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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STATEMENT OF THE CASE

Nature of the case:	This is a suit for a declaratory judgment and damages brought after an insurer denied coverage to ATOFINA as an additional insured for a wrongful death suit.
Trial Judge:	The Honorable Gary Sanderson
Trial Court and County:	60th Judicial District Court, Jefferson County
Disposition by the Trial Court:	The trial court initially granted partial summary judgment in favor of respondent, but later vacated its earlier judgment and granted summary judgment for petitioner.
Parties in the Court of Appeals:	*Appellant*: ATOFINA Petrochemicals, Inc. *Appellee*: Evanston Insurance Company
Court of Appeals:	Ninth Court of Appeals at Beaumont
Appellate Justices:	*Per curiam* opinion of Chief Justice McKeithan, Justice Burgess and Justice Gaultney
Citation:	*Atofina Petrochemicals, Inc. v. Evanston Insurance Company*, 104 S.W.2d 247 (Tex. App.—Beaumont 2003, pet. filed)
Disposition:	Reversed and remanded with instructions

STATEMENT OF JURISDICTION

This Court lacks jurisdiction because the opinion of the court of appeals, which properly applied well-established principles of law, does not conflict with the opinions of this Court or other courts of appeals on any question of law material to the case, and because this case presents no issue of importance to the jurisprudence of the state.

ISSUES PRESENTED

1. Whether the court of appeals correctly determined that this case is controlled by *Getty*, not *Fireman's Fund*.

2. Whether the court of appeals correctly decided that ATOFINA is an additional insured under Section III.B.6 the Evanston policy with coverage for the Jones claim.

3. Whether the judgment of the court of appeals can be affirmed on the independent ground that ATOFINA is an insured under Section III.B.5 of the Evanston policy with coverage for the Jones claim.

4. Whether the court of appeals correctly held that because Evanston wrongfully denied coverage to ATOFINA, Evanston is not entitled to challenge the reasonableness of ATOFINA's all-cash settlement.

5. Whether the court of appeals correctly applied Article 21.55 to permit ATOFINA to recover a statutory penalty based on Evanston's wrongful denial of coverage.

STATEMENT OF FACTS

I. BACKGROUND FACTS

ATOFINA hired Triple S Industrial Corporation as an independent contractor to perform maintenance and construction work at ATOFINA's Port Arthur refinery. CR. 20.[1] Matthew Todd Jones, a Triple S employee, was killed while working on one of ATOFINA's storage tanks pursuant to the contract. While installing a catwalk, Mr. Jones fell through the corroded roof of a storage tank filled with fuel oil and drowned.

Mr. Jones's widow filed a wrongful death suit in Beaumont. CR. 2. Mr. Jones's mother, represented by separate counsel, intervened in the suit. CR. 12. Evanston's own brief underscores the fact that the Jones case was a dangerous case for ATOFINA. *E.g.*, Pet. Br. at 2 ("A letter written by its trial counsel acknowledged ATOFINA's knowledge of the unsafe condition of the fuel tank's roof."). Had the case gone to trial, the jury would have heard that falling into a tank of fuel oil is not like falling into a tank of water because humans cannot swim in fuel oil. The evidence would have shown that Mr. Jones spent the last few minutes of his life conscious, struggling but unable to swim, and sinking to the bottom of the dark tank as fuel oil flooded his lungs.

The contract between ATOFINA and Triple S required Triple S to carry Comprehensive General Liability (CGL) insurance and Excess Umbrella insurance. CR. 70. The contract also required ATOFINA to "be named as additional insured on each of

[1] For simplicity and convenience, this brief will cite the record as "CR.;" Petitioner's Brief on the Merits as "Pet. Br.;" the Brief of Appellee [Evanston] in the court of appeals as "App. Br.;" and the Petition as "Pet."

[Triple S's] policies, except Worker's Compensation." CR. 71. In addition, the contract required Triple S's policies to be primary to ATOFINA's policies. CR. 71. Contrary to Evanston's assertions (Pet. Br. at 2), the contract between Triple S and ATOFINA did not "assign[]" to ATOFINA "the risks of its own negligence." Rather, as Evanston reluctantly acknowledges, the contract provided only that Triple S would not *indemnify* ATOFINA for any injury "attributable to the concurrent or sole negligence, misconduct, or strict liability of" ATOFINA. Pet. Br. at 3 (citing CR. 24). The contract did not purport to limit Triple S's obligation to provide ATOFINA with *insurance* for such injuries. To the contrary, as the Vice President of Triple S testified, "Triple S intended its insurance carrier(s) to name ATOFINA as an additional insured per the contract terms, and for ATOFINA to be covered by the Triple S policy(ies) to the maximum extent those policies allow as per the contract terms." CR. 961.

Pursuant to its contract with ATOFINA, Triple S purchased two policies that are relevant: a CGL policy issued by Admiral Insurance Company with $1 million limits ("the Admiral policy"), and an Excess Umbrella Policy issued by Evanston with $9 million limits ("the Evanston policy"). CR. 83, 139. Section III.B.6 of the Evanston policy provides that anyone for whom Triple S agrees to provide insurance is an insured under the Evanston policy:

> B. Each of the following is also an insured:
>
> 6. A person or organization for whom you [Triple S] agrees to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you [Triple S] or on your behalf. . . .

CR. 170. Nothing in the Evanston policy excludes coverage for the negligence of someone like ATOFINA which is an insured under Section III.B.6. The only condition on ATOFINA's status as an insured under Section III.B.6 is that the coverage applies "with respect to operations performed by" Triple S.[2] The Jones plaintiffs alleged, and Evanston has conceded, that Mr. Jones "was fatally injured while working at [ATOFINA's] plant in Triple S's employ." CR. 274; *see* CR. 13, 20.

Separately from Section III.B.6, Section III.B.5 of the Evanston policy includes as an "insured":

> Any other person or organization who is an insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance.

CR. 170. The Evanston policy defines "underlying insurance" as "the coverage afforded under insurance policies designated in the Schedule of Underlying Insurance of this policy . . . ." CR. 183. The Schedule of Underlying Insurance, in turn, lists the Admiral policy as underlying insurance. CR. 143. The Admiral policy contains an endorsement which includes as an insured "any person or organization as required by written contract [with Triple S]." CR. 129. The only limitation is that the insurance is "only with respect to liability arising out of [Triple S's] ongoing operations performed for [ATOFINA], but in no event for ATOFINA's sole negligence." *Id.*

Faced with the Jones suit, ATOFINA sought coverage as an additional insured from both Admiral and Evanston. Admiral tendered a defense and ultimately its $1

[2] Although Evanston complains that "the record does not reflect that Evanston was ever paid a premium . . . to cover ATOFINA as an additional insured" (Pet. Br. at 6), Evanston does not (and could

million policy limits. CR. 186, 189. Evanston, however, flatly denied coverage in June 2001. CR. 192. ATOFINA's own excess carrier, National Union, took the position that its obligations to ATOFINA would not be triggered unless and until Evanston tendered its policy limits. CR. 368. As a result, ATOFINA was forced either to settle or to risk a trial and potential enormous liability with no guarantee of coverage from either excess carrier.

The Jones plaintiffs were ready, willing and able to take their case to trial. Plaintiffs were represented by capable lawyers: Mr. Mitchell Toups of Weller Green Toups & Terrell LLP and the well-known firm of Provost Umphrey. CR. 5, 17. Two separate mediations involving two different mediators failed to result in a settlement. CR. 358. ATOFINA first mediated the Jones case with Mr. Bob Black of Mehaffey Webber on June 6, 2001. CR. 937. The Jones plaintiffs initially demanded $15 million to settle the case. CR. 368. In an effort to involve Evanston in the settlement process, ATOFINA requested and the trial court issued an order requiring Evanston to be present at the mediation. Evanston, though present, refused to participate and formally denied coverage the following week. CR. 192, 203. In response to Admiral's tender of its $1 million policy limits on June 27, 2001, the Jones plaintiffs reduced their settlement demand to $10 million. CR. 368.

The second mediation was held in Houston on August 9, 2001, before Mr. David Matthiesson. CR. 31. ATOFINA obtained another order requiring Evanston to be

(continued…)
not) pretend that it issued the policy free of charge.

present at the mediation. *Id.* Again, Evanston refused to offer a dime and ATOFINA's own carrier, National Union, refused to make any offer on the ground that its layer of coverage would not be reached until the Evanston coverage was exhausted. The case did not settle and the Jones plaintiffs threatened to increase their settlement demand to $15 million and to seek $140 million at trial. CR. 368. Plaintiffs also filed a motion requesting that the case be preferentially set for trial in November 2001. CR. 44.

Mr. Black conducted the third mediation later in August 2001. With Mr. Black's continued involvement, ATOFINA was finally able to settle with the Jones plaintiffs for $6.75 million *cash*. CR. 372-92. Admiral contributed its policy limits of $1 million. Evanston's refusal to honor its coverage obligations left ATOFINA to bear the remaining $5.75 million. CR. 368. Mr. Black, a highly experienced attorney-mediator with extensive experience in Jefferson County wrongful death cases, later testified: "Based on my experience and knowledge of the facts of this case, I believe the $6,750,000 settlement in this case for claims asserted by plaintiffs against ATOFINA is fair and reasonable." CR. 935.

In Jefferson County, large jury verdicts are common in cases against oil and petrochemical companies in factually similar cases. CR. 359. For example, attached to one of the Jones plaintiffs' demand letters was an opinion reflecting a jury verdict rendered in 1998 for $42.5 million in a case involving a death of a worker at a Diamond Shamrock facility. *Id.* Plaintiffs also pointed out a recent case that resulted in a jury verdict of $14.5 million to the survivors of a worker killed in a fall while working on an oil rig. *Id.* That is more than double the amount that ATOFINA paid in settlement. The

affidavit of Kirk Martin, counsel for ATOFINA in the Jones case, cited half a dozen recent, factually similar cases with verdicts ranging from $6.8 million to $14.5 million in actual damages.[3] CR. 904. In a recent diet-drug suit, a Jefferson County jury rendered the nation's largest verdict ever—$1 billion, with $100 million in actual damages—for the death of one individual. *See* Appendix A. In that case, the jury found the defendant liable even though the decedent had taken only one of the drugs in the fen-phen combination. *Id.*

Evanston relies heavily on a letter by ATOFINA's counsel Kirk Martin, who was defending the Jones case. That letter, however, was dated February 9, 2001, and the Jones case did not settle until September 2001—over seven months later. During that time, several damaging depositions of ATOFINA's witnesses took place that made liability more likely and the amount of potential damages far larger than had been estimated back in February. CR. 943. In addition, ATOFINA learned from consulting a pathologist that Mr. Jones was probably alive and unable to swim in the fuel oil for up to a minute and a half before he died a horrible death from drowning in fuel oil. *Id.* That fact alone substantially increased the damages far beyond the February evaluation, which did not provide "for the substantial pain and suffering evidence that was going to be presented to the jury . . . ." *Id.* At the time of settlement, ATOFINA's counsel believed that, in a jury trial, ATOFINA would do well to hold the verdict below $20 million. *Id.*

[3] *See, e.g., Drew v. Crown Derrick Erectors* ($14.5 million in compensatory damages award by Jefferson County jury to widow and parents of oilfield worker who fell to his death through a hole in a catwalk); *Martinez v. Philips Chemical Co.* ($7.8 million in compensatory damages, $110 million in exemplary damages); *Hall v. Diamond Shamrock Refining Co.* ($42.5 million verdict); *Ellender v. Mobil Oil Corp.* ($6.8 million verdict); *De La Lastra v. General Chemical Corp.* ($13 million in actual

II. PROCEDURAL BACKGROUND

ATOFINA brought a declaratory judgment suit against Evanston as a third-party defendant in the Jones case in June 2001, shortly before Evanston denied coverage. CR. 422. ATOFINA later severed its suit against Evanston from the remainder of the Jones case and amended its complaint to assert a breach of contract claim for damages in whatever amount ATOFINA might be obligated to pay in the Jones case. CR. 317, 320.

On August 2, 2001, before the second mediation of the Jones case, ATOFINA moved for partial summary judgment against Evanston seeking a declaration that it was obligated to cover ATOFINA for the Jones claim, and a ruling that Evanston was liable for attorneys' fees. CR. 6. ATOFINA moved for summary judgment on the grounds that it was an insured with coverage for the Jones claim under two separate, independent provisions of the Evanston policy: Section III.B.6 and Section III.B.5. CR. 7, 9, 337.

Evanston filed a combined response and cross-motion for summary judgment. *See* CR. 273, 328. Evanston argued only that (1) the insurance only supported Triple S's indemnity obligation and that Triple S was not obligated to indemnify ATOFINA (CR. 283), and (2) ATOFINA was not covered by the Admiral policy, and therefore was not an insured under Section III.B.5 of the Evanston policy. CR. 278. Evanston's combined response and cross-motion for summary judgment never addressed ATOFINA's argument that it was entitled to coverage under Section III.B.6 of the Evanston policy. Indeed, Evanston's combined response and cross-motion did not mention Section III.B.6

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damages); *Skeen v. Monsanto Co.* ($8 million in compensatory damages); *Sanchez v. Spaw-Glass, Inc.* ($7.89 million verdict).

at all. After ATOFINA filed its response, the court heard the motions on September 5. The Jones case settled while the motions were under advisement.[4]

On October 17, 2001, the trial court granted summary judgment in favor of ATOFINA on liability. It declared that ATOFINA was an insured under the Evanston policy, that Evanston was obligated to cover ATOFINA for the Jones plaintiffs' claims, that the Evanston policy was primary to all other policies except the $1 million Admiral policy and that ATOFINA was entitled to recover its attorneys' fees. CR. 353.

After the settlement liquidated ATOFINA's damages, ATOFINA moved for final summary judgment against Evanston. CR. 355. The motion was set for hearing on January 11, 2002. Evanston filed a response. CR. 528. Less than 48 hours before the scheduled hearing, Evanston also filed a 23-page, largely single-spaced Motion for Reconsideration of its original response and cross-motion for summary judgment. CR. 433. Over ATOFINA's objection that the motion was untimely and failed to provide notice and an opportunity to heard (CR. 496-98), the court granted Evanston's motion, vacated its summary judgment in favor of ATOFINA and granted summary judgment for Evanston instead. CR. 686.

ATOFINA filed a Motion to Modify Judgment or for New Trial, which the trial court set for a hearing on April 4, 2002. CR. 688, 981. The record reflects that on April 3, Evanston filed a motion to strike ATOFINA's motion for new trial. *See* CR. 987. Evanston's motion contained no substantive response to ATOFINA's new trial motion

[4] Contrary to Evanston's insinuations (Pet. Br. at 10), the Jones case settled *before* the grant of partial summary judgment and therefore could not have been influenced by it.

and no valid basis for "striking" it. ATOFINA, however, never had an opportunity to respond and there was no hearing. The trial judge signed Evanston's proposed order on April 2, the day *before* the motion to strike was file stamped by the clerk and before ATOFINA was even aware of the motion. CR. 993; *see* CR. 987, 991. Two days later, the trial judge signed an order vacating the April 2 order drafted by Evanston, but continuing to deny ATOFINA's motion on the merits without an oral hearing. CR. 994.

ATOFINA appealed. On appeal, Evanston conceded that the summary judgment in its favor must stand or fall solely on the grounds asserted in its combined response and cross-motion for summary judgment, and not on any other grounds that it might have attempted to raise in later filings such as its motion for reconsideration. App. Br. at 9 ("[T]he trial court's summary judgment stands on the grounds asserted in Evanston's Amended Response to ATOFINA's Motion for Summary Judgment and Amended Motion for Summary Judgment, filed Aug. 24, 2001."). This concession limits Evanston to two grounds for summary judgment: (1) that the insurance only supported Triple S's indemnity obligation and that Triple S was not obligated to indemnify ATOFINA (CR. 283), and (2) that ATOFINA was not covered by the Admiral policy, and therefore was not an insured under Section III.B.5 of the Evanston policy. CR. 278; *see also* App. Br. at 9 ("Evanston sought summary judgment on the ground that ATOFINA is not entitled to insurance coverage that is beyond the scope of ATOFINA's indemnification agreement with Triple S. Because Triple S did not agree to indemnify ATOFINA for damages caused by ATOFINA's negligence, ATOFINA is not covered by Evanston's insurance."); *id.* at 23 ("There is no dispute that section III.B.5 provides coverage *if*

coverage was allowed under Triple S's primary insurance policy with Admiral Insurance.").[5]

The court of appeals held that ATOFINA was an insured under the Evanston policy, and that it was entitled to coverage from Evanston for the Jones case. The court of appeals also remanded the case for the trial court to determine the amount of statutory penalties and attorneys' fees.

SUMMARY OF ARGUMENT

The court of appeals properly followed this Court's decision in *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 804 (Tex. 1992), in determining that ATOFINA's entitlement to coverage as an additional insured under the Evanston policy is not limited by any indemnity obligations of the named insured. In *Getty*, this Court established a clear distinction between additional insured provisions and indemnity obligations, and held that an additional insured provision is not limited by the named insured's indemnity obligation, if any. Both state and federal courts have consistently followed *Getty* in holding that additional insured provisions such as the one here cover the additional insured's negligence. Evanston's attempt to manufacture a conflict with *Fireman's Fund Ins. Co. v. Commercial Std. Ins. Co.*, 490 S.W.2d 818 (Tex. 1972), fails because that case addressed the entirely separate issue of the scope of an indemnity.

[5] The grounds stated in a party's motion for summary judgment are the only grounds that may be considered in determining whether that party is entitled to summary judgment: "A motion for summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on these grounds alone." *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *accord McConnell v. Southside Ind. Sch. Dist.*, 858 S.W.2d 337, 339 (Tex. 1993).

The court of appeals correctly determined that ATOFINA is an additional insured under the Evanston policy with coverage for the Jones claim. Under Section III.B.6 of the policy, ATOFINA is entitled to coverage as an additional insured if: (1) Triple S agreed to provide such insurance, and (2) the claim arose "with respect to operations performed by [Triple S] or on [its] behalf." Both conditions are satisfied here. It is undisputed that (1) Triple S agreed to provide ATOFINA with "insurance as is afforded by" the Evanston policy (CR. 71), and (2) Mr. Jones was an employee of Triple S who was working on ATOFINA's premises when he was injured. CR. 220. ATOFINA is therefore an additional insured under the policy. Evanston contends that Section III.B.6 of the Evanston policy bars coverage for ATOFINA's own negligence, but this argument lacks merit because the policy contains no such exclusion. In all events, Evanston has waived that argument by failing to raise it properly in the trial court. Indeed, Evanston never addressed Section III.B.6 at all in its combined response and cross-motion for summary judgment.

The court of appeals can also be affirmed on the independent ground that ATOFINA is an insured under Section III.B.5 of the Evanston policy. That section defines "Insured" as anyone "who is insured under a policy of 'underlying insurance.'" The only limitation is that the scope of coverage under Section III.B.5 "will be no broader than the 'underlying insurance.'" Under Section III.B.5, ATOFINA is covered by the Evanston policy because it was covered by the underlying Admiral policy for the Jones claim. There is no dispute that Admiral tendered a defense and paid its one million-dollar limit.

Further, the court of appeals correctly held that where, as here, an insured enters into an all-cash settlement without any assignment of rights after the insurer wrongfully denies coverage, the insurer is not entitled to challenge the reasonableness of the settlement. Any other rule would undermine this Court's decision in *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996), by reducing insurers' incentives to seek prompt resolution of coverage disputes. Of course, this rule does not create coverage where none exists, and an insurer remains free to allocate the settlement amount between covered and non-covered claims. But that issue is not present here, where there is only one claim.

Nor does this case raise any concerns about collusive behavior. Evanston's wrongful denial of coverage forced ATOFINA to pay an all-cash settlement out of its own pocket—with no guarantee of reimbursement—and ATOFINA made no assignment to the plaintiffs or anyone else. ATOFINA had no incentive except to settle for the lowest possible amount. Accordingly, Evanston is not entitled to the narrow exception recognized by this Court in *Gandy*. And, even if Evanston were entitled to challenge the reasonableness of the settlement, which it is not, the settlement is reasonable as a matter of law. The settlement is well within the realm of liability that a Jefferson County jury might have imposed, and Evanston does not argue otherwise.

Finally, the court of appeals correctly held that ATOFINA is entitled to the penalties provided in Article 21.55 for Evanston's wrongful denial of coverage. Even if Evanston had not waived its argument to the contrary, there would be no need to disturb the court of appeals' ruling. ATOFINA's claim to recover millions of dollars paid out of

its own pocket because of Evanston's wrongful denial of coverage is precisely the kind of claim contemplated by the statute.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THIS CASE IS CONTROLLED BY GETTY, NOT FIREMAN'S FUND.

In rendering judgment for ATOFINA, the court of appeals properly applied the well-established rule that where, as here, an additional insured is entitled to coverage under the terms of the policy, the scope of coverage is determined by the terms of the policy itself and is not limited by the named insured's indemnity obligation, if any. *See Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 804 (Tex. 1992) (holding that an "additional insured provision" constitutes an entirely "separate obligation" not limited by any indemnity obligation); *Certain Underwriters at Lloyd's London v. Oryx Energy Co.*, 142 F.3d 255, 260 (5th Cir. (Tex.) 1998) (following *Getty*). Contrary to Evanston's argument, there is no conflict with any decision of this Court or any other Texas appellate court.

In *Getty*, this Court considered and rejected the same argument Evanston makes here—that the insurance requirements were limited to supporting the contractor's unenforceable indemnity obligation—and drew a clear distinction between indemnities and additional insured provisions:

> [I]ndemnity provisions make the indemnitor [Triple S] liable for the indemnitee's [ATOFINA's] negligence. Additional insured provisions, on the other hand, make the insurance-purchaser's insurers [Evanston] liable for the loss caused by the insured's [ATOFINA's] negligence. The insurance-purchaser [Triple S] is responsible only for paying the insurance premiums, presumably far less than the actual loss.

Getty, 845 S.W.2d at 803. In *Getty*, this Court established that an additional insured requirement does not merely support an indemnity obligation, but is conceptually different. Contractual liability insurance, which supports an indemnity by making sure the indemnitor can pay its indemnity obligation, does not make the indemnitee an insured. In contrast, making a party an additional insured provides that party with direct coverage under the policy. An additional insured requirement obligates the contractor to pay for insurance covering the other party, after which the insurance company is directly obligated to the other party for whatever losses fall within the scope of coverage.[6]

Thus, protection as an additional insured is entirely separate from contractual liability coverage supporting an indemnity obligation. Under an additional insured provision, the risk is not shifted to an indemnitor, but directly to the insurance company; the scope of protection is determined by the insurance policy, not by the underlying contract; and the legal analysis is different because of the "diametrically opposed" policies that apply to indemnities compared to insurance policies. As the Fifth Circuit has made clear:

> We emphasize that Mid-Continent's first argument does not require us to determine whether Swift was entitled to indemnity under the indemnity provisions of the MSA. Rather, it requires us to answer the different question of whether Swift should be denied coverage as an additional insured under the Policy . . . . The presumptions involved in these different contexts are diametrically opposed. As the district court emphasized, under Texas law indemnity agreements are strictly construed in favor of the indemnitor. . . . By contrast, insurance policies are strictly construed in favor of coverage.

[6] For the Court's convenience, a chart summarizing the appropriate analysis is set forth as Appendix B.

Mid-Continent Cas. Co. v. Swift Energy Co., 206 F.3d 487, 492 (5th Cir. (Tex.) 2000).

Consistent with this important distinction, Texas courts of appeals, as well as federal courts applying Texas law, have uniformly looked to the terms of the policy—not to the terms of the contractor's indemnity obligation—to determine the scope of insurance coverage available to an additional insured. And in all these cases, courts have done so as a matter of law. *See, e.g.*, *Highland Park Shopping Village v. Trinity Universal Insurance Co.*, 36 S.W.3d 916, 918 (Tex. App.—Dallas 2001, no pet.) (reversing judgment for insurer and rendering judgment for additional insured); *American Motorists Ins. Co. v. Occidental Chemical Corp.*, 16 S.W.3d 140, 143-45 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (affirming summary judgment for additional insured); *McCarthy Brothers Co. v. Continental Lloyds Ins. Co.*, 7 S.W.2d 725, 729-30 (Tex. App.—Austin 1999, no pet.) (reversing judgment for insurer and rendering judgment for additional insured); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 454-55 (Tex. App.— Houston [1st Dist.] 1999, pet. denied) (affirming summary judgment for additional insured); *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 550-51 (5th Cir. (Tex.) 2002) (affirming grant of partial summary judgment to additional insured); *Mid-Continent*, 206 F.3d at 492-98 (reversing summary judgment for insurer and remanding with instructions to enter judgment for additional insured); *Mid-Continent Cas. Co. v. Chevron Pipe Line Co.*, 205 F.3d 222, 229 (5th Cir. (Tex.) 2000) (affirming summary judgment for additional insured).

Given Evanston's concession that the Triple S contract contains an additional insured requirement and that Triple S complied with that requirement (Pet. Br. at 4),

Getty is dispositive because it refutes Evanston's argument that an additional insured requirement merely supports the contractor's indemnity obligation. The additional insured provisions have nothing to do with Triple S's indemnity obligations to ATOFINA, if any. To be sure, the contract between ATOFINA and Triple S—just like the one in *Getty*—required Triple S to carry insurance supporting the indemnity, which is commonly known as contractual liability coverage. CR. 70. But, just as in *Getty*, the contract also required ATOFINA to be named an additional insured. CR. 71. Here, as in *Getty*, the indemnity and insurance provisions are found in entirely different sections of the contract and do not reference each other. The indemnity provision says nothing about insurance, and the insurance requirements say nothing about indemnity. And the contract explicitly separates the additional insured requirement from the indemnity obligation by providing that "these insurance provisions shall not affect the liability of [Triple S] stated elsewhere in this Contract . . . ." CR. 71.

Evanston's attempt to distinguish the contract in *Getty* (Pet. Br. at 20-21) also fails because, if anything, the contract here, which explicitly uses the term "additional insured," is clearer than the contract in *Getty*, which did not. ATOFINA is directly covered as an additional insured under the Evanston policy in the same way that Triple S is covered as a named insured under that policy. Nothing in the Evanston policy precludes coverage for its insured's negligence under Section III.B.6 whether the insured is a "named insured" or an "additional insured."

Contrary to Evanston's assertions, this straightforward application of *Getty* creates no conflict with the Court's earlier decision in *Fireman's Fund Ins. Co. v. Commercial*

Std. Ins. Co., 490 S.W.2d 818 (Tex. 1972). That case concerned a declaratory judgment action "for the construction of certain ***indemnity*** provisions." *Id*. at 820 (emphasis added). *Fireman's Fund* simply established that the scope of a contractor's indemnity obligation is not affected by the insurance required in a contract. *Id*. at 823. But the scope of Triple S's indemnity is not at issue here. Evanston does not (and cannot) cite anything in *Fireman's Fund* that could support its erroneous contention that an additional insured provision "does not provide coverage for the additional insured's own negligence in the absence of express language." Pet. Br. at 20 (citing the court of appeals' decision in *Getty* that was later reversed by this Court). This is not surprising, since this Court rejected that very argument in *Getty* by "declin[ing] to extend the reach of the express negligence doctrine to contractual provisions other than indemnity agreements" and by making clear that the "express negligence" doctrine does not apply to additional insured provisions. *Getty*, 845 S.W.2d at 807.

Unlike the contract between ATOFINA and Triple S, the contract in *Fireman's Fund* said nothing about making anyone an additional insured. The term "additional insured" is not mentioned once anywhere in that case. Because *Fireman's Fund* did not involve an additional insured requirement, it has no application here. Thus, it is hardly "remarkable," as Evanston contends, that the court of appeals did not "cite the *Fireman's Fund* decision" (Pet. Br. at 16), since it does not control the outcome of this case.

Nor is there any conflict with *Emery Air Freight Corp. v. General Transp. Sys., Inc.*, 933 S.W.2d 312 (Tex. App.—Houston [14th Dist.] 1996, no writ). First, *Emery* did not concern a suit against an insurer for coverage, but rather a suit against Emery's

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."

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT ATOFINA IS AN ADDITIONAL INSURED UNDER SECTION III.B.6 OF THE EVANSTON POLICY WITH COVERAGE FOR THE JONES CLAIM.

Under Section III.B.6 of the Evanston policy, ATOFINA is entitled to coverage for the Jones claim as an additional insured if two conditions are satisfied: (1) Triple S agreed to provide such insurance, and (2) the claim arose "with respect to operations performed by [Triple S] or on [its] behalf." The first requirement is satisfied by the language of the contract, which specifically requires Triple S to "name[ ] . . . [ATO]FINA as additional insured in each of [Triple S's] policies, except Workers' Compensation" (CR. 71), and by Triple S's affidavit, which states that "[i]n negotiating our contract with ATOFINA, Triple S intended its insurance carrier(s) to name ATOFINA as an additional insured . . . and for ATOFINA to be covered by the Triple S policy(ies) to the maximum extent those policies allow . . . ." CR. 961. The second requirement is satisfied by Evanston's concession that Mr. Jones was an employee of Triple S who was working on ATOFINA's premises when he was injured. *See* CR. 220. Accordingly, as the court of appeals correctly held, ATOFINA is an additional insured under Section III.B.6 the Evanston policy with coverage for the Jones claim.

Evanston tries to avoid this straightforward conclusion by arguing that ATOFINA's negligence bars coverage under Section III.B.6 of the Evanston policy. As an initial matter, Evanston has waived this argument by failing to assert it either as a ground for summary judgment or a defense to ATOFINA's motion for summary judgment. Evanston's combined response and cross-motion for summary judgment never addressed ATOFINA's argument about Section III.B.6 at all, much less argued that one

who qualifies as an insured under Section III.B.6 is not covered for its negligence. *See* CR. 273. In all events, Evanston's argument lacks merit. Under Section III.B.6 of the Evanston policy, ATOFINA is covered whether or not it was negligent.

Evanston's contrary argument ignores the basic purpose of insurance. Just like any other insured, ATOFINA is entitled to coverage according to the terms of the policy. It does not matter that ATOFINA is an additional insured rather than the named insured. ATOFINA is still an insured entitled to coverage. Had Evanston wanted to exclude coverage for an additional insured's negligence, it could have done so. *See Mid-Continent Cas. Co. v. Chevron Pipe Line Co.*, 205 F.3d 222, 229 (5th Cir. 2000) ("Mid-Continent easily could have limited coverage by including in the endorsement terms such as 'vicarious liability' or 'negligence of the named insured.'"); *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420, 425 (6th Cir. 2000) (construing insurance policy that expressly "exclud[ed] any negligent acts committed by such additional insured"). The Evanston policy contains no such exclusion, and the court of appeals properly rejected Evanston's attempt to rewrite the policy after the fact.[8]

Evanston musters only one court of appeals case that it contends construes similar policy language to bar coverage for an additional insured's negligence: *Granite v. Bituminous Ins. Co.*, 832 S.W.2d 427 (Tex. App.—Amarillo 1992, no writ). About the most that can be said for *Granite* is that it is limited to its facts. No Texas case decided

[8]Even if, despite the absence of a clear or express exclusion for ATOFINA's negligence, Evanston's argument were that the policy language was ambiguous on this point, that argument would founder on the basic principle that when ambiguous policy terms permit more than one interpretation, courts construe the policy against the insurer and in favor of coverage. *State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 933 (Tex. 1998); *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811

since *Granite* has followed it. What is more, the one federal district court case that did follow *Granite*—and upon which Evanston heavily relies—has been expressly rejected by Texas courts. *See, e.g.*, *Admiral*, 988 S.W.2d at 454 n.4 ("[W]e have found only one Texas state court case (a 'no writ' case) [*Granite*], and one federal case that cites the 'no writ case': . . . *Northern Ins. Co. v. Austin Commercial, Inc.*, 908 F. Supp. 436 (N.D. Tex. 1994). To the extent they are contrary to this opinion, we disagree with these two cases."); *see also Fireman's Fund Ins. Co. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 115 Cal. Rptr. 2d 26 (Cal. App. 2001) (following *Admiral*).[9]

Whatever its merits, *Granite* is distinguishable because it "relied on the fact that the underlying service contract expressly pinned sole responsibility for . . . operations during which the [contractor's] employee was injured on the [additional insured]." *See Mid-Continent*, 206 F.3d at 498. Here the opposite is true. The contract between ATOFINA and Triple S expressly pins responsibility for operations on Triple S. It provides that ATOFINA "shall not have the power or authority to direct or control [Triple S] in the means, method or manner of the performance of the WORK" and that in carrying out the terms of the contract Triple S "is acting independently and is an independent contractor with full power and authority to select the means, method and

(continued…)

S.W.2d 552, 555 (Tex. 1991). This principle applies with special force to policy terms that exclude or limit coverage. *Vaughan*, 968 S.W.2d at 933.

[9] As for the Maryland case relied upon by Evanston, that case construed significantly different policy language and is thus inapposite. *See Baltimore Gas and Electric Co. v. Commercial Union Ins. Co.*, 113 Md. App. 540, 688 A.2d 496 (Md. App. 1997) (interpreting policy language that expressly excluded coverage for claims based on actions by the additional insured, except for its supervision of the named insured's work). If anything, that case illustrates once more how Evanston could have excluded coverage for ATOFINA's negligence if that were Evanston's intention.

manner of performing the WORK and is responsible to [ATOFINA] only for the results contracted for herein." CR. 23. Thus, unlike the contract in *Granite*, the contract between Triple S and ATOFINA "pinned sole responsibility for . . . operations during which [Triple S's] employee was injured on" the *contractor* [Triple S], not on the additional *insured* [ATOFINA].

Moreover, contrary to Evanston's argument, the Triple S contract also did not "expressly pin responsibility" on ATOFINA for losses attributable to its "concurrent or sole negligence." Pet. Br. at 24. The contract merely provided that Triple S need not *indemnify* ATOFINA against the consequences of its own negligence, which is an entirely separate issue. In all events, the terms of the contract between ATOFINA and Triple S do not determine the scope of coverage. The terms of the insurance policy issued by Evanston do—and nothing in the policy incorporates any such limitations as to coverage of ATOFINA as an additional insured under Section III.B.6, even if there were any in the contract between ATOFINA and Triple S, which there are not.

The contract between Triple S and ATOFINA does not alter the scope of coverage provided by the insurance contract between Evanston and ATOFINA. Evanston once understood this fundamental principle of contract law. *See* CR. 435 ("ATOFINA and Triple S executed the blanket contract, however, Evanston was not a party to it. Accordingly, Evanston cannot be obligated by its terms unless it otherwise has agreed to abide by them or to provide coverage for them."). Indeed, Evanston's heavy reliance on the contract between ATOFINA and Triple S (*e.g.*, Pet. Br. at 3-5, 13, 15, 17-18, 18-19, 20-21, 24) is not only misplaced, but also strikingly at odds with its own assertions in the

trial court that "Evanston is not a party to the blanket contract and is not bound by it except to the extent the policy so provides" and that the "governing document[s]" in this case are the "underlying Admiral policy" and "the Evanston policy." *See* CR. 469.

Evanston also contends that the court of appeals erred in relying upon *Highland Park* because the policy language there was somehow broader than the policy language here. Pet. Br. at 25-26. Evanston is mistaken. First, in *Highland Park*, the policy covered the additional insured for "*liability* arising out of the named insured's operations." 36 S.W.3d at 917. That is a *limitation* on the scope of coverage. In contrast, the Evanston policy is not limited to covering ATOFINA only for liabilities arising out of Triple S's operations, but applies to *any* occurrence that happens "with respect to operations performed by" Triple S or on its behalf. Second, the Evanston policy language—which provides coverage "***with respect to*** operations performed by Triple S"—is broader than the policy language in *Highland Park*, which covered the additional insured for liability "***arising out of***" the named insured's operations. *See Smith v. Lucent Technologies, Inc.*, No. Civ. A. 02-0481, 2004 WL 515769, at *8 (E.D. La. Mar. 16, 2004) (stating that courts have held "with respect to" to be broader than "arising out of" and citing cases); *Meadows Indem. Co. v. Baccala & Shoop Ins. Services, Inc.*, 760 F. Supp. 1036, 1045 (E.D.N.Y. 1991) (finding provision for arbitration of "any dispute . . . with reference to the interpretation of this contract or the rights of either party ***with respect to*** any transaction under this contract" broader than clause requiring arbitration of "any dispute ***arising out of***" the contract).

The *Highland Park* court rejected the very same argument that Evanston makes here. In *Highland Park*, the insurer denied coverage on the basis that the plaintiff had alleged negligence only on the part of the additional insured. 36 S.W.3d at 917. The court of appeals reversed judgment for the insurer and rendered judgment for the additional insured. *Id.* It held that because the plaintiff's injury occurred while he was performing work for his employer pursuant to the contract with the additional insured, the additional insured was covered even if the injury was solely a result of the additional insured's negligence: "[A]s [the] injury occurred while he was on the premises to do the work of his employer . . . his injury arose out of [his employer's] work and appellants were covered as additional insureds." *Id.* at 918. Similarly, Mr. Jones was killed while working for Triple S pursuant to the contract with the additional insured, ATOFINA. Like the additional insured in *Highland Park*, ATOFINA is covered under the Evanston policy.

Evanston, however, leans heavily on the proposition that Section III.B.6 requires a "causal connection" between Mr. Jones's death and Triple S's negligence. Pet. Br. 22-24. Evanston is wrong again. Conspicuously absent from Evanston's argument is any reference to the policy language itself. This is not surprising, given that the language of Section III.B.6 requires only that the claim arise "with respect to operations performed by [Triple S] or on [its] behalf." That requirement is satisfied by Evanston's own concession that Mr. Jones "was fatally injured while working at [ATOFINA's] plant in Triple S's employ." CR. 274.

Courts have uniformly rejected the same argument advanced by Evanston in interpreting similar policy language: "[I]t is not necessary for the named insured's acts to have 'caused' the accident; rather it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured. . . ." *Admiral*, 988 S.W.2d at 454. *Accord McCarthy Brothers*, 7 S.W.2d at 729-30 ("The accident occurred while Wilson was on the construction site for the purpose of carrying out Crouch's contract with McCarthy. . . . Therefore, there is a causal connection between Wilson's injury and Crouch's performance of its work for McCarthy. . . ."); *Highland Park*, 36 S.W.3d at 918. The conditions for coverage set forth in Section III.B.6 are satisfied and the court of appeals correctly held that ATOFINA is entitled to coverage for the Jones claim under that section of the Evanston policy.

III. THE JUDGMENT OF THE COURT OF APPEALS CAN BE AFFIRMED ON THE INDEPENDENT GROUND THAT ATOFINA IS AN INSURED UNDER SECTION III.B.5 OF THE EVANSTON POLICY WITH COVERAGE FOR THE JONES CLAIM.

In its motion for summary judgment, ATOFINA argued that it was an insured on the Evanston policy for the additional, separate reason that ATOFINA is an insured under Section III.B.5 of the Evanston policy. Because the court of appeals held that ATOFINA was an additional insured under Section III.B.6 of the Evanston policy, the court had no need to consider or address whether ATOFINA was also an insured under Section III.B.5. Evanston's argument that the court of appeals "erred" in "overlooking" the language of Section III.B.5 makes little sense, as the two policy provisions are entirely separate and independent.

The decision below can be affirmed on the independent ground that ATOFINA is an insured under Section III.B.5 of the Evanston policy with coverage for the Jones claim. Section III.B.5 provides as follows:

> B. Each of the following is also an insured:
>
> 5. Any other person or organization who is an insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance.

ATOFINA is insured under the "underlying insurance" issued by Admiral Insurance. The Admiral policy covers ATOFINA when it is negligent, so long as ATOFINA is not solely negligent. That condition is satisfied. Indeed, Admiral defended ATOFINA and tendered its limits to settle the Jones suit. Because ATOFINA is an insured under the "underlying insurance," ATOFINA is also an insured on the Evanston policy.

Contrary to Evanston's repeated assertions (Pet. Br. at 1, 8, 12, 15 & 25), the Jones case did not involve ATOFINA's sole negligence so as to preclude coverage under the Admiral policy. Mr. Jones's widow originally sued both ATOFINA and his employer, Triple S, alleging that both were negligent. CR. 871, 873. She later non-suited Triple S not because it was not negligent, but because it was protected by the worker's compensation bar. CR. 890. Even after non-suiting Triple S, Ms. Jones never alleged that ATOFINA was solely negligent. Rather, she alleged only that ATOFINA's negligence "caused and/or contributed" to Mr. Jones's injuries. CR. 20. Similarly, Mr. Jones's mother did not allege that ATOFINA was solely negligent; she alleged only that

ATOFINA's negligence in failing to remedy a premises defect "caused and/or contributed" to Mr. Jones's injuries. CR. 882.

Moreover, the Jones plaintiffs specifically alleged that third parties not named in the suit were negligent, as the pleadings quoted in Evanston's own brief make clear. *See* Pet. Br. at 7 ("'Defendants, their agents, servants and/or employees negligently caused or negligently permitted' a premises defect that allegedly resulted in the death of Mr. Jones.'") (quoting Supp. CR 1:20).[10] There were also pleadings and evidence that Mr. Jones was contributorily negligent. CR. 945-58. Contrary to Evanston's repeated assertions, it is not true that "ATOFINA was the only party whose negligence was alleged to have caused Mr. Jones's death." *See* Pet. Br. at 8. Accordingly, there is no basis for Evanston's argument that ATOFINA is not entitled to coverage under Section III.B.5. And in all events, nothing entitles Evanston to second-guess Admiral's own coverage decision.

Evanston scolds the court of appeals for "overlook[ing] the fact that the Evanston policy followed the form of the Admiral policy" (Pet. Br. at 14), but this argument gets Evanston nowhere. First, Evanston's brief in the court of appeals never raised this argument, so the court of appeals can hardly be blamed for "overlook[ing]" it. Rather,

[10] The negligence of a "servant or employee" would not be ATOFINA's negligence. In order for ATOFINA to be liable for the negligence of a servant or employee, there must first be a finding not only that the servant or employee was negligent, but also that the negligence occurred in the course and scope of his employment. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 541-42 (Tex. 2002). Even then, ATOFINA's liability would only be vicarious and it would have a right of indemnity against the employee because, by definition, ATOFINA itself was not negligent. S*t. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174, 178 (Tex. App.—Amarillo, writ denied) ("Under the doctrine of respondeat superior, the employer is exposed to liability not because of any negligence on its part, but because of the employee's negligence in the scope of that employment. Therefore, it is clear that because respondeat superior is a theory based on purely vicarious liability, the employer's right of recover against the employee is through indemnity. . . . ").

Evanston's "following form" argument is waived. Second, whether or not the Evanston policy "followed form" as to the Admiral policy is irrelevant. What matters (and what Evanston ignores) is that Admiral *covered* ATOFINA under the Admiral policy up to the limits of that policy. Even if Evanston could challenge Admiral's own coverage decision, which it cannot, the Admiral policy covers ATOFINA even when it is negligent, so long as it is not solely negligent. ATOFINA was not solely negligent, so it was covered under the Admiral policy in all events.

Evanston nonetheless insists that ATOFINA is not entitled to summary judgment because "its motion was based on a superseded policy provision," *i.e.*, an endorsement to the Admiral policy that did not "include the prohibition against coverage for sole negligence." Pet. Br. at 15. That assertion is incorrect.

First, ATOFINA's original motion for summary judgment was based on an endorsement to the Admiral policy that was in effect at the inception of the Evanston policy and which contained no exception for situations where ATOFINA is solely negligent. CR. 699. Indeed, that endorsement was in effect at the time the Jones suit was filed. *Id.*

Second, ATOFINA's Supplement to Motion for Summary Judgment took into account that even under the subsequent endorsement, ATOFINA was entitled to summary judgment because it was covered under the Admiral policy (and thus under Section III.B.5 of the Evanston policy) so long as it was not *solely* negligent, which it was not.[11]

[11] Evanston's argument also ignores that ATOFINA moved for summary judgment on the separate and independent ground that it was entitled to coverage under Section III.B.6 of the Evanston policy, which covers ATOFINA whether or not it was solely negligent.

