ORAL ARGUMENT – 04/13/05
03-0647
EVANSTON INS. CO. V. ATOFINA PETROCHEMICALS

NOBLES: This appeal turns on the question of whether the respondent Atofina, is entitled to coverage as an additional insured on the Evanston insurance policy for its own negligence? Atofina says the question of its own negligence is not relevant to the coverage question. We say it is.

HECHT: Do you think it depends on the language of the policy? I mean is it okay to have an additional insured provision that would cover Atofina in these circumstances?

NOBLES: It certainly is permissible for an additional insured provision to cover Atofina in these circumstances. But this policy language does not do that. As the court knows, the policy contracts and the service agreement between these parties are 160 pages or more. There's been hundreds of pages of briefing filed in this court and in the lower courts. And in an attempt to synthesize the coverage question, I try not to incorporate all the arguments today in my oral presentation during the briefing. But standing on that briefing, I would like to turn to what I think is the fundamental problem with the Beaumont Court's decision and with the coverage argument that Atofina has made. And really and truly there are only eight lines of contract language that are necessary for us to look at to see why the CA was wrong and why Atofina is wrong in saying that Section 3(b)(6) is a separate independent coverage provision. That's not correct. Section 3(b)(5) of the Evanston insurance policy is the operative coverage provision. 3(b)(6) has to be read in coordination with 3(b)(5) and not to conflict with it.

I would like to read 3(b)(5) very briefly. Section 3(b) of the Evanston policy defines who are insureds, and there are several types of additional insureds defined in this policy. In this case, sections 5 and 6 are those that are relevant. Section 5 is the provision that we have relied on in the TC and the CA and in this court. And that says that any other person or organization who is insured under a policy of "underlying insurance", that's a defined term, is an insured. The coverage afforded such insured under this policy is what 3(b)(5) says will be no broader than the underlying insurance except for this policy's limit of insurance. And in order to understand what 3(b)(5) is saying there. It is incorporating endorsement 20 in the primary policy, and that is a policy issued by Admiral Ins. Co. That's found at clerk's record page 129. It's also excerpted on our brief on the merits at page 5. And that says under the primary coverage who is an insured, includes as an insured the person or organization shown above hereinafter called the initial insured. The only with respect to liability arising out of your ongoing operations performed for the additional insured. But in no event for the additional insureds sole negligence. And in that's but no event the additional insured sole negligence that makes the negligence of Atofina relevant to the policy determination. Not only under the Admiral policy, but under the Evanston policy as well.

HECHT: Didn't Admiral extend coverage?

NOBLES: It did.

HECHT: Did they just make a $1 million mistake?

NOBLES: They didn't make $1 million mistake. They made a $1 million business decision. As a primary carrier they had a duty to defend. Their exposure was only $1 million. Evanston's exposure as a nexus carrier is of course a lot greater. The 6th Circuit in a case that we cited in our briefs, the BT case, is a case also that is factually and legally very similar to this case. The 6th circuit acknowledged in that case why a primary carrier may decide to settle the claim even if it's not covered. This is a business decision to get out of the case for $1 million rather than spend years in litigation with defense costs that could exceed $1 million in certain venues.

WAINWRIGHT: However, in this case there's been no determination of negligence on any party unlike Getty.

NOBLES: That's right.

WAINWRIGHT: So how do you conclude that this exception for negligence of Atofina applies without a negligence determination or apportionment?

NOBLES: That's the simple question of the case. I want to get out of the way the effect of 3(b)(5) being the governing provision. 3(b)(5) says that there will be no coverage under this policy, not under this provision, but under this policy, the Evanston policy. On the same basis as applies in the primary policy. So if Atofina is solely negligent, it can't recover coverage from Evanston. And as you pointed out, that question has not been decided by a jury. The settlement of the underlying case prevented the jury from deciding that issue.

OWEN: You say §5 puts limits on §6?

