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The \$750 Million Comma? BP Is Not Entitled to Coverage for the Gulf Oil Spill as an Additional Insured Under Policies Issued to Transocean

The Supreme Court of Texas ruled on February 13, 2015, that BP is not entitled to coverage as an additional insured under insurance policies Transocean procured for the Deepwater Horizon. We previously wrote about the insurance coverage dispute concerning subsurface pollution that resulted from the 2010 oil spill in the Gulf of Mexico in the following articles:

- In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010,
- In Re: Deepwater Horizon Insurance Litigation - Fifth Circuit Reverses in Favor of BP’s Additional Insured Claim, and
- In Re: Deepwater Horizon Insurance Litigation - The Fifth Circuit Reverses the District Court’s Additional Insured Decision but then Withdraws its Decision and Certifies Issues to the Texas Supreme Court

Readers may recall that the federal district court in Louisiana originally ruled that the Transocean policies did not afford coverage to BP. The Fifth Circuit Court of Appeals reversed the trial court and ruled that BP was entitled to coverage, but that court then withdrew its opinion and certified two questions to the Supreme Court of Texas.

Upon certification, the principal question before the Supreme Court of Texas was

whether, in deciding the scope of coverage provided to an additional insured, a trial court may look only to the insurance policy at issue or whether it may also consider other documents (in this case, the drilling contract between Transocean and BP). (The court also considered a second question as to the applicability of the sophisticated insured exception to the general rule that policies are construed in favor of insureds.)

The parties had agreed in the drilling contract that Transocean would indemnify BP for above-surface pollution regardless of fault and that BP would indemnify Transocean for subsurface pollution. The drilling contract also obligated Transocean to name BP as an additional insured under its policies.

BP was not specifically named in the policies, but the policies extended coverage to “[a]ny person or entity to whom the ‘Insured’ is obligated by oral or written ‘Insured Contract’ . . . to provide insurance such as afforded by [the] Policy.” Transocean was an Insured under the policies.

After the catastrophic blow-out, BP sought insurance coverage under the Transocean policies.

The parties agreed that BP was an additional insured; thus the dispute involved only the extent of coverage afforded to

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BP, Transocean and its insurers argued that BP's coverage extended only to the indemnity obligations Transocean assumed in the drilling contract. BP argued that the language in the insurance policy afforded coverage that was broader than the contractual indemnity in the drilling contract and that it is improper to narrow coverage terms by referring to limitations outside the four corners of the policy.

In support of its argument, BP relied on *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008). It argued that the court previously ruled in *ATOFINA* that a court may consider only the language within the four corners of the insurance policy to determine the scope of coverage. In reply, Transocean and its insurers pointed out that BP was an additional insured under the Transocean policies only because of the status conferred to it under the drilling contract to which the insurance policy refers, by predicating additional-insured status on the existence of an Insured Contract requiring insurance coverage. In support of their position, they relied on *Urrutia v. Decker*, 992 S.W.2d 440 (Tex. 1999), which recognized that a separate contract can be incorporated by reference into an insurance policy if it is clear that the parties intended to do so.

The court recognized that a named insured may gratuitously choose to secure more coverage for an additional insured than it is contractually obligated to provide. But, it ruled that an insurance policy may incorporate an external limitation

on additional-insured coverage, which limitation effectively is an endorsement to the policy.

In this situation, had the insurance policies expressly named BP as an additional insured, the court would not have needed to consult the drilling contract for any limitation therein. However, BP would not have been afforded any coverage under the insurance policies but for the reference to the drilling contract, so it was necessary to consult that contract.

The court devoted several pages of its decision to the parties' arguments concerning the punctuation of the drilling contract insurance clause.

Transocean was required to name BP and related entities:

as additional insureds in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of [the Drilling] Contract.

Transocean argued that the appropriate reading of this clause is that there is a general insurance obligation that excepted only Workers Compensation coverage. BP disagreed and pointed out that there was comma before, but not after, the phrase "Workers' Compensation." BP argued that an additional comma cannot be inserted where it does not exist when that would alter the plain meaning of the contract. The court addressed this issue by stating it would "not construe the absence of

a comma to produce an unreasonable construction." The court went on to observe that Transocean's argument was consistent with the allocation of liabilities in the drilling contract and noted the common practice of excepting workers' compensation from additional insured coverage.

In summary, the court held that (1) the Transocean insurance policies include language that necessitates consulting the drilling contract to determine BP's status as an additional insured; (2) under the drilling contract, BP's status as an additional insured is inextricably intertwined with limitations on the extent of coverage to be afforded under the Transocean policies; (3) the only reasonable construction of the drilling contract's additional-insured provision is that BP's status as an additional insured is limited to the liabilities Transocean assumed in the drilling contract; and (4) BP is not entitled to coverage under the Transocean insurance policies for damages arising from subsurface pollution because BP, not Transocean, assumed liability for such claims.