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Additional Insureds

Contractor's CGL Policy's Additional Insured Endorsement, Extending Coverage to the Owner "Only with Respect to Operations Performed by" the Contractor, Applies to a Loss Caused by the Owner's Sole Negligence, a Premises Defect

Insurer Cannot Challenge Reasonableness of Insured's Settlement

Evanston Insurance Company v. ATOFINA Petrochemicals, Inc., ___ S.W.3d ___, 2008 WL 2405005 (Tex. June 13, 2008)

Case at a Glance

An additional insured endorsement's scope of coverage is determined by the policy language, without regard to an indemnity agreement in the underlying construction contract which excepted coverage for the owner's sole negligence.

A contractor's CGL policy's additional insured endorsement, extending coverage to the owner "only with respect to operations performed by" the contractor, applies to a loss caused by the owner's sole negligence, a premises defect; the same rule would apply to coverage "arising out of" the named insured's operations.

Where an excess insurance policy contains several "who is an insured" provisions, and the additional insured is covered under one but excluded under another, each provision applies independently and the insurer is obligated to provide coverage.

An insurer, who wrongfully denied coverage to an additional insured who then settled the underlying claim, is barred from contesting the reasonableness of the settlement.

The Texas "prompt payment of claims" statute (then: 21.55, now: 542.051-061 of the Texas Insurance Code) applies only to first party coverage and hence not to third party (or, liability) coverage.

Summary of Decision

[Editor Note: This is the Texas Supreme Court's

third opinion in the *Evanston* case. The court's two previous opinions, *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 2006 WL 1195330 (Tex. May 5, 2005), and *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 2008 WL 400394 (Tex. Feb. 15, 2008), were withdrawn upon grants of rehearing.]

Facts

ATOFINA, the owner of an oil refinery, hired an independent contractor (Triple S) to perform maintenance and construction work at the refinery. Matthew Todd Jones, an employee of Triple S, was killed when he fell through a corroded roof of a storage tank and drowned in fuel oil. Jones's estate sued ATOFINA and Triple S for negligence, but the contractor was non-suited.

The owner sought coverage as an additional insured under Triple S's primary and excess commercial general liability (CGL) policies. Admiral Insurance Company, the primary insurer, tendered its policy limits of \$1 million. However, Evanston Insurance Company, the excess insurer, denied coverage. ATOFINA settled the *Jones* lawsuit for \$6.75 million and brought this declaratory judgment action against Evanston to recover \$5.75 million. The trial court granted Evanston's motion for summary judgment. The court of appeals reversed, holding that the Evanston policy covered ATOFINA.

Resolution of this appeal involves the interplay of four contract provisions: an indemnity clause, an additional insured endorsement in the primary insurance policy, and two additional insured endorsements in the excess policy. First, the prime contract required Triple S to indemnify ATOFINA against claims of personal injury and death, unless caused by the owner's concurrent or sole negligence.

Of greater significance, the contract also required the contractor to procure both primary and excess CGL insurance, naming ATOFINA as an additional insured on each policy, and that the excess policy was to be a "following form" policy, meaning that the excess policy would insure exactly the same types of liabilities as the primary policy. The primary policy, issued by Admiral, contained the following endorsement:

WHO IS AN INSURED (Section II) is amended to include as an insured [ATOFINA], but 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.*

The excess policy issued by Evanston policy contained two additional insured endorsements. First, under section III.B.5 of the policy, an insured is

[a]ny ... person or organization who is 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.

Second, under section III.B.6 of the policy, an insured may also be

[a] person or organization for whom [Triple S has] agreed to provide insurance as is afforded by this policy; but that person or organization is an insured *only with respect to operations performed by [Triple S]* or on [Triple S's] behalf, or facilities owned or used by [Triple S].

There is no dispute that ATOFINA qualified as an insured under all three provisions.

On appeal to the supreme court, Evanston argued that it had no duty to indemnify ATOFINA for the owner's contribution to the underlying settlement for three reasons. First, it viewed the policy as providing coverage no greater than that promised by Triple S under the indemnity agreement. The insurer pointed out that the subcontract excepted the duty to indemnify from losses caused by the owner's own negligence, while the Admiral additional insured endorsement similarly excepted coverage for losses caused by ATOFINA's sole negligence. (Because the Evanston policy was a "following form" policy, Evanston viewed the Admiral additional insured endorsement as defining its own responsibility.) Second, Evanston cited *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972) as prohibiting ATOFINA from obtaining a judgment for insurance proceeds based on losses arising from its own negligence. Finally, Evanston asserted that the settlement amount of \$6.75 million

was unreasonable and so unenforceable. The Texas Supreme Court rejected all three arguments and affirmed.

Indemnity Clause

The court first stated that the Evanston policy itself, and not the indemnity clause in the ATOFINA/Triple S contract, would determine whether the owner was entitled to insurance coverage as an additional insured. Accord, *Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 804 (Tex. 1992) (insurance coverage under an additional insured endorsement is interpreted independent of an indemnity agreement).

Section III.B.6

The court next turned to the issue of whether the additional insured endorsement III.B.6—which provided coverage "with respect to operations performed by [Triple S]"—extends coverage to losses caused by an additional insured's sole negligence. After observing that no fact finding had been done with respect to responsibility for the underlying death, the supreme court noted a divergence of opinion among the courts of appeal as to whether a "with respect to operations" (or the equivalent "arising out of") nexus requires a fault-basis causal connection. Compare *Granite Construction Co. v. Bituminous Ins. Cos.*, 832 S.W.2d 427, 428 (Tex. App. — Amarillo 1992, no writ) (holding that the claim did not "aris[e] out of operations performed by" the insured because only the additional insured company was responsible for the injury) with *McCarthy Bros. Co. v. Continental Lloyds Ins. Co.*, 7 S.W.3d 725, 730 n. 8 (Tex. App. — Austin 1999, no pet.) (disagreeing with *Granite*) and *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 454 n. 4 (Tex. App. — Houston [1st Dist.] 1999, pet. denied) (also disagreeing with *Granite*). The supreme court too rejected *Granite*:

[W]e do not follow *Granite* because the fault-based interpretation of this kind of additional insured endorsement no longer prevails. Instead, we interpret "with respect to operations" under a broader theory of causation. Generally, an event "respects" operations if there exists "a causal connection

or relation” between the event and the operations; we do not require proximate cause or legal causation. In cases in which the premises condition caused a personal injury, the injury respects an operation if the operation brings the person to the premises for purposes of that operation. The particular attribution of fault between insured and additional insured does not change the outcome.

Citations omitted, but citing *Utica Nat'l Ins. Co. of Tex. v. American Indemnity Co.*, 141 S.W.3d 198, 201-03 (Tex. 2004) (contrasting “arising out of” with “due to”; the latter “requires a more direct type of causation that could tie the insured’s liability to the manner in which the services were performed.”)

The court added that its conclusion was bolstered by the ordinary and natural meaning of the phrase “with respect to,” which is defined broadly in dictionaries as “referring to” or “concerning.” In addition, had Evanston wished to limited coverage to ATOFINA’s vicarious liability, it could easily have done so. Moreover, the majority view is that an “arise out of” nexus does not require a causal connection. However, while several courts have sought to explicate the nature of an “arising out of” or “with respect to operations” nexus (see the Comment below), the *Evanston* court found no need to do so on these facts. In footnote 17 of its opinion, the court noted that the accident was clearly caused by a premises defect, for which the owner would be responsible. (But, because no fact finding had been done, the contractor’s possible concurrent negligence has not been determined.) The court then stated that “we do not decide what level of causation, but-for or otherwise, would be required in a case where the additional insured’s premises is merely the situs of the injury.”

The court then applied this interpretation of the policy language to the allegations of the complaint. While the pleadings in the underlying suit do affirmatively state that Jones was performing a Triple S operation at the precise time of the accident, the employee was present at ATOFINA’s facility for the purpose of Triple S’s operations when the accident occurred. As a result, even if ATOFINA’s negligence alone caused Jones’s injury, section III.B.6 of the Evanston policy provides direct insurance coverage to

ATOFINA.

Section III.B.5

Section III.B.5 provided that coverage for anyone other than the named insured “will be no broader than the ‘underlying insurance’ except for this policy’s Limit of Insurance.” The court explained that the purpose of this provision is to make the Evanston policy a “following form” to the underlying, Admiral policy. It makes ATOFINA an insured under the Evanston policy if the owner was an insured under the Admiral policy. Accordingly, any exclusion to coverage under the Admiral policy would defeat coverage under the Evanston policy as well.