NOBLES: Section 5 governs §6. Sections 5 and 6 are read together because to read §5 so that it doesn't govern §6 makes that language in §5 meaningless which violates rules of contract construction.

OWEN: If we disagree with you what does §6 mean?

NOBLES: Under Texas law, as we've argued in our briefs, that operations performed language in §6 is intended to limit the liability of Evanston as an insurer for Triple S, the named insured, to only those acts of negligence for which Triple S were directly negligent. And only those for which Atofina is either vicariously responsible or responsible as a supervisor of negligent supervision.

There is case law cited in our briefs to that effect. That's the effect of the operations performed language under Texas law. There are other cases in other jurisdictions that

disagree but that's the effect of that language under Texas law.

To get back to J. Wainwrights's question. Under Texas law Atofina was the only defendant at the time of settlement of this case. It was the only party against whom negligence, direct negligence or otherwise at the time of the settlement, had been alleged. And under Texas law...

BRISTER: But that doesn't mean they were the only one that was negligent in the occurrence because a guy couldn't sue his employer alleging negligence.

NOBLES: That's true. They are not responsible third party under...

BRISTER: So there might have been other negligence. It just wasn't alleged because worker's comp law doesn't allow it.

NOBLES: The facts of the incident as reflected in the incident report show that Atofina was surely negligent. There is no theory articulated in the record...

BRISTER: But maybe the deceased was too.

NOBLES: That may be correct. And a federal court applying Texas law has said that any negligence on the part of a deceased is not relevant to this issue of sole negligence on the part of the defendant.

BRISTER: Why is that?

NOBLES: That's a case that J. Maloney decided in the Northern district of Texas. He didn't explain his reason. He didn't analyze that.

BRISTER: That doesn't make any sense though. If it's the sole negligence of A, then we can't disregard P's negligence. That would not be logical would it?

NOBLES: Under the case law, the courts that have addressed that have said that the allegations are what govern. And this court has said that the allegations certainly govern the duty to defend. And if the pleading as it is on file couldn't be construed to create a duty to indemnify, then it's proper to decide the indemnification also.

BRISTER: Is that in duty to defend cases or indemnify cases?

NOBLES: It's a duty to indemnify cases.

WAINWRIGHT: But here we're talking about coverage.

NOBLES: We are.

WAINWRIGHT: So allegations don't govern.

NOBLES: That's correct.

WAINWRIGHT: So again we're back to there's been no determination of sole negligence. What's your proposal that happens in this instance?

NOBLES: There's really a two tier response up to that question. This case was decided on cross motions for summary judgment. The TC ran its summary judgment to Evanston on the basis of its summary judgment which said among other things that the negligence of Atofina bars its right to coverage from Evanston. And that was the summary judgment that we obtained.

We also were opposing the motion for summary judgment that was filed by Atofina. Now even if the question of sole negligence can't be decided as a matter of law on summary judgment, it at the very least is a fact question that has to be decided in a lawsuit that Atofina filed against Evanston before the summary judgments were granted. So if this court were to find that summary judgment is not proper for Atofina or is not proper for Evanston, and if this court were to find that it would not want to affirm the summary judgment that was granted by the TC, the remedy would be for a trial. And this court's precedent says that. There are cases in which questions of indemnification have to be decided by a jury. Those cites obviously include Farmers Texas County Mutual. This court's decision by CJ Phillips in 1997, which is at 955 S.W.2d 81. The Western Alliance case is a 5th circuit case discussing the same rule 176, F3d 825. It is cited in our briefs.

Our position is that if we're not entitled to summary judgment on the question of Atofina's sole negligence, although the allegations of sole negligence is all that we have, all of the facts seems to reflect that only Atofina was solely negligent. If the court finds that that is not a question to which summary judgment is proper, and this case is not amenable to summary judgment, then the remedy is a reversal of the summary judgment that the CA rendered erroneously for Atofina. And a remand for a trial on the question of sole negligence would be a proper disposition.

But it is not a question that Atofina can obtain summary judgment on because the question of sole negligence was raised in our summary judgment response. And more importantly, and more fundamentally, Atofina did not move on summary judgment addressing endorsement 20 which contains the definition of additional insured status.

If the court will look at the summary judgment motion that Atofina filed, it doesn't address the question of sole negligence at all. Our response did. They can't be entitled to summary judgment on that ground. And at the very least a remand for a trial on the sole negligence issue is the proper remedy.

JEFFERSON: Evanston you say is entitled to contest the reasonableness of the settlement. Can you explain that?

NOBLES: Under Texas case law, a carrier in this position is entitled to contest coverage. As Texas precedent holds is entitled to question the good faith of the settlement, whether there's a reasonable basis for the settlement and whether the amount is reasonable. We cite cases in our brief for that rule. There actually appears to be no cases that hold to the contrary in which that was the holding of the court.

BRISTER: So both sides just hire a lawyer and say, I think it was reasonable. I don't think it was reasonable.

NOBLES: There was in fact summary judgment evidence that said that. Because there was competent summary judgment evidence on our side, the evidence of Atofina was stricken by the TC before summary judgment was granted.

BRISTER: But that's all it's going to be - expert testimony by lawyers?

NOBLES: And the jury's decision on whether the settlement was reasonable. The case law supports that.

WAINWRIGHT: There is law in Texas that at least a primary carrier who denies coverage, refuses to defend is barred from contesting the reasonableness of the settlement or a judgment. How is this case different from that case law, or do you disagree with that case law?

NOBLES: That case law doesn't govern this case because there was no duty to defend in this case. Very important for this court to recognize that Evanston is an excess carrier. It owes no duty to defend. In fact Atofina was defended to the hilt in this litigation. Evanston doesn't owe any duty to defend. And those cases aren't relevant here. For the same reason article 21.55, the statutory penalty for first party claims has no relevance to this case. There are some courts, a court very recently last week in Houston held that in a duty to defend case defense costs can be treated as first party claims for which the statutory penalty of 18% per year applies. This again is not a duty to defend case.

MEDINA: It's an excess policy or reimbursement case?

NOBLES: Absolutely. And as J. Rosenthall even recognized in her decision last week in the _____ case, her ____ at page 16 says that she believes it would apply, the statutory penalty to a reimbursement for defense costs. But she doesn't hold in that case and she expressly recognizes that it would not hold - she did not hold and held in fact that penalty does not apply to a case in which a punitive insured has settled a third party claim and seeking reimbursement of those costs.

There is no authority under Texas law for the penalty to apply in this case. And that clearly was error also on the part of the CA.

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RESPONDENT

CARNEGIE: This court's decision in the Getty case should control the coverage question here. But this should be a much easier case than Getty because the contract language at issue here is much clearer and more precise than the contract language this court dealt with in the Getty case.

Atofina's contract, there is some very explicit terms that Triple S is required to make Atofina an additional insured on each of Triple S's insurance policies. Section 3(b)(6) of the Evanston policy then in turn says that anyone that Triple S agrees to make an insured becomes an insured on the Evanston policy. Under those two provisions, Atofina is an insured under 3(b)(6) of the Evanston policy, and that disposes of the question of whether Atofina is insured.

The next step in the analysis is to look at the scope of the coverage that is provided to someone who qualifies as an additional insured under §3(b)(6) of the policy. And you determine that for additional insureds the same way as you would determine the scope of coverage for any insured under the policy. You look to the terms of the policy itself. And there is nothing, there is not one word in this policy that suggests that the sole negligence of an insured under 3(b)(6) of this policy is excluded from coverage.

WAINWRIGHT: How do you interpret 3(b)(5)'s language that the coverage should be no broader than Admiral's underlying insurance excludes coverage for the additional insured's sole negligence?

CARNEGIE: Section 3(b) of the Evanston policy contains a list of at least six separate categories of individuals or companies that qualify as an insured under that policy. And simply because you may not qualify as an insured under one of those, but you do qualify as an insured under another one, you have to treat those as independent. The other piece of that - you know if we're insured under 3(b)(5) and under 3(b)(6), we get the benefit of whichever category gives us greater coverage if there is a difference.

WAINWRIGHT: Section 3(b)(5) says the coverage afforded such insureds under this policy. It doesn't say under this provision or this subsection. It seems to speak in terms of the entire policy doesn't it?

CARNEGIE: Section 3(b)(5), the issue is are you insured? Section 3(b) is who is an insured? So if for example we were solely negligent, then under 3(b)(5) you would say we just are not an insured under that section. But then you go to 3(b)(6), well do we qualify under an insured under that section? Yes, we do. So even if we didn't qualify as an insured under 3(b)(5), if we independently qualify as an insured under 3(b)(6), then there is coverage. The other...

OWEN: But section 6 also says, you agree to provide insurance as is afforded by this policy. So that sort of begs the question. What is the insurance afforded by this policy?

CARNEGIE: And that's where you just look to the general terms of the policy, the coverage parts of the policy, to see what is the scope of coverage afforded to an insured.

OWEN: Which is no broader than the underlying insurance.

CARNEGIE: Not under 3(b)(6). Under 3(b)(5) that would be true. Under 3(b)(6) it's not true. I could stipulate, I won't, that we are not an insured under 3(b)(5) at all because we were solely negligent. So then we say, well do we qualify as an insured under some other provision? Yes, we do. For someone who qualifies as an insured under 3(b)(6), you look at the scope of the policy to see what coverage is provided. And there is nothing there that says someone who qualifies as an insured independently under 3(b)(6) is not covered for its own negligence.

I think there are a couple of other points to make here too. First of all, the Atofina contract with Triple S says that Atofina will be made an additional insured on each Triple S's policies. Contrast that for example to if it said, Atofina will be made an additional insured on Triple S's primary policy. If that were the case, we would be an insured on the Admiral policy, then we would sort of automatically get coverage under 3(b)(5) of the Evanston policy even though the contract didn't specifically require it, because anybody who is an insured under the underlying policy is an insured under the Evanston policy too.

But the contract goes farther. It requires us separately and independently to be made an insured on the Evanston policy as well. And under that we would qualify under 3(b)(6) regardless of whether we were an insured at all under the primary. So I think that you look at the contract.

The other thing about this is, this court has held that where the insured's interpretation of the policy is reasonable, even if the insurance company offers an alternate, reasonable interpretation, the insured's interpretation has to be accepted as a matter of law and a matter of contract construction.

WAINWRIGHT: If we disagree with your analysis and conclude that the no broader than language is applicable here, what do you propose happens in the circumstance we have here where there's been no determination of sole negligence?

CARNEGIE: I think Evanston loses under that circumstance because Evanston did not seek a determination or coverage by declaratory judgment. They just flat said, we're not going to cover you under this policy under any circumstances. Period. Their analysis in the TC was, you apply the 8-corners rule like you would in a duty to defend case, and if you accept their argument in the TC on that and you look at the 8 corners rule, you see several things. First of all, Triple S was originally sued as negligence and dropped because of the comp bar. If you look at the pleadings themselves, Atofina was never alleged to be solely negligent. They were alleged to have caused or contributed to the accident. There were allegations of vicarious liability in this case where Atofina was alleged to be liable for the acts of servants or agents and that sort of thing, which is a respondeat superior

thing, which is the not the direct negligence of Atofina. And there certainly is potential negligence out there of other third parties who are not named in the suit.

WAINWRIGHT: If they are not named in the suit, no negligence can be found against them. Triple S was nonsuited. Right?

CARNEGIE: Triple S was nonsuited. That's correct. But the issue is not is Atofina found solely negligent? The issue is, is Atofina solely negligent? And that's a different question. Evanston in this case had the ability, they had the right to come in and defend, not necessarily the duty, but they had the right to come in and defend and where there is coverage under this policy they had the right to control the settlement. By breaching the policy and saying we are just flatly denying coverage without obtaining a declaratory judgment or determination beforehand they gave up those rights.

You have to look at the reality of what normally happens in the real world here when there's a question like are you solely negligent? And 9 times out of 10, the insurance company is going to come in, they are going to settle the case rather than take the risk that there might be one percent found on somebody else. And Evanston here shouldn't be in a better position having breached the policy than it would have been in had it provided coverage. So where there's a settlement, Evanston shouldn't come in and then be entitled to second guess and say, well what are we going to do? We're going to go have a separate trial now on whether the jury would or would not have found Atofina solely negligent in this case.

And that leads in to the issue of can they contest the reasonableness of the settlement and, if so, what does that mean? I would contend that having breached this policy and deny coverage without attempting to obtain a declaratory judgment beforehand, as this court has held in Andy and Texas Ass'n of Counties v. Matagorda County that they should have done, they take the risk of being wrong in that situation.

HECHT: Even if they have evidence of collusion?

CARNEGIE: No. Certainly fraud and collusion would always be an exception. But there is no suggestion of that here.

HECHT: If there were just a possibility of it and no evidence yet would that entitle them to discovery or hearing or something?

CARNEGIE: Yes. If there were legitimate suspicion of collusion here, the insurance company could say, Let's do discovery. But in the TC when there were cross motions for summary judgment here, Evanston never said, Ghee, I want a continuance on this motion for summary judgment because we need to do discovery. In fact they moved to accelerate the motions for summary judgment so the court could hear them more quickly and the cross motions could be heard at the same time.

JEFFERSON: Does Gandy require the pursuit and conclusion of a declaratory judgment action before you can contest settlement?

CARNEGIE: I think Gandy as extended by the Texas Ass'n of Counties case does lead to that conclusion.

JEFFERSON: Is there language in one or both of those opinions that say that specifically?

CARNEGIE: There is language in the Texas Ass'n of counties case...

WAINWRIGHT: Matagorda?

CARNEGIE: Yes. That says that the insurer is in a better position to make coverage analysis and decisions than the insured is. And, therefore, the burden should be on the insured to obtain a declaratory judgment and try to resolve the coverage issue. And where the insured does not do that because they are in a better position to make the determination, they should bear the risk.

OWEN: That's a risk of right of reimbursement. That case didn't deal with contesting the reasonableness of the settlement for purposes of...

CARNEGIE: That's true. But still I think it bears on the duties of the insured and the allocation of risks here. Now with regard to J. Hecht's collusion point. I think the facts of this case are very, very important. This case is as far on the opposite side of the spectrum from cases like Gandy and Maldanado as you can possibly get in any case. There is no assignment. There is no covenant not to execute. There are no skewed incentives. There is a cash out of pocket payment by Atofina to settle this horrible death case. Evanston flatly denied coverage, which created a problem. Atofina despite the denial of coverage went out of its way to get orders from the TC requiring Evanston to be present at the mediations. Evanston did appear but wouldn't participate, and wouldn't offer a dime. Atofina was caught in the middle between two excess carriers because National Union, Atofina's own excess carrier said, Ghee, under the contract with Triple S, Triple S's policies are supposed to be primary. So we don't have any coverage until the Evanston limits are exhausted. So Atofina is left with no coverage from either excess carrier. Its only incentive was to try to minimize its liability as best it could. It went through three separate mediations before it finally settled this case, and then ended up settling for $6.75 million for a guy who drowned in gasoline in a case pending in Beaumont Texas against a petro chemical company. This was a horrible case. National Union agreed that any settlement under $10 million was reasonable. And of course we reserved our rights against Nat'l Union in case we don't recover against Evanston.

So there is absolutely no incentive if there is a right...

MEDINA: Was Atofina self insured for any portion of that settlement?

CARNEGIE: Atofina received $1 million from the Admiral Policy, which was Evanston's

primary. There is a Liberty Mutual policy which essentially is a fronting policy. So $5.75 came straight out of Atofina's pocket as cash. That's the only coverage Atofina had.

MEDINA: What was your self insured retention?

CARNEGIE: It's effectively $1 million under the fronting policy.

MEDINA: So they were directing their own settlement. Right?

CARNEGIE: Yes. Well not entirely. Admiral had some control over it but Admiral tendered its limits in the case.

BRISTER: So was does excess insurer like Evanston do? They don't think they've got coverage. If they do pay under the Matagorda case they can't get reimbursement. What do they do?

CARNEGIE: I think what they do is first of all they should move for a declaratory judgment to try to determine coverage beforehand.

BRISTER: And assume the plaintiffs in Beaumont are not willing to wait around while the insurance companies do their DEC actions.

CARNEGIE: The Evanston's policy is not a _____. It's not a following form excess policy. It is a true umbrella policy. And it has for example a no action clause in it like primary policies do. So if Evanston reserved its rights and provided coverage, it has the ability to control the settlement, because it's got a clause in it that says we don't have any liability. You can't sue us unless there's a judgment after an actual trial, or there is an agreed settlement, which means a settlement that is agreed to by Evanston. So they have the right to control the settlement.

BRISTER: So they can step in and control the settlement but then they've got to pay it. They've got to pay it and can't get reimbursement. What do they do if the contest coverage. You say they reserved their rights, but if they reserved their rights they've got to step in, take over, pay, and no reimburse.

CARNEGIE: I'm not so clear about the no reimbursement. I think where there are two insurance companies here...

BRISTER: Are you going to agree contractually to reimburse them?

CARNEGIE: It's not reimbursement for me. They could reserve their rights for potential contribution from National Union for example for a subrogation claim. If they settle the case then they've agreed to settle and that's what happens 90%...

BRISTER: But you're saying they are going to be estopped in someway if they don't

come in. But you're also saying they are going to be estopped if they do.

CARNEGIE: No. I'm saying they can't have it both ways. They have the right, they have the ability under the policy to come in and control the settlement and have a say in it. And potentially the worst case to trial. If they are willing to take the risk that there is no coverage.

BRISTER: That's no different than if they admitted they had coverage. If they contest coverage, what should they do? You're saying well they should act like they admit coverage.

CARNEGIE: Yeah. In essence because - first of all we're sort of getting off the track because part of this turns on this sole negligence question, which is not a question. There is only even a question about coverage...

BRISTER: I'm just concerned about the amount. If they think $6.75 is too high what do they do?

CARNEGIE: If there is coverage, which there is under 3(b)(6) regardless of whether Atofina is solely negligent and they think $6.75 is too high, then they say go to trial. Because we have the right and we're not agreeing to this settlement and if you settle it we're not going to have liability _____ no action clause. They have that ability. But having denied coverage, they have given up the right to control that settlement because they said it's not Evanston's money. It's Atofina's money, therefore, Atofina has control the amount of settlement. So they shouldn't be allowed to have it both ways.

Evanston never made the argument in the TC that the penalty under 21.55 was precluded because this is not a first party claim. So they can't get summary judgment on that on a ground that they never argued in the TC. More importantly this is a first party claim. If you look at the definition of claim under 21.55 it says a claim is "a first party made by an insured or policy holder under an insurance policy or contract or by beneficiary under the policy or contract, that must be paid by the insurer directly to the insured or beneficiary." They didn't just say first party claim period and then stopped. They added language that I think explains what the legislature was talking about when it said first party claim.

HECHT: The problem with that is that whether you settle it or not would affect whether the statute applies or not.

CARNEGIE: I think whether the statute applies depends on whether there is a breach or not. The thing you have to remember here is the claim that is at issue here is not the Jones claim against Atofina. It's the Atofina claim against Evanston for reimbursement of Atofinas own out of pocket loss.

HECHT: But if it were. If Atofina hadn't paid, if it was Mrs. Jones and she couldn't pay all the money, then that would affect whether the statute applied. Is that right?

CARNEGIE: No.

HECHT: If a third party is making the claim under 21.55 it doesn't apply?

CARNEGIE: If there were someone like Atofina who was not solvent enough to pay the judgment, but there is a judgment under which that person incurs a liability and is subject to execution, then that party then sues the insurance company saying I'm subject to liability, I'm subject to execution, this is money that is coming out of my pocket, that is a first party claim. As opposed for example where the judgment debtor assigns the claim to the plaintiff. That is not a first party claim. Or under a no action clause a judgment creditor can go directly against the insurance company, that is not a first party claim. That would be excluded. And I think the same thing is evident throughout 21.55. If you look at the types of policies that are included, it includes accident coverage. If you look at the types of policies that are excluded, the only type of liability policy that is excluded is worker's comp. They didn't exclude liability policies generally. And finally if you look at the liberal construction clause of the statute it says that the purpose is to cause insurance companies to pay claims under insurance policies. It doesn't say first party insurance policies for examples. It says insurance policies generally. So I think all of those things lead to that interpretation.

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REBUTTAL

WAINWRIGHT: If Atofina is an additional insured under Triple S's policy, then why isn't Atofina's claim a first party claim under 21.55?

NOBLES: Because the claim is for a liability to a third party, not a first party claim for a payment that must be made directly to Atofina, which is what the statute requires. Most courts that have addressed the issue have said that must pay directly to the first party excludes liability claims. And there is no case law that I'm aware of that says a third party claim that settled becomes a first party claim under a claim for reimbursement.

Atofina's construction of the Evanston policy violates basic rules of contract construction. Those rules are that all of the provisions of a contract must be read together and the provisions should not be read to conflict unnecessarily. It's undeniable that Atofina's construction of 3(b)(5) and 3(b)(6) reads out of 3(b)(5) the very important provision which says that coverage accorded under this policy, this Evanston policy, will be no broader than the underlying insurance except for the policy's limits, that is the amounts that are paid.

JOHNSON: Doesn't that actually though under 5 and 6, 5 addresses the specific terms of another policy. Section 6 addresses contractual liability that your underwriting department can have Triple S send in those contracts. They say send us all these contracts that you have so we can see who you have agreed to indemnify. Wouldn't that be a reasonable construction that those are separate insuring provisions?

NOBLES: It's not a position that Atofina has taken in this case.

JOHNSON: But we're reading the contract.

NOBLES: Atofina's position has been that 6 is not contractual liability coverage. It's additional insured coverage. Section 5 and 6 are not contradictory to additional insured.

JOHNSON: But 6 defines the category of people insured. It could be read to read that way.

NOBLES: And I think the parties agree that 6 in this case provides additional insurance status to anyone to whom Triple S has made a contractual promise to provide that coverage. And it may not be excess coverage. It could be some other form of coverage. And that's why there is two different provisions there.

JOHNSON: Could you address then the but part of that. Is there any dispute between the parties if 6 were to apply to contractual agreements? What about the semicolon but? Is there any dispute that that would take Atofina out?

NOBLES: Our argument throughout this litigation has been "but that" clause that you've identified, that that but clause also takes Atofina out of additional insured status. Under an Amarillo CA decision from the early 1990's Granite Construction v. _____ Ins. Companies, that case held that the operations performed means what it says, that the operations were performed by the named insured and not the additional insured. In this case, in a case like this one, the Amarillo court held that 3(b)(6) on its own, even without reference to 3(b)(5), would not provide additional insured status to a company like Atofina whose direct negligence is what caused the harm.

Mr. Carnegie stated that in the underlying litigation that Evanston never asked for a continuance of discovery. That's incorrect. The cite is clerk's record vol. 4, page 54.