (MM/DD/YY) 06/28/99

PRODUCER

Anco Insurance B/CS
P. O. Box 3889
Bryan TX 77805
Phone: 409-776-2626 Fax: 409-776-1308

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURED

Triple S Industrial Corp.
P. O. Box 8069
Lumberton TX 77657

INSURER A:	Credit General Insurance Co.
INSURER B:	Admiral Insurance Company
INSURER C:	Evanston
INSURER D:	Mid-Continent Casualty Co.
INSURER E:	

COVERAGES

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. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
B	GENERAL LIABILITY [X] COMMERCIAL GENERAL LIABILITY [ ] CLAIMS MADE [X] OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: [ ] POLICY [ ] PROJECT [ ] LOC	A99AG06786	06/30/99	06/30/00	EACH OCCURRENCE FIRE DAMAGE (Any one fire) MED EXP (Any one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OP AGG	$ 1000000. $ 50000. $ n/a $ 1000000. $ 2000000. ** $ 2000000.
D	AUTOMOBILE LIABILITY [X] ANY AUTO [ ] ALL OWNED AUTOS [ ] SCHEDULED AUTOS [ ] HIRED AUTOS [ ] NON-OWNED AUTOS	04TX00107364	06/30/99	06/30/00	COMBINED SINGLE LIMIT (Ea accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)	$ 1000000. $ $ $
	GARAGE LIABILITY [ ] ANY AUTO				AUTO ONLY - EA ACCIDENT OTHER THAN AUTO ONLY: EA ACC AGG	$ $ $
C	EXCESS LIABILITY [X] OCCUR [ ] CLAIMS MADE [ ] DEDUCTIBLE [X] RETENTION $ 10000.	CUNJ153999	06/30/99	06/30/00	EACH OCCURRENCE AGGREGATE	$ 9000000. $ 9000000. $ $ $
A	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY	TWC709018701	06/29/99	06/29/00	[ ] WC STATUTORY LIMITS [X] OTHER E.L. EACH ACCIDENT E.L. DISEASE - EA EMPLOYEE E.L. DISEASE - POLICY LIMIT	 $ 1000000. $ 1000000. $ 1000000.
	OTHER					

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS

Blanket Waiver of Subrogation and Additional Insured in favor of Certificate holder where required by written contract regarding General Liability, Auto, Workers Compensation - (waiver only). ***General Agg. applies per project.

CERTIFICATE HOLDER | ADDITIONAL INSURED; INSURER LETTER: ___

FINAOIL

Fina Oil & Chemical
Attn: Bruce Hickman
P. O. Box 849
Port Arthur TX 77640

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

Adrian G. McDonald Jr.
Adrian G. McDonald, Jr.

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).

If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

DISCLAIMER

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

Named Insured: TRIPLE S. INDUSTRIAL CORPORATION
RICHARD L. SIMMONS, JR. AND
PATRICIA A. SIMMONS, INDIV.

No: 20

Policy: A99AG06786

Effective Date: 6/30/99

COMMERCIAL GENERAL LIABILITY
AD 66 16 01 95

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - PRIMARY COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Name of Person or Organization:

ANY PERSON OR ORGANIZATION AS REQUIRED BY WRITTEN CONTRACT WITH THE NAMED INSURED.

WHO IS AN INSURED (Section II) is amended to include as an Insured the person or organization shown above (herinafter called the additional Insured), but only with respect to liability arising out of your ongoing operations performed for the additional Insured, but in no event for the additional Insured's sole negligence.

When required by written contract between you and the additional Insured, the Other Insurance clause (Section IV, 4., a.) shall be amended with respect to the coverage provided by this endorsement as follows:

a. Primary Insurance
This insurance is primary to any similar, valid and collectible policy of insurance issued directly to the additional Insured.

NO. 03-0647

IN THE SUPREME COURT OF TEXAS

EVANSTON INSURANCE COMPANY,

PETITIONER,

V.

ATOFINA PETROCHEMICALS, INC.

RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS NO. 09-02-00072-CV

RESPONDENT'S BRIEF ON THE MERITS

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ATTORNEYS FOR RESPONDENT

contractor General Transport. Second, it was undisputed that Emery was *not* an additional insured. Third, because Emery was not an insured, the court in *Emery* never even looked at the policy language to determine the scope of coverage. Here, of course, the policies are before the Court and the scope of coverage is determined by the terms of those policies. Finally, the *Emery* court distinguished *Getty* on the basis that, in *Emery*, there was no separate clause requiring insurance beyond that covering General Transport's indemnity obligation. In contrast, the Triple S contract requires insurance including but not limited to contractual liability insurance backing Triple S's indemnity obligations (CR. 70) and then separately requires ATOFINA to be made an additional insured on each policy except worker's compensation. CR. 71. In sum, there is no conflict with *Emery*, *Fireman's Fund*, or any other Texas case and thus no need for this Court's review.

Betraying the weakness of its contrary argument, Evanston lamely contends that the "*[c]ertificates of insurance* . . required by the Blanket Contract do not provide insurance to ATOFINA for its own negligence." Pet. Br. at 13-14 (emphasis added). This conclusory argument misses the point. ATOFINA does not rely on the "certificates on insurance," which expressly state that they do not determine the scope of coverage. *See* CR. 22.[7] ATOFINA properly relies on the language of the policy itself. Under that policy language, as the court of appeals correctly held, ATOFINA is entitled to coverage as an additional insured.

[7] "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW."