ARE YOU MY INSURANCE COMPANY?* ADDITIONAL INSURED INSURANCE COVERAGE UNDER TEXAS LAW: THE DEEPWATER HORIZON LITIGATION

*With apologies to P.D. Eastman, author of the children's book *Are You My Mother?*

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State Bar of Texas
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CHAPTER 11

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Work Experience

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Special Counsel in the Houston office of Jones Walker LLP, practicing in the Admiralty and Maritime Group and Energy Group

As will be seen in more detail below, Mr. Jackson has practiced primarily in the areas of maritime, oilfield and energy litigation since 1974. His varied experience has included cargo, collision, allision, pollution, product liability, toxic tort, insurance, indemnity, death, personal injury, property damage, explosions and multi-party complex and commercial litigation in state and federal courts. In his maritime practice, Mr. Jackson has engaged in brown water, offshore and blue water litigation, including cases in the U.S. Supreme Court and Texas Supreme Court.

2008 – 2012

Fugro, Inc.
Houston, Texas
U.S. General Counsel

Responsible for risk management, claims (preventing them and handling both threatened and actual), litigation management and placement of all insurances.

First Primary Function – General Counsel – Legal

A. Litigation Management
B. Negotiations – Settlements
C. Depositions, Subpoenas, Written Legal Responses
D. Contract Review
E. Pursuit of Claims
F. Handling of Claims

Second Primary Function – Risk Management – Insurance

A. Insurance Purchase (all lines) – 12 months a year
B. Claims Management
C. Centralize Risk Control – Safety to a New Level
D. Retention Management – Allocation and Choice of DED/SIR
E. Compliance with Contractual Obligations

Other Functions

A. Manage a Team of Three
B. Communicate with CEO, CFO, Global Risk Manager, Operations Management, Vendors, Clients and P/R for Catastrophes

1974 – 2008

Royston, Rayzor, Vickery &Williams, LLP.
Houston, Texas
Associate – 1974 – 1979
Partner – 1980 – 2008

Involved with trials/litigation (Complex Business Litigation, Onshore and Offshore Oil Patch Litigation, Environmental and Toxic Tort, Refinery and Petrochemical Incidents, Trucking, Insurance Coverage and Admiralty and Maritime); Insurance Coverage (Primary and Excess); Monitoring of Litigation for Excess Interests; Appeals.

Practice encompassed a wide variety of complex/sophisticated matters in the areas of trials/litigation, insurance coverage and appeals as more fully described above. Representative clients included major U.S. insurance companies, Underwriters at Lloyd's and London Companies, P&I Clubs in the International Group, other international insurance underwriters and a variety of oil companies, oilfield contractors, chemical and petrochemical companies and trucking companies.

Worked in the oil patch while obtaining undergraduate degree and continued a lifelong interest in oilfield litigation. Experienced in risk shifting matters (indemnity and additional insured status) and was involved in substantial litigation regarding the Texas Oilfield Anti-Indemnity Statute.

The practice involved admiralty and maritime matters, including personal injury litigation, ship collisions, major offshore oilfield catastrophes, cargo, oil pollution, and Immigration and Customs matters. Involved with the defense of ODECO in the loss of the jack-up rig OCEAN EXPRESS and involved with defense of the UNOCAL affiliated interests in the loss of the drill ship SEACREST in the Gulf of Thailand.

Was involved in substantial oil and petrochemical refinery litigation, including the representation of UNOCAL with respect to licensed hydrocracking technology and representation of Underwriters at Lloyd's of London Companies in connection with the Phillips Petrochemical Complex explosion.

Handled cases in numerous courts, including the Texas Supreme Court and the United States Supreme Court.