CR. 337-38. Evanston's contrary argument is belied by the fact that Admiral *did* in fact provide coverage to ATOFINA and even paid its $1 million limits. Evanston is not entitled to second-guess Admiral's decision that ATOFINA was covered under Admiral's own policy. Summary judgment for ATOFINA was proper, and Evanston's contrary arguments all fail.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT BECAUSE EVANSTON WRONGFULLY DENIED COVERAGE, EVANSTON IS NOT ENTITLED TO CHALLENGE THE REASONABLENESS OF THE SETTLEMENT.

The court of appeals held that Evanston was not entitled to challenge the reasonableness of ATOFINA's all-cash settlement—paid out of ATOFINA's own pocket without any guarantee of reimbursement—because Evanston wrongfully denied coverage. That holding is correct. Where, as here, an insurer breaches a duty to defend or improperly denies coverage and the insured enters into a cash settlement with no assignment of rights, the insurer is not entitled to challenge the reasonableness of the settlement. Even if Evanston were entitled to challenge the settlement, which it is not, the settlement is reasonable as a matter of law.

A. Evanston Is Not Entitled To Challenge ATOFINA's Settlement Decision.

Where, as here, there is no incentive for an insured to engage in any sort of collusion, an insurer like Evanston is not permitted to deny coverage and then second-guess the insured's settlement decision. *Western Alliance Ins. Co. v. Northern Ins. Co. of New York*, 176 F.3d 825, 830 (5th Cir. (Tex.) 1999) ("If an insurer breaches the duty to defend, it may not contest a determination that its insured was liable in the underlying

settlement or verdict (or the amount of either)."), citing *Employers Casualty Company v. Block*, 744 S.W.2d 940, 943 (Tex. 1988), overruled in part on other grounds, 925 S.W.2d 696, 715 (Tex. 1996); *Ensearch v. Shand Moran & Co.*, 952 F.2d 1485, 1495-96 (5th Cir. (Tex.) 1992) ("Texas law denies insurers like these a collateral attack on the settlement itself. Recent opinions of the Texas Supreme Court have confirmed that . . . an attempt to contest the reasonableness of a consent judgment . . . is unavailable to an insurer that has wrongfully breached its duty to defend."). This rule does not, of course, bind insurers to a collusive judgment, which can be attacked collaterally and does not establish coverage. *Block*, 744 S.W.2d at 943. But where, as here, concerns about collusion are not present, an insurer may not second-guess the settlement decisions of an insured to which it has wrongfully denied coverage. Courts in several other jurisdictions follow the same rule.[12]

[12] *See, e.g., USAA v. Alaska Ins. Co.*, 94 Cal.App.4 638, 644 114 Cal.Rptr.2d 449 (2001) (under California law, "when an excess insurer denies excess coverage for a third party claim, it waives the right to challenge the reasonableness of the primary insurer's settlement of the claim. The underlying principle . . . is that when a liability insurer denies coverage . . . and abandons its insured, it relinquishes the right to object to the manner in which the claim is resolved."); *USAA v. Hartford Ins. Co.*, 468 So.2d 545 (Fla. Ct. App. 1985) ("The general rule is that if an insurance company refuses to assume its contractual obligation and defend its insured, then it cannot challenge the reasonableness of a settlement made with the injured party.") (citing *Florida Farm Bureau Mut. Ins. Co. v. Rice*, 393 So.2d 552 (Fla. Ct. App. 1980) (under Florida law, the insurer cannot "be heard to complain of the reasonableness of the consent judgment entered below without the insurer's participation. . . . [Its] failure to assume its contractual obligation was voluntary and undertaken with full appreciation of the risk involved.")); *Galen Health Care, Inc. v. Am. Cas. Co. of Reading, Penn.*, 913 F. Supp. 1525, 1533 (M.D. Fla 1996) ("Under Florida law a primary carrier who has the duty to defend its insured, and who refuses to do so, cannot later challenge the reasonableness of the settlement . . . . ACCR, having abandoned its duty to defend Larson and having failed to participate in negotiation of a settlement in good faith, cannot now complain . . . . "); *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.2d 966, 970 (8th Cir. 1999) ("Missouri law recognizes that, by refusing to defend, the insurer gives up its contractual right to control the defense of the underlying action and frees the insured to negotiate a reasonable settlement with the plaintiff. In this situation, the general rule in Missouri is that the insured . . . may recover the amount of the settlement absent collusion or bad faith."); *Pub. Utility Dist. No. a of Klickitat Co. v. Int'l Ins. Co.*, 124 Wash.2d 789, 881 P.2d 1020 (1994) (following *Ensearch* and holding under Washington law that the plaintiffs "need only prove the underlying claims were covered by the policies"; a contrary rule would "defeat the purpose of settlement agreements," especially where settlement "was reached in part to avoid lengthy and difficult litigation of these very issues"); *Am. Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669, 690 (W.D. Wisc. 1982) (holding, under Wisconsin law, that where the "conditions surrounding the settlement do not reveal any reason to questions its propriety," "the arguments which would require a trial court to determine the reasonableness of the settlement are not applicable here").

This Court, in a slightly different context, recently validated the concerns underlying this rule:

> [W]e [have] required insurers either to accept coverage or make a good-faith effort to resolve coverage before resolving the underlying claim. . . . Requiring the insurer, rather than the insured, to choose a course of action is appropriate because the insurer is in the business of analyzing and allocating risk and is in the best position to assess the viability of its coverage dispute.

Texas Ass'n of Counties Gov't Risk Pool v. Matagorda County, 52 S.W.3d 128, 135 (Tex. 2000) (citations omitted). Here, Evanston neither accepted coverage nor made any effort to seek early resolution of the coverage dispute. Despite ATOFINA's repeated attempts to include Evanston in the settlement negotiations, Evanston appeared but declined to participate in the three mediations that eventually resulted in the settlement. Evanston chose instead to deny coverage and leave ATOFINA to its own best judgment as to whether to settle the Jones case and, if so, for how much. Given that ATOFINA entered into a $6.75 million ***cash*** settlement that, with the exception of $1 million, ATOFINA paid out of its own pocket with no guarantee of reimbursement, Evanston cannot now be heard to complain about the reasonableness of the settlement. *Western Alliance*, 176 F.3d at 830 (citing *Block*, 744 S.W.2d at 943); *Ensearch*, 952 F.2d at 1495-96.

Evanston attempts to distinguish *Western Alliance*, *Block* and *Enserch* on the basis that those cases concerned breaches of the duty to defend. But that is a distinction without a difference. To be sure, Evanston did not owe ATOFINA a duty to defend. But Evanston *did* owe ATOFINA coverage as an additional insured, and Evanston's breach of that contractual duty was every bit as damaging as a breach of the duty to defend. It

will not do for Evanston to deny that it is ATOFINA's insurer for purposes of coverage, and yet turn around and insist that *is* ATOFINA's "insurer" (Pet. Br. at 27) with the right to second guess the reasonableness of ATOFINA's settlement.[13]

To shore up its position, Evanston resorts (yet again) to conveniently excising key language from this Court's holding in *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996). In *Gandy*, this Court held that "[i]n no event … is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer ***by plaintiff as defendant's assignee***." *Id.* at 714 (emphasis added).[14] By using ellipses in its brief to conceal the emphasized language, Evanston continues to misrepresent this Court's holding. *Compare* Pet. at 12 *with* Pet. Br. at 29. But as the complete quotation makes clear, *Gandy* merely recognized a limited exception to the rule articulated in *Block.*

The *Block* rule, and not the *Gandy* exception, applies in this case because there was no assignment, ATOFINA never took a position contrary to its natural interests and ATOFINA had no incentive in settling to do anything other than minimize its liability. *Quorum Health Resources, L.L.C. v. Maverick County Hosp. Dist.*, 308 F.3d 451 (5th

[13] Not surprisingly, none of the cases cited by Evanston calls for a different conclusion. In *Stumph v. Dallas Fire Ins. Co.*, 34 S.W.3d 722 (Tex. App.—Austin, 2000, no pet.), the court simply affirmed the factual sufficiency of a jury's finding of damages resulting from the insurer's refusal to defend and indemnify the insured in a previous suit. *See id.* at 732. Similarly inapposite is *Texas Property & Casualty Ins. Guaranty Ass'n v. Boy Scouts of America*, 947 S.W.2d 682 (Tex. App.—Austin, 1997, no writ), which involved a statute that required the insurer, a guaranty association, to review any settlement and determine the extent to which it could be challenged. No such statute is at issue here.

[14] The Court's later statement in *Gandy* that "[i]n no event should a judgment agreed to between plaintiff and defendant be binding on defendant. . . . " was similarly qualified: "If an insurer's liability is to be litigated in an action ***by a plaintiff as a defendant's assignee*** after such a judgment is rendered, it should be done on the strength of plaintiff's claims . . . ." 925 S.W.2d at 719 (emphasis added).

