IN THE SUPREME COURT OF TEXAS

NO. 03-0647

EVANSTON INSURANCE COMPANY,
PETITIONER,

v.

ATOFINA PETROCHEMICALS, INC.
RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued April 13, 2005

JUSTICE HECHT, joined by JUSTICE JOHNSON, concurring in part and dissenting in part.

I agree with the Court that Evanston's commercial liability umbrella policy covered the Jones claim, and that Evanston must reimburse ATOFINA the settlement amount if it was reasonable. I do not agree that Evanston, which had no duty to defend ATOFINA, is estopped to challenge the reasonableness of the settlement simply because it denied coverage and refused to participate in negotiations with the claimants. I would remand the reasonableness issue to the trial court to resolve the parties' factual dispute. Accordingly, I respectfully dissent.

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. This is what

we held in *Employers Casualty Co. v. Block*,[1] and as far as I can tell, it is uniformly the rule throughout the country.[2] This is hardly surprising. An insurer that wrongly refuses to defend a claim, leaving its insured to defend himself, can hardly be allowed to argue that it would have done a better job.

But Evanston had no duty to defend ATOFINA, as ATOFINA itself admits.[3] The umbrella policy gave Evanston *the right* to defend a covered claim but *no duty* unless the claim was not covered by an underlying policy or that policy's limits were exhausted, neither of which occurred here.[4] Then why does *Block*'s estoppel rule apply? Because, the Court says, Evanston refused to

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[1] 744 S.W.2d 940, 943 (Tex. 1988).

[2] *See ante* at ___ & n.62.

[3] ATOFINA's Brief in Response at 31 ("To be sure, Evanston did not owe ATOFINA a duty to defend."); *see also ante* at ___ ("no duty to defend is implicated in this case").

[4] The policy stated:

"A. We will have the right to defend any "claim" or "suit" seeking damages for "bodily injury", "property damage", "personal injury", or "advertising injury" to which this insurance applies, but:

* * *

"2. When an "occurrence" or "offense" is covered by this policy and is also covered by "underlying insurance" or by any other applicable insurance, we have no duty to defend. We shall have the right to associate with the insured in the defense and control of any "claim" or "suit" that we think may involve this policy.

"3. When an "occurrence" or "offense", covered by this policy, would have been covered by "underlying insurance" but for the exhaustion of the applicable limit of such "underlying insurance" as a result of any "occurence(s)" or "offense(s)" to which this policy would have applied, we will have a duty to defend any "claims" or "suits" to which this policy applies.

"4. When an "occurrence" or "offense", covered by this policy, is not covered by "underlying insurance" or any other applicable insurance, we will have the duty to defend any "claims" or "suits" to which this policy applies.

"5. When we have a duty to defend as described in 3. and 4. above, we will:

"a. Defend any "claim" or "suit" against the insured seeking damages on account of "bodily injury",

participate in settlement negotiations between ATOFINA and the Jones plaintiffs. "[W]hat is most important in this context," the Court explains, "is notice to the insurer and an opportunity to participate in the settlement discussions."[5] But Evanston had no duty to participate in settlement discussions, and surely ATOFINA's invitation could not create one. The Court also faults Evanston for refusing to acknowledge coverage, suggesting that Evanston's denial of coverage may have been an anticipatory breach of the policy.[6] But even if it was, a party's anticipatory breach of a contract only allows the other party to sue for damages immediately; it does not alter the breaching party's contractual obligations.[7] The Court says that Evanston's "explicit, unqualified rejection of coverage surely operates to trigger the equitable principles in *Block*."[8] But Evanston had no duty to admit coverage; its duty under its policy was to pay a judgment on a covered claim or a settlement to which it agreed. Neither occurred. Evanston's policy provided that it had "[n]o other obligation . . . to . . . perform acts or services". Even if Evanston had admitted coverage, it still had no duty to participate in settlement negotiations. The Court holds that when an excess carrier acts entirely within its rights, equity requires that it be estopped to question the reasonableness of a settlement in which it took no

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"property damage", "personal injury", or "advertising injury" even if such "claim" or "suit" is groundless, false, or fraudulent;

"b. Investigate, negotiate, and settle any "claims" or "suits" as we deem expedient. . . ."