An extensive insurance coverage practice for both primary and excess insurers and has extensive experience in monitoring litigation on behalf of excess interests

Education

University of Texas School of Law (J.D., with honors, 1974)
Teaching Quizmaster for two years; Board of Advocates (Trial Director); Order of Barristers; Phi Delta Phi (Magister, 1973 – 1974)

University of Virginia (B.A. 1971)
Bachelor of Arts in Foreign Affairs; Member, Jefferson Literary and Debating Society; Virginia Debaters (National Collegiate Tournament Participant)

Bar and Court Admissions

Texas, 1974
Courts of the State of Texas
U.S. District Court Southern District of Texas
U.S. District Court Eastern District of Texas
U.S. Court of Appeals, Fifth Circuit
U.S. Court of Appeals, Eleventh Circuit
U.S. Supreme Court

Noteworthy

2013/2014 Chairman – Houston Marine Insurance Seminar
Listed in the "Best Lawyers in America"
Listed in "Who's Who in Executives and Professionals"
Listed in "International Who's Who of Professionals"
Listed in Inside Houston's "Houston's Best Lawyers"
Listed as a "Texas Super Lawyer"

Memberships

American Bar Association
State Bar of Texas
Houston Bar Association
Maritime Law Association of the United States (Former Board Member and Chairperson for the Offshore Industries Committee)
Southeastern Admiralty Law Institute
Houston Mariners Club

Seminars & Speeches

Author/Speaker for the State Bar of Texas Professional Development Program 1991

Admiralty/Maritime Law Seminar (Admiralty and Maritime Jurisdiction)

Author/Speaker for the Houston Marine Insurance Seminar 1993 (The Duty of Good Faith – A Two Way Street: Uberriamae Fidei and the Insurer's Duty of Good Faith and Fair Dealing)

Author/Speaker for the State Bar of Texas Professional Development Program 1994

Admiralty/Maritime Law Seminar (Contribution/Indemnity, Including Treatment of Settlements)

Speaker- Houston Claims Association – 1995 (Damages in Maritime Personal Injury and Death Cases)

Houston Marine Insurance Seminar, Executive Board Member

Houston Marine Insurance Seminar, Chairman 2013 and 2014

Author/Speaker for the Southeastern Admiralty Law Institute 2002 (Federal Regulations)

Author/Speaker for the University of Texas School of Law Admiralty and Maritime Law Institute, 2002 (Removal)

Presiding Officer for the University of Texas School of Law Admiralty and Maritime Law Institute, 2006

Author/Speaker for the Houston Marine Insurance Seminar, 2007 (Law Governing Offshore Wind Energy Facilities)

Author/Speaker for the University of Texas Admiralty Law Seminar, 2007 (Law Governing Offshore Wind Energy Facilities)

Author/Speaker for the University of Texas Admiralty Law
Seminar, 2011, 2012, 2013 (Ethics)

Personal and Community

Married for 42 years to Marylyn Childress Jackson
Two children and five grandchildren
Member, St. Paul’s Methodist Church

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ARE YOU MY INSURANCE COMPANY?* ADDITIONAL INSURED INSURANCE COVERAGE UNDER TEXAS LAW: THE DEEPWATER HORIZON LITIGATION

I. INTRODUCTION

On April 20, 2010, the Mobile Offshore Drilling Unit *Deepwater Horizon* was engaged in drilling operations at BP's Macondo well located on the Outer Continental Shelf approximately 50 miles southeast of Venice, Louisiana. At that time, BP's well became out of control, resulting in a blow-out, explosion and fire onboard the *Deepwater Horizon*. The vessel sank on April 22, 2010, and the well spilled large amounts of oil into the Gulf of Mexico until it was capped approximately three months later.

After the Macondo well spill and the sinking of the *Deepwater Horizon*, hundreds of lawsuits were filed by individuals, business entities and associations, public interest organizations, and governmental entities. On August 10, 2010, the Judicial Panel on Multi-District Litigation ordered a large number of actions transferred to the Honorable Carl J. Barbier in the Eastern District of Louisiana.

The consolidated cases involved over 100,000 claimants, including claims related to the deaths of eleven individuals, personal-injury claims, and claims for economic and environmental damages. The Defendants sued included BP Exploration & Production and other BP entities (the Macondo well owner), Transocean Deepwater Inc. and other Transocean entities (the Owner and Operator of the *Deepwater Horizon*), and other companies involved in work at or having interest in the Macondo well, including Halliburton, Cameron, Anadarko, MOEX and others.