The court noted that the Admiral policy excluded coverage for losses caused by ATOFINA’s sole negligence. This exclusion would apply equally to the Evanston policy. However, application *vel non* of this exclusion was defeated by the lack of fact finding as to responsibility for Jones’s death.

Section III.B.5 and III.B.6

Because of the possibility that a remand would reveal ATOFINA as solely responsible for the loss, the court was required to decide whether the two “who is an insured” clauses—III.B.5 and III.B.6—operate to grant coverage independent or dependent of each other. The court found nothing in section III.B.6 (which does grant coverage) as requiring that it be read in conjunction with any other part of section III.B. “In fact,” the court continued,

apart from section III.B.5, other paragraph III.B sections contain disparate limiting language in their definitions of “insured,” suggesting that each grant of coverage in paragraph III.B can be read independently as a self-contained grant of coverage. For example, section III.B.1 covers employees as “an insured” but excludes coverage for certain bodily injury. For the same reason that we would not read the section III.B.1 bodily injury limitation into the broad coverage of section III.B.6, we refuse to read section III.B.5’s exclusion of coverage beyond the scope of the Admiral policy into section III.B.6. Because ATOFINA is entitled to

coverage under more than one who-is-an-insured clause in paragraph III.B, it is not unreasonable to conclude that the policy should be read to provide the broader measure of coverage available under the applicable clauses.

Indemnity/Insurance Interface

Evanston next argued that, under *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, *supra*, 490 S.W2d 818, ATOFINA cannot recover insurance proceeds based on losses arising from its own negligence. The *Evanston* court distinguished *Fireman's Fund*. In the earlier case, a contractor promised to indemnify the owner against certain losses and to acquire liability insurance backing up the indemnity obligations. The contractor's employees were injured on the job and sued the owner. The owner sought indemnification from the contractor, including for those losses caused by the owner's negligence. Citing the majority rule that "a contract of indemnity will not afford protection to the indemnitee against the consequences of his own negligence unless the contract clearly expresses such an obligation in unequivocal terms," the court determined that no such clear intent to indemnify a negligence indemnitee was evinced, and so no duty to indemnify arose. Absent a duty to indemnify, there was no coverage under the insurance policy.

The *Evanston* court distinguished *Fireman's Fund* on the ground that, in the earlier case, the contractor had no duty to name the owner as an additional insured. In this case, by contrast, Triple S did name ATOFINA as an additional insured, and it is on that basis that the owner sought insurance coverage.

More analogous to this case, the *Evanston* court continued, is the 1992 decision of *Getty Oil Co. v. Insurance Co. of N. Am.*, *supra*, 845 S.W2d 794. In that case, Getty agreed to purchase chemicals from NL Industries. The contract included both an indemnity provision and a further requirement that "[a]ll insurance coverage carried by [NL] ... shall extend to and protect" Getty "whether or not required [by other provisions of the contract]." An accident involving NL's product killed one of Getty's contractors, and a jury found that Getty was 100 percent responsible. NL's insurer refused coverage for

Getty because the Texas Oilfield Anti-Indemnity Statute prohibits indemnification for one's own negligence. Notwithstanding abrogation of the indemnity obligation, the *Getty* court ruled that the insurance obligation provided a separate and independent basis for coverage.

In this case, the *Evanston* court pointed out, Triple S had an obligation to name ATOFINA as an additional insured on its liability policies. While an insurance certificate "merely evinces the holder's status as an insured and does not create coverage, it is unmistakable that the agreement in this case to extend *direct* insured status to ATOFINA as an additional insured is separate and independent from ATOFINA's agreement to forego *contractual* indemnity for its own negligence. We disapprove the view that this kind of additional insured requirement fails to establish a separate and independent obligation for insuring liability." Citations omitted.

Settlement

Finally, the court examined whether *Evanston's* obligation to pay \$5.75 million of the \$6.75 million settlement was unreasonable as a matter of law, as asserted by the insurer. ATOFINA countered that the settlement was reasonable as a matter of law.