Cir.(Tex.) 2002) (post-*Gandy* case citing *Block* for the proposition that "an insurer who first 'wrongfully refuses to defend' an insured is precluded from insisting on the insured's compliance with other policy conditions"); *Western Alliance*, 176 F.3d at 830 (post-*Gandy* case citing *Block* for the proposition that "[i]f an insurer breaches the duty to defend, it may not contest a determination that its insured was liable in the underlying settlement or verdict (or the amount of either)"). *See Reyna v. Safeway Managing Agency for State & County Mutual Fire Ins. Co.*, 27 S.W.3d 7, 15-18 (Tex. App.—San Antonio 2000, pet. granted, judgment vacated w.r.m.) (refusing to extend *Gandy* to invalidate a default judgment where, unlike *Gandy*, the insurer failed to tender a defense and the insured took no position contrary to its natural interests.")[15]

In *Gandy*, unlike in this case, there was no breach by the insurer. Rather, the insurer had offered to defend under a reservation of rights (though the trial court later ruled that it had no duty to do so). *Gandy*, 925 S.W.2d at 697, 704. The defendant's lawyers ignored the insurer's offer, and instead entered into a settlement under which the defendant assigned claims against the insurer in exchange for a covenant to limit execution. *Id.* at 698. The assignment, signed in December 1991, referred to an agreed judgment to be rendered in 1992. *Id.* at 702. The defendant's lawyer lied to the insurer about the status of the case and the fact that it had settled. *Id.* In addition, the plaintiff and defendant in the underlying personal injury case in *Gandy* engaged in conduct that amounted to a conspiracy to generate a larger insurance liability in which they would

[15] This Court, pursuant to a settlement agreement between the parties, vacated the judgment in *Reyna* and remanded for entry of a new judgment consistent with the parties' settlement agreement. This Court, however, did not vacate the opinion in *Reyna*. *See* Order of August 10, 2000 in Cause No. 00-0484 and Tex. R. App. P. 56.3.

later share. *Id.* at 712. These egregious facts skewed the parties' incentives to reach a valid judgment. Accordingly, this Court held that an assignment of claims from a defendant to a plaintiff is void where (1) the assignment is made before an adjudication of the plaintiff's claims against the defendant; (2) the insurer has tendered a defense; and (3) either (a) the defendant's insurer has accepted coverage, or (b) the defendant's insurer has made a good faith effort to adjudicate coverage issues before adjudication of the plaintiff's claim. *Id.* at 714.

The settlement here has none of the factors that were present in *Gandy*. Unlike the insurer in *Gandy*, Evanston breached its coverage obligations to ATOFINA by flatly denying coverage. In contrast to the insured in *Gandy*, ATOFINA made no assignment to the plaintiffs or anyone else. Unlike the insured in *Gandy*, ATOFINA had no incentive other than to settle for as little as it could, because ATOFINA paid the settlement with its own funds and bore the risk of recovering the settlement from Evanston. ATOFINA settled for a cash payment to the Jones plaintiffs, and will not pay any more or less in settlement as a result of this suit against Evanston. In marked contrast to the parties in *Gandy*, ATOFINA never took a position contrary to its interests in the underlying litigation, nor did it ever have any reason to do so. In sum, the *Gandy* exception to *Block* does not apply and Evanston is not entitled to challenge the reasonableness of ATOFINA's settlement.

Any other rule would place insureds like ATOFINA in an intolerable position. On one hand, an insured that has been wrongfully denied coverage might well choose to go to trial in order to minimize the risk of a subsequent challenge to the amount of the claim.

On the other hand, an insured that does go to trial risks untold liability, which it has no assurance will be covered, and even risks drawing a challenge from the insurer for not settling in the first place. And if the insured does decide to settle, its decision to settle and for how much is subject to second-guessing by the insurer. An insured like ATOFINA would be put in the untenable position of having to justify the settlement amount by *maximizing* its culpability in the personal injury lawsuit, despite the fact that the insured's only incentive in that lawsuit would have been *minimizing* culpability. An insured's efforts to justify the amount of settlement by emphasizing the strength of the plaintiff's case against it would hardly endear the insured to the jury, and indeed would make the insured vulnerable to accusations of adopting whatever position best served its own interests. What is more, the insured would be forced to make the personal injury plaintiff's case, but without being able to expose the jury to the emotional force of the grieving family members or the suffering plaintiffs. The law does not require such distorted litigation. *See, e.g., id.* at 712; *Delta Engineering Corp. v. Warren Petroleum*, 668 S.W.2d 770, 772 (Tex. App.—Houston [1st Dist.] 1984, writ refused n.r.e.) (rejecting burden-shifting scheme that would require litigant "to take what appears to be two contradictory conditions" and noting that such a scheme "could easily create needless confusion among the members of the jury").

The court of appeals correctly applied the rule articulated in *Block* and refined in *Gandy* that an insurer that wrongfully denies coverage cannot wait in the weeds until the case settles and then mount a collateral attack on the reasonableness of a cash settlement where there is no reason to suspect any collusion. Any other rule would "undermine

Gandy by reducing insurers' incentive to seek early resolution of coverage disputes." *Texas Ass'n of Counties*, 52 S.W.2d at 135. Evanston is not entitled to the narrow exception to *Block* carved out by *Gandy*, which applies only "in an action against defendant's insurer ***by plaintiff as defendant's assignee***." *Gandy*, 925 S.W.2d at 714 (emphasis added). Here, unlike in *Gandy*, ATOFINA paid an all-cash settlement out of its own pocket without any assignment and without any guarantee of reimbursement. There is no evidence of improper motive or collusion, and Evanston does not argue otherwise. Evanston had the right to participate in the defense of the case and multiple opportunities to participate in the settlement negotiations. Having declined to do so, Evanston is in no position now to complaint of the amount of the settlement.

B. Even If Evanston Were Entitled To Challenge The Reasonableness Of The Settlement, Which It Is Not, The Settlement Is Reasonable As A Matter Of Law.

Even where reasonableness may be challenged, the reasonableness inquiry is a narrow one, limited to whether the settlement offer "is one that the insured, acting as a person of ordinary care and prudence, would accept." *Texas Ass'n of Counties*, 52 S.W.3d at 138; *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 121 (5th Cir. (Tex.) 1992) (insured need only show that "in settling, his conduct conformed to the standard of a prudent uninsured"). Thus, even where a reasonableness inquiry is authorized, the insurer is not entitled to re-litigate the merits of the personal injury case and have one jury second guess what another jury, in the entirely different context of deciding the underlying personal injury case, might have found had the underlying case been tried. Rather, the only question is whether the insured could have been held liable for as much

as the settlement amount. In this wrongful death case in Jefferson County, an oil company such as ATOFINA could easily have been held liable for as much as the settlement amount. Evanston does not dispute that fact. ATOFINA's settlement is therefore reasonable as a matter of law.

The affidavits proffered by the mediator, Mr. Black (CR. 935) and by ATOFINA's trial counsel in the Jones case, Mr. Martin (CR. 369), as well as the case law relied upon by the Jones plaintiffs in settlement negotiations all make clear that the amount of the settlement was well within the realm of the liability that could have been rendered at trial. Mr. Martin's affidavit cited jury verdicts from factually similar cases ranging from $6.8 million to $14.5 million in actual damages alone. CR. 369. At least one single-plaintiff death case in Jefferson County resulted in a verdict of more than $100 million in actual damages. *See* Appendix A. Not surprisingly, Evanston does not even attempt to argue that the settlement was not within the realm of liability that a Jefferson County jury might have imposed. Instead, Evanston points to a letter containing an early assessment of the case by one of ATOFINA's lawyers. But that letter is no evidence that the settlement was in any way unreasonable or that ATOFINA was not acting as a prudent insured. Even assuming that Evanston could raise a fact issue simply by arguing that ATOFINA paid too much, which it cannot, the letter does not raise any such fact issue.

The letter was dated February 9, 2001, and the case did not settle until September 2001—over seven months later. During that time, several damaging depositions of ATOFINA's witnesses took place that made liability more likely and the amount of potential damages far larger than had been estimated in February. CR. 943. ATOFINA

learned from consulting a pathologist that Mr. Jones was probably conscious and struggling to swim in the fuel oil for up to a minute and a half before he died a horrible death from drowning in fuel oil. *Id.* That fact alone substantially increased the damages far beyond the February evaluation, which did not take account of the "pain and suffering evidence that was going to be presented to the jury." *Id.* At the time of settlement, ATOFINA's counsel believed that, in a jury trial, ATOFINA would do well to hold the verdict below $20 million. *Id.* Records of other verdicts in Beaumont wrongful death cases demonstrate that ATOFINA's evaluation of a potential verdict of $20 million was very possible. CR. 369. Accordingly, ATOFINA's settlement of $6.75 million was reasonable as a matter of law.