Because of the enormous potential liabilities presented by the claims for economic and environmental damages related to the spilled oil, a dispute arose as to whether BP was entitled to coverage as an additional insured under Transocean's Insurance Policies for the below-surface discharge of oil from BP's Macondo well. This paper addresses the background to the BP/Transocean insurance dispute; the language of Transocean's Insurance Policies and the BP/Transocean Drilling Contract; Judge Barbier's Order and Reasons and Rule 54(b) Final Judgment issued on November 15, 2011; the Fifth Circuit's Panel Ruling of March 1, 2013; the resulting Petitions for Rehearing *en banc*; and the Fifth Circuit's August 29, 2013 opinion withdrawing its March 1, 2013 opinion and certifying two questions to the Texas Supreme Court for authoritative determination.

II. THE PROCEDURAL BACKGROUND

Following the explosion and sinking of the *Deepwater Horizon* in April 2010, BP made demands on Transocean's insurers under Transocean's Policies for full coverage for BP's well pollution liabilities. In response to BP's demands, both groups of Transocean's insurers, Ranger Insurance Limited ("Ranger") and its Excess Insurers, filed suit against BP in federal district court in Houston, Texas, seeking a declaration that BP was not entitled to additional insured coverage for BP's well pollution liabilities under Transocean's Policies.[1] BP counter-claimed in these suits, seeking a declaration that BP was an additional insured for BP's well pollution liabilities. Transocean was granted leave to intervene, and filed its complaint in intervention to protect its sole, finite sum of insurance from BP's well pollution demands. Transocean's complaint in intervention was virtually identical to that of its insurers and sought declarations that BP was not entitled to coverage under Transocean's Policies for BP's well pollution liabilities. Eventually, BP would move for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

III. TRANSOCEAN'S INSURANCE POLICIES

Section II.A of Transocean's Policies defined "Insured" to include the named insured (Transocean) as well as certain other parties. Relevant to the BP/Transocean dispute, the definition of "Insured" included:

> c. any person or entity to whom the "Insured" ***is obliged by any oral or written "Insured Contract"*** (including contracts which are in agreement but have not been formally concluded in writing) entered into before any relevant "Occurrence", ***to provide insurance*** such as is afforded by this Policy;

Transocean's Policies defined "Insured Contract" as follows:

> The words "Insured Contract", whenever used in this Policy, shall mean ***any written or oral contract or agreement*** entered into by the "Insured" (including contracts which are in agreement but have not been formally

[1] In February 2011, the Judicial Panel on Multidistrict Litigation transferred both cases to the United States District Court for the Eastern District of Louisiana for coordinated pre-trial proceedings with the other *Deepwater Horizon*-related litigation pending in that Court.

> concluded in writing) and ***pertaining to business under which the "Insured" assumes the tort liability of another party*** to pay for "Bodily Injury", "Property Damage", "Personal Injury" or "Advertising Injury" to a "Third Party" or organization. ***Tort Liability means a liability that would be imposed by law in the absence of any contract or agreement.***

Under Section II of Transocean's Policies, in an endorsement in the General Conditions, the insurers agreed to include additional insureds "where required by written contract:"

> **ADDITIONAL INSURED/WAIVER OF** SUBROGATION
> Underwriters agree ***where required by written contract, bid or work order***, additional insureds are automatically included hereunder, and/or waiver(s) of subrogation are provided as may be required by contract.

IV. THE BP/TRANSOCEAN DRILLING CONTRACT: RESPONSIBILITY FOR SUB-SURFACE POLLUTION

There was only one "written or oral contract or agreement" under which Transocean agreed to assume the tort liability of BP in any way: the Drilling Contract. Hence, in terms of Transocean's Policies, the Drilling Contract was the operative "Insured Contract."