Rather than resolve that dispute, the court invoked the rule that an insurer who wrongfully denies coverage is barred from challenging the reasonableness of a settlement later entered into by its insured. As stated in a 1988 decision, "we agree with the court of appeals' conclusion that [the insurer] was barred from collaterally attacking the agreed judgment by litigating the reasonableness of the damages recited therein," quoting *Employers Casualty Co. v. Block*, 744 S.W2d 940, 943 (Tex. 1988) (italics added by the *Evanston* court are deleted).

In this case, the Jones estate sued ATOFINA, ATOFINA requested coverage from *Evanston*, and *Evanston* wrongfully denied coverage, citing the policy terms. ATOFINA brought *Evanston* into the case as a third-party defendant for a declaration of coverage, and *Evanston* continued to deny coverage in its pleadings. ATOFINA then settled with the estate and litigated the remaining coverage issues against *Evanston*. The court concluded that the *Block* rule precludes *Evanston* from challenging the reasonableness of ATOFINA's settlement of the underlying

action.

The court acknowledged that it has limited *Block* in one significant way. If an assignment of the defendant's rights against his liability insurer to the plaintiff is part of the settlement agreement, then the insurer may challenge the reasonableness of the settlement, since liability and the amount of damages were determined with a "fully adversarial trial." *State Farm Fire & Casualty v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996). But, said the court, *Gandy* does not apply here. There was not assignment here. And the use of assignments was crucial to the reasoning in *Gandy*, since it is they which make evaluating the merits of the injured plaintiff case difficult, and they do so by "prolonging disputes and distorting trial litigation motives." Thus, one of the goals in *Gandy* was to accelerate the resolution of claims, and here that goal is served by applying *Block*. Doing this will encourage early involvement of insurers "who are best positioned to evaluate the worth of claims during settlement discussions." [Query: Justice Green uses the word "intervention" and not the word "involvement." His word will encourage lawyers for insurers that the Court has authorized them to intervene in the underlying suit, i.e., to become parties. One wonders if this is the court's intent.] Thus, the Court, 7-2, held that "Evanston's denial of coverage barred it from challenging the reasonableness of API's settlement. Evanston is, therefore, bound to pay the \$5.75 million that remains of the settlement."

Statutory Bad Faith. There are several bad faith insurance statutes. The one at issue here has to do with promptness. Its explicit language is restricted to first-party claims, e.g. property insurance, and there has been some question as to whether it also applies to third party claims, i.e., claims under liability insurance policies. The Court here says "No." See the italicized headline above.

The Dissent. Nathan Hecht, J. wrote the dissent. He agrees with the majority in part. "An insurer that breaches its duty to defend a claim cannot later be heard to complain that the amount the insured paid in settlement was unreasonable, absent evidence of collusion. . . . [A]s far as I can tell, it is uniformly the rule throughout the country. This is hardly surprising. An insurer that wrongly refuses to defend a claim, leaving its insured to defend itself, can hardly be allowed to argue that it would have done a better job." But, said the dissenters, Evanston had no duty to

defend here, and nothing in the insurance contract required it to participate in settlement negotiations. All it did was to deny coverage, albeit mistakenly. This mistake should not forbid it from challenging the reasonableness of the amount of the settlement.

Majority Response. The response of the majority to Justice Hecht's argument is to be found in a footnote. "The dissent suggests that Evanston never breached any duty it owed A[PI]. . . . Yet on multiple occasions *before the settlement*, Evanston explicitly rejected A[PI]'s claim for coverage under the policy. Evanston first denied A[PI]'s request for coverage by letter, and then consistently asserted the same in its pleadings throughout the coverage suit. Even if this conduct does not amount to an anticipatory breach of the contract, which it very well may. . . , this kind of explicit, unqualified rejection of coverage surely operates to trigger the equitable principles in *Block*."

Response. Justice Hecht responded by noting that the contract involved—an excess liability insurance policy—contained no provision obligating the insurer to participate in settlements. Of course, it would be crazy of it not to do so, if it agreed that there was coverage. But the contract creates no duty to get involved if coverage is denied. Hence, the majority has written obligations into the contract of insurance, something which this very court has denounced and refused to do many times and quite recently. // Quinn and Schneier

Comments

The *Evanston* decision solidifies a clear, majority rule that an additional insured endorsement, using either an "arising out of" or "with respect to operations" nexus, extends coverage to a loss caused by the additional insured's sole fault. Not surprisingly, many of these cases involve injury to the named insured's employees caused by a premises defect.