Indeed, Evanston's own affidavit contains no evidence to suggest that the settlement was not within the realm of potential liability. The affidavit merely takes issue with ATOFINA's own evaluation of the risk and value of the Jones case and opines that ATOFINA should have settled the case for "$1 million-$2 million" based on evidence of contributory negligence, "the status of the decedent's alleged common-law wife and his personal problems." CR. 548. But there is no evidence that the case could have been settled for that amount. Evanston is not entitled to make ATOFINA prove that it actually would have been held liable in the underlying case, nor may Evanston second-guess ATOFINA's evaluation of the risk or value of the case and its decision to settle. It is enough that ATOFINA was potentially liable and that the settlement amount was well within the realm of its potential liability. Accordingly, the settlement was reasonable as a matter of law.

V. THE COURT OF APPEALS CORRECTLY APPLIED ARTICLE 21.55 TO PERMIT ATOFINA TO RECOVER A STATUTORY PENALTY BASED ON EVANSTON'S WRONGFUL DENIAL OF COVERAGE.

The court of appeals correctly determined that ATOFINA is entitled to recover the 18% statutory penalty under Article 21.55 based on Evanston's wrongful denial of coverage. To begin with, Evanston has waived its contrary argument by failing to raise it properly below. Even if Evanston's argument were not waived, which it is, ATOFINA's claim to recover millions of dollars paid out of its own pocket because of Evanston's wrongful denial of coverage is precisely the kind of claim contemplated by the statute. ATOFINA is therefore entitled to recover a statutory penalty under Article 21.55.

A. Evanston Has Waived Its Argument That ATOFINA Is Not Entitled To The Statutory Penalty.

As an initial matter, Evanston failed to preserve this argument for review by not raising it until its motion for rehearing in the court of appeals. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993); *Coastal Liquids Transportation, L.P. v. Harris County Appraisal District*, 46 S.W.3d 880, 886 (Tex. 2001). Prior to its motion for rehearing, Evanston's entire argument on this point consisted of a single sentence in its brief, with no citation to authority, stating that "[b]ecause Evanston asserted bona fide coverage positions, in good faith, in cannot be held liable for any extra-contractual exposure." Evanston never argued that the definition of "claim" set forth in Article 21.55 bars

ATOFINA from seeking the statute's 18% penalty either in the trial court or in the court of appeals until after that court's opinion. *Id.* The argument is therefore waived.[16]

B. ATOFINA Is Entitled To A Statutory Penalty Under Article 21.55.

Even if Evanston's argument were not waived, it lacks merit. Under Article 21.55, courts may impose penalties "[i]n all cases where a claim is made pursuant to a policy of insurance and the insurer liable therefore is not in compliance with this article. . . . " Tex. Ins. Code Ann. art. 21.55 § 6. Article 21.55 defines a "claim" as "a first party claim . . . that must be paid by the insurer ***directly to the insured*** or beneficiary." *Id.* at § 1 (emphasis added). If an insurer delays payment of a claim within the statutory period, it is liable for statutory damages. An insurer's wrongful rejection of a claim may be considered a delay in payment for purposes of Article 21.55. *See Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 461 (5th Cir. (Tex.) 1997). Accordingly, ATOFINA's claim to recover millions of dollars paid out of its own pocket is precisely the kind of claim contemplated by the statute.

Evanston, however, contends that ATOFINA is not entitled to the statutory penalty under Article 21.55 because it "does not apply to claims for reimbursement of settlement costs in the context of a liability insurer's ***denial of indemnity for a third party claim against its insured***." Pet. Br. at 31 (emphasis added). Again, Evanston is wrong. To be sure, the term "first party" as used in Article 21.55 simply means that only

[16] This Court recently heard oral argument in *Northern County Mut. Ins. Co. v. Davalos*, 84 S.W.3d 314 (Tex. App.—Corpus Christi, 2002, pet. granted), which raises the issue whether Article 21.55 applies to claims for defense. Because Evanston failed to preserve the Article 21.55 issue presented in this case for review, the outcome of that case will have no bearing on ATOFINA's entitlement to the 18% statutory penalty.

an insured or the beneficiary can recover under the statute, and not a third party making a claim against the insured. But ATOFINA is not a third party making a claim against an insured. It *is* an insured that seeks to recover $5.75 million *of its own money*, paid with no guarantee of reimbursement. ATOFINA's claim is therefore a "first party claim" for purposes of Article 21.55 and ATOFINA is entitled to the 18% statutory penalty. Indeed, this Court has recognized that an insured in ATOFINA's position may recover under Article 21.55:

> Disputes between I & D can often be expeditiously resolved in an action for declaratory judgment while P's claim is pending. If successful, D should be entitled to recover attorneys fees. Tex. Civ. Prac. & Rem. Code § 37.009; Tex. Ins. Code art. 21.55, § 6. *D may also be entitled to recover a penalty against I equal to eighteen percent of the claim*. Tex. Ins. Code art. 21.55, § 6.

Gandy, 925 S.W.2d at 714 (emphasis added). As this Court has indicated, an insured's claim for defense costs is no different as a matter of logic than an insured's claim for property damage. Both insureds are seeking benefits under the policy that will be paid directly to the insured. For this reason, nearly every court that has considered the issue has applied Article 21.55 to both kinds of claims. *See, e.g.*, *Northern County Mut. Ins. Co. v. Davalos*, 84 S.W.2d 314, 318-320 (Tex. App.—Corpus Christi, 2002, pet. granted); *Mt. Hawley Ins. Co. v. Steve Roberts Custom Builders, Inc.*, 215 F. Supp.2d 783, 794 (E.D. Tex. 2002); *E&R Rubalcava Construction, Inc. v. The Burlington Ins. Co.*, 148 F. Supp.2d 746, 750 (N.D. Tex. 2001); *Sentry Ins. Co. v. Greenleaf Software, Inc.*, 91 F. Supp.2d 920 (N.D. Tex. 2001) (withdrawn because of settlement).

The authorities upon which Evanston relies provide no basis for disturbing the court of appeals' determination that ATOFINA is entitled to the 18% statutory penalty under Article 21.55. In *Hartman v. St. Paul Fire & Marine Co.*, 55 F. Supp.2d 600 (N.D. Tex. 1998), the insurer apparently complied with the statute by tendering a defense subject to a reservation of rights. *See id.* at 604. That is not so here. Evanston's reliance on *Hartman* is also misplaced for another reason: Under *Hartman*'s reading of the statute, an insurer who unjustifiably refuses to defend a lawsuit and thereby causes the insured damages would suffer no penalty, while another insurer that behaves exactly the same but with respect to a claim for property damage *would* be subject to the penalty. This result would frustrate the remedial purpose of the statute, "which is to obtain prompt payment of claims made pursuant to policies of insurance." Tex. Ins. Code Ann., art. 21.55 § 8. Having been forced by Evanston's wrongful denial of coverage to part with $5.75 million of its own money, and having sought to recover those funds directly from its insurer, ATOFINA is properly considered a "first party" for purposes of Article 21.55 and is entitled to the 18% statutory penalty.

Evanston's heavy reliance on *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex. App.—Dallas 2004, no pet. h.), is similarly misplaced. The *TIG* court held that "[t]he language of 21.55 cannot be applied to claims for a defense in any meaningful way." *Id.* at 242. The decision in *TIG*, however, rested on the court's determination that a claim for a defense is "not one for *payment* to be made *directly to the insured or beneficiary*." *Id.* at 241 (emphasis added). Whatever the force of this reasoning, it has no application to this case. Evanston's wrongful denial of coverage forced ATOFINA to

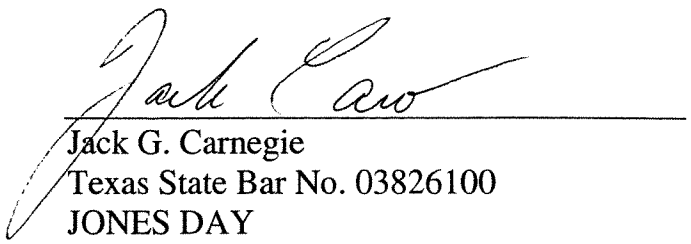
part with $5.75 million of its own money, and ATOFINA seeks *direct* recovery of those funds from its insurer. The decision in *TIG*— which relied heavily on the notion that "a [c]laim for a defense has no 'amount' to which the . . . penalty may be applied because the claim is not for payment of money but for services to be rendered"—does not call into question the court of appeals' determination that, under the facts of this case, ATOFINA is entitled to the 18% statutory penalty for Evanston's wrongful denial of coverage.[17]

CONCLUSION AND PRAYER

For all the foregoing reasons, respondent ATOFINA respectfully requests that the petition be denied.

[17] Evanston asserts that the decision under review has "already generated confusion" and, as its only support for that proposition, cites an unpublished Ninth Circuit case that mistakenly attributes to this Court the holding of the court of appeals. *See* Pet. Br. at 34-35 (citing *Legacy Partners, Inc. v. Travelers Indem. Co.*, Nos. 02-15900, 02-15978, 2003 WL 22905287 (9th Cir. Dec. 9, 2003). ATOFINA respectfully submits that any "confusion" in the Ninth Circuit can hardly be blamed on the court of appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on all known counsel of record by certified mail, return receipt requested, on this the 21 day of June, 2004, as follows:

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