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## ***ATOFINA Petrochemicals, Inc. v. Continental Casualty Co., 185 S.W.3d 440 (Tex. 2005)***

Additional Insured Endorsement Provides Broad Coverage Where Allegations Implicate Negligence of Named Insured; Excludes Coverage Only When Injury or Damage Results from Additional Insured's Sole Negligence

### Background

A&B Builders was the contractor for a construction project on property owned by ATOFINA ("Fina"). Larry Wisdom, an A&B employee, was injured while unloading steel on Fina's property. Wisdom sued Fina and others for negligence, and Fina tendered its defense as an additional insured to Continental, which provided CGL coverage to A&B.

In the coverage litigation that ensued, Continental argued that coverage was precluded for two reasons: (1) the requirements of the blanket additional insured endorsement were not satisfied so as to render Fina an additional insured; and (2) even if Fina qualified, additional insured coverage applied only to an additional insured's vicarious liability for the acts of the named insured. The trial court rejected both arguments and rendered judgment for Fina. The court of appeals reversed, but the supreme court reinstated the trial court's judgment.

### Analysis

**A&B's agreement to furnish insurance satisfied endorsement.** The Continental blanket endorsement agreed to cover as an additional insured those parties who A&B was required to add "under a written contract or agreement" effective during the policy term if "a certificate of insurance listing that person or organization, as an additional insured has been issued." *Id.* at 225. A&B submitted a written proposal to Fina on August 12, 1997 for the construction, including a proposal to "furnish . . . insurance," which Fina orally accepted the same day. Fina also faxed purchase requisitions to A&B immediately. A&B began work at the Fina site on August 14, the day Wisdom was injured. The certificate of insurance ("COI") was issued on August 18, and hard copies of the purchase orders, which purported to "contain[] the entire agreement between the parties hereto," but did not mention insurance, were issued August 22 and 25.

Continental argued that an agreement to "furnish insurance" was not sufficiently definite to create additional insured status. *Id.* at 226. The court held, however, that both the course of dealing between A&B and Fina and standard industry practice supplied the missing terms – that Fina be added to the existing policy for the coverage and limits stated therein. *Id.* The court further noted that the policy language did not require the parties to specify the amount or type of coverage. *Id.* The subsequent purchase orders that failed to mention insurance did not supersede the agreement to provide insurance because they were consistent with the original contract and because they were issued after the accident. *Id.* at 226-27. Finally, the "certificate of insurance" clause of the endorsement was not a condition precedent because the policy did not require that the certificate issue prior to the commencement of work or prior to loss. *Id.* at 227.

**Only liability for the additional insured's sole negligence is excluded.** The endorsement limits an additional insured's coverage to liability that arises out of the named insured's premises or work "for or on behalf of the additional insured," and excludes "any liability arising out of any act, error or omission of the additional insured, or any of its employees." After noting that the first condition "extends broad coverage to [an additional insured] on all matters arising out of [a named insured's] work," the court held that the second condition could only be read to exclude the additional insured's sole negligence. *Id.* The court reasoned that adopting Continental's construction of the two clauses, which would preclude coverage for everything but the additional insured's vicarious liability for the acts of the contractor, "would render coverage under the endorsement largely illusory." *Id.* Moreover, the fact that there were no legal theories asserted against A&B (which, as Wisdom's employer, enjoyed workers' compensation immunity) did not preclude coverage since the petition contained factual allegations of A&B's negligence while working at Fina's facility. *Id.*

### Implications

*ATOFINA* confirms and clarifies that additional insured endorsements provide broad coverage for additional insureds whenever the factual allegations implicate negligence of the named insured as well. Coverage is excluded only when the injury or damage is a result of the additional insured's sole negligence.

Furthermore, *ATOFINA* signals a low threshold for establishing additional insured status that considers all surrounding circumstances of contract formation: the writings between the parties, including purchase orders, the parties' prior dealings and practice, and industry custom.