Courts applying a broad interpretation to the "arising out of" language usually require something more than a but-for test, but less than a direct, causal connection. See *Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity & Guaranty Co.*, 143 F.3d 5, 9-10 (1st Cir. 1998) (Massachusetts law; "More than 'but for' causation existed. It was not simply because the two companies happened to be working in the same location that [the subcontractor's worker] was injured by [the contractor's]

employee; rather, the injury was a consequence of the work that [the subcontractor] was performing.”); *National Union Fire Ins. Co. of Pittsburgh v. Lumbermens Mutual Casualty Co.*, 385 F.3d 47 (1st Cir. 2004) (Massachusetts law; coverage under “arising out of” language where the subcontractor’s employees were injured on their way to lunch); *Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal. App. 4th 34, 81 Cal.Rptr. 2d 557, 561 (1999) (“It is settled that [‘arising out of’] language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.”); *Florida Power & Light Co. v. Penn Am. Ins. Co.*, 654 So.2d 276, 279 (Fla. App. 1995) (“At best, the phrase, “but only with respect to liability arising out of [named insured’s] operations” is ambiguous as to whose negligence is covered and whose negligence is excluded from coverage. Because this ambiguous language purports to limit coverage, we must construe it narrowly.”); *Casualty Ins. Co. v. Northbrook Property & Casualty Ins. Co.*, 150 Ill.App.3d 472, 103 Ill.Dec. 495, 501 N.E.2d 812, 814 (1986) (“The phrase “arising out of” is both broad and vague, and must be liberally construed in favor of the insured; accordingly, “but for causation,” not necessarily proximate causation, satisfies this language.”); *Shell Oil Co. v. AC & S, Inc.*, 271 Ill.App.3d 898, 208 Ill.Dec. 586, 649 N.E.2d 946, 951-52 (1995) (defining “arising out of” to mean “originating from,” “having its origin in,” “growing out of,” and “flowing from.” [Citations omitted.] Consonant with this definition, a “but for” causation analysis is applied to the facts in the instant case.”); *County of Hudson v. Selective Ins. Co.*, 332 N.J.Super. 107, 752 A.2d 849, 852 (App. Div. 2000), 21 CLR 270 (2000) (defining “arise out of” “to mean ‘originating from’ or ‘growing out of’ [the insured’s] work”); and *Consolidated Edison Co. of N.Y. v. United States Fidelity & Guaranty Co.*, 266 A.D.2d 9, 697 N.Y.S.2d 620 (1999), 21 CLR 26 (2000) (“arising out of” nexus provides coverage to a solely negligent additional insured). As noted in the case summary, the *Evanston* court decided the appeal without resorting to a definition of the nexus language. While these cases seem to require something more than but-for causation, a leading commentator also cited to authority that “but for causation, not proximate causation, is often all that

is required for coverage.” 1 Scott C. Turner, *Insurance Coverage of Construction Disputes* § 42:3 at 42-9, n. 1 (Thomson/West 2007).

For a recent decision applying a causal-connection test to an “arising out of” nexus language in an additional insured endorsement, see *Pro Con Construction, Inc. v. Acadia Ins. Co.*, 147 N.H. 470, 794 A.2d 108 (2002). In that case, the court found no coverage as a matter of law where the contractor’s employee slipped on ice while on his way from the work site to a coffee truck parked on the site’s lot to get lunch.

Recall that the *Evanston* lumped together additional insured endorsements applying either an “arising out of” or “with respect to operations” nexus. However, the Rhode Island Supreme Court distinguishes between the two terms, finding “arising out of” creates coverage for the additional insured’s negligence while “with respect to operations” does not. See *A.F. Lusi Const., Inc. v. Peerless Ins. Co.*, 847 A.2d 254, 264 (R.I. 2004), 25 CLR 229 (2004).

For further discussion, see Donald S. Malecki, Pete Ligeros & Jack P. Gibson, *The Additional Insured Book* 188-91 (International Risk Management Institute, Inc. 4th ed. 2000) and, for a broader discussion of additional insured endorsements, Trisha Strode, *From the Bottom of the Food Chain Looking Up: Subcontractors and the Full Costs of Additional Insured Endorsements*, 25 *Construction Lawyer* 21 (Summer 2005). // Schneider

The crucial paragraph of Justice Hecht’s opinion in *Gandy* begins by clearly stating that the holding of the court pertains to the use and effect of assignments followed by settlement agreements and perhaps agreed judgments. They cannot be used to trap liability insurers into paying huge settlements, whether they had coverage or not.