[5] *Ante* at ___.

[6] *Ante* at ___ n.60.

[7] *See Continental Am. Life Ins. Co.*, 416 S.W.2d 796, 797 (Tex. 1967) (per curiam); *Sanders v. Aetna Life Ins. Co.*, 205 S.W.2d 43, 45 (Tex. 1947).

[8] *Ante* at ___ n.60.

part. It is a different sort of equity that punishes someone, even an insurance company, for acting legally.

A few days ago, the Court refused to allow an insurer to seek restitution for payment of a non-covered claim because the policy did not provide for such an equitable remedy.[9] Sounding what has come to be a familiar refrain, the Court "proclaimed itself 'loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards'".[10] If the insurer had wanted the right to restitution, the Court said, it should have said so in the policy. Applying this rule, one might think that if ATOFINA had wanted the rights to require Evanston to acknowledge coverage before payment was due and to accept any invitation to participate in settlement negotiations, it should have included them in the policy. Either the Court thinks that imposing additional duties on an insurer does not entail rewriting the policy, or else it does not find that effort quite as loathesome.

ATOFINA has not cited, and the Court has not found, authority of any kind to support the Court's holding that an excess insurer is estopped to challenge the reasonableness of a settlement in these circumstances. This, too, is hardly surprising. What possible basis could there be to estop an insurer who has not breached a duty to its insured? At least one case suggests that the Court's holding is wrong. The Fifth Circuit has held in *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.* that an insured who rejects a defense tendered under a reservation of rights cannot require the insurer, once coverage has been established, to pay a settlement of the claim without

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[9] *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, ___ S.W.3d ___, ___ (Tex. 2008).

[10] *Id.* (quoting *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007)).

proving that it was reasonable.[11] If an insurer that has not breached its duty to defend is not estopped from contesting the reasonableness of a settlement, surely an insurer with no duty to defend at all should not be estopped. Amazingly, the Court finds support in the Circuit's conclusion that "under Texas law an insurer *which is obliged to defend its insured* but flatly refuses to do so . . . cannot contest the reasonableness of a consent judgment agreed to between the insured and the injured party."[12] The Circuit was completely right. But here, Evanston had no duty to defend. In the Court's view, since an insurer that breaches a duty to defend is estopped, an insurer with no duty to defend is also estopped. Any logic hiding in this view is hard to find.

Having refused to agree to a settlement because it believed the claim was not covered, and now having had the coverage issue resolved in ATOFINA's favor, Evanston is required to pay the settlement if it was reasonable. But nothing in Evanston's policy obligates it to pay an unreasonable settlement, and the parties still disagree whether ATOFINA's settlement was reasonable. ATOFINA moved for summary judgment that its settlement was reasonable, based on the affidavits of its lawyer and the mediator in the liability case. This evidence certainly supports ATOFINA's position, as does its argument that it would not have paid $5.75 million out of its own pocket (in addition to the $1 million its primary insurer paid) to settle the claim if it had thought the amount unreasonable. But ATOFINA's view of reasonableness changed over time. Only a few months before the case settled, ATOFINA's lawyer suggested in a letter to Evanston's adjuster that a judgment of $5 million was possible. This estimate, though accompanied by caveats about the assumptions on which it was

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[11] 896 F.2d 949, 955 (5th Cir. 1990).

[12] *Ante* at ___ n.65 (quoting *Olympia Wings*, 896 F.2d at 955) (emphasis added).

based, was only about three-fourths of the settlement to which ATOFINA eventually agreed. ATOFINA argues that developments after the letter was written cast the case in a poorer light. Evanston offered the letter and affidavits from its adjuster and an insurance defense lawyer in response to ATOFINA's motion. Both opined that ATOFINA's settlement was more than what would have been reasonable; one estimated that a reasonable settlement would have been between $1 million and $2 million. These affidavits certainly do not establish that the settlement was unreasonable, but they do raise a fact issue that must be resolved. I would remand the case to the trial court for that purpose. Because the Court does not do so, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: February 15, 2008