Later in the same paragraph, Justice Hecht remarked that the intent of the court was to make sure that insurers could challenge the reasonableness of a settlement under any circumstances when it did not participate and there was not “fully adversarial trial.” There were two problems inherent in this move. First, that was not the actual holding of the court. Second, it extended far beyond the actual fact pattern before the court, and binding precedent is not supposed to

be that broad, a proposition Texas law embraces. (There is also a third problem with the entire paragraph, and this is that the phrase “fully adversarial process” is obscure and dangerous.)

Interestingly, the majority in *Evanston* does not criticize Justice Hecht’s paragraph. In fact, it relies upon the broader language toward the end of the key paragraph, and then states that *Gandy* holding was restricted to assignments. In his dissent, Justice Hecht does not complain about the way the majority described *Gandy*, and he does not invoke his reasoning there to defend his dissenting view. Instead, he uses an entirely different argument. Thus, what we probably have here is a clever, silent collusion to kill off the mistake in the second half of the “Key *Gandy* Paragraph,” preserve what was right in that paragraph, and avoid any and all acrimony. Well done, justices! A classic of the common law! \ \ Quinn

Agents & Brokers

Nebraska Does Not Recognize Cause of Action for Breach of a Contract to Procure Against an Insurance Intermediary Who Is an Insurance Agent Acting Solely on Behalf of a Disclosed Insurer

Court Recognizes Contract Cause of Action for Failure to Procure Insurance as Requested against an Insurance Broker, Defined As, a Middleman between the Insured and the Insurer, the Legal Agent of Neither and Able to “Shop” for Policies from Different Companies

Broad ex rel. Estate of Schekall v. Randy Bauer Insurance Agency, Inc., 749 N.W.2d 478 (Neb. 2008)

Case at a Glance

While there can be no contract cause of action— an action for failure to procure insurance—against an “insurance agent,” since the agent is the legal agent for the insurer it represents and not the purchaser, there can be such a cause of action against an “insurance broker,” who is not the agent of the insurer. Since the agent-versus-broker status of the intermediary-defendant had not been established in

this case, and since it involved a fact issue, the case was reversed and remanded.

Summary of Decision

Facts. David Schekall (“David”) was killed in an automobile accident he caused, as was his passenger. The passenger’s estate sued David’s estate. David’s estate did not have enough automobile liability insurance to compensate the passenger’s estate, so David’s estate had to pay \$165,000 to settle with the passenger’s estate.

David had purchased insurance, but not automobile insurance, from Randy S. Bauer and the Randy Bauer Insurance Agency (“Randy”) a year before the accident. He obtained land and cattle, so needed insurance. David and his parents met with Randy on December 31, 2002. The original purpose of the meeting was for David’s parents to “review their insurance coverage” with Randy. David’s father claimed that Randy agreed to obtain the same insurance for David that he got for the parents, except that David’s personal liability umbrella would have a limit of \$1 million, while that of his parents would have a limit of \$3m. This insurance was to be a “farm and ranch premises/personal liability policy.” Randy stated that David had said to him that he did not want homeowner’s or auto coverage, since he already had it. Randy therefore did not obtain homeowners or automobile insurance for David.

David’s estate sued Randy. The trial court granted Randy’s motion for summary judgment. It held the two policies were clear and unambiguous, so if David had read them he would have understand what he did not have. Purchasers of insurance, said the trial judge, have an obligation to read the policies they purchase. David either read the policy or he did not. If he didn’t, his omission was the cause of the problem. If he did, then he failed to grasp what he read, and so he was a fault again. The estate appealed.

The Nebraska Supreme Court reversed and remanded, reasoning that the district court failed to focus on the right issue, namely whether David’s estate had a cause of action against Randy. The allegation against the defendants is breach of contract, but what contract—and hence what type of contract—did Randy allegedly breach? Obviously, it was not a breach of the insurance contract itself. Hence, the complaint must be that Randy breached a