Article 24.1 of the Drilling Contract defined the pollution liabilities assumed by Transocean:

> 24.1 CONTRACTOR RESPONSIBILITY
>
> ***[TRANSOCEAN] SHALL ASSUME FULL RESPONSIBILITY FOR*** AND SHALL PROTECT, RELEASE, DEFEND, INDEMNIFY AND HOLD [BP] AND ITS JOINT OWNERS HARMLESS FROM AND AGAINST ANY LOSS, DAMAGE, EXPENSE, CLAIM, FINE, PENALTY, DEMAND, OR ***LIABILITY FOR POLLUTION*** OR CONTAMINATION, INCLUDING CONTROL AND REMOVAL THEREOF, ***ORIGINATING ON OR ABOVE THE SURFACE OF THE LAND OR WATER***, FROM SPILLS, LEAKS, OR DISCHARGES OF FUELS, LUBRICANTS, MOTOR OILS, PIPE DOPE, PAINTS, SOLVENTS, BALLAST, AIR EMISSIONS, BILGE SLUDGE, GARBAGE, OR ANY OTHER LIQUID OR SOLID WHATSOEVER IN POSSESSION AND CONTROL OF [TRANSOCEAN] AND WITHOUT REGARD TO NEGLIGENCE OF ANY PARTY OR PARTIES. . . .

Under Article 24.2 of the Drilling Contract, BP assumed all pollution liabilities "not assumed by [Transocean] in Article 24.1 above," by virtue of the following language:

> 24.2 COMPANY RESPONSIBILITY
>
> ***[BP] SHALL ASSUME FULL RESPONSIBILITY FOR*** AND SHALL PROTECT, ***RELEASE***, DEFEND, INDEMNIFY, AND HOLD [TRANSOCEAN] HARMLESS FROM AND AGAINST ANY LOSS, DAMAGE, EXPENSE, CLAIM, FINE, PENALTY, DEMAND, OR ***LIABILITY FOR POLLUTION*** OR CONTAMINATION, INCLUDING CONTROL AND REMOVAL THEREOF, ***ARISING OUT OF OR CONNECTED WITH OPERATIONS UNDER THIS CONTRACT HEREUNDER AND NOT ASSUMED BY CONTRACTOR IN ARTICLE 24.1 ABOVE***, WITHOUT REGARD FOR NEGLIGENCE OF ANY PARTY OR PARTIES AND SPECIFICALLY WITHOUT REGARD FOR WHETHER THE POLLUTION OR CONTAMINATION IS CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OR FAULT OF CONTRACTOR.

Only one provision of the Drilling Contract addressed additional insured coverage for BP:

> [BP], its subsidiaries and affiliated ***companies***, co-owners, and joint venturers, if any, and their employees, officers, and agents shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation ***for liabilities assumed by [Transocean] under the terms of this Contract***.

V. THE DISTRICT COURT'S RULING

On November 15, 2011, Judge Barbier issued his Order and Reasons denying BP's Rule 12(c) Motion for Judgment.[2]

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[2] *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, *on April 20, 2010*, 2:10-md-02179-CJB-SS, 2011 U.S. Dist. LEXIS 131693, 2012 A.M.C. 533 (E.D. La. 2011).

A. Summary of Judge Barbier's Memorandum and Order.

Judge Barbier found that, based upon the plain language of Transocean's Policies, the scope of BP's coverage as an additional insured under the Policies was determined by the additional insured ("AI") provision in the Drilling Contract.[3] Judge Barbier then gave the language of the AI provision its natural effect.[4] He reasoned that because BP and not Transocean assumed liability for subsurface pollution under the Drilling Contract, and because BP was an additional insured only "for liabilities assumed by [Transocean] under the terms of th[e] [Drilling] Contract," BP therefore was not insured for subsurface pollution.[5] In reaching this conclusion, Judge Barbier rejected BP's argument that the scope of AI coverage should be determined based upon the language of the Policies alone. Judge Barbier distinguished BP's two authorities, *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.* (hereinafter "*ATOFINA*"),[6] and *Aubris Resources LP v. St. Paul Fire & Marine Ins. Co.* (hereinafter, "*Aubris*"),[7] holding that the result in

3 *Id.* at 560-64.

4 In what came to be known as the "missing comma" issue, BP argued for a literal reading of the Drilling Contract's AI provision that would obligate Transocean to secure insurance coverage for BP's potential liabilities, except for whatever part of BP's workers' compensation obligations Transocean had assumed. Transocean and its insurers argued for an interpretation as if a comma was present in the AI provision after "except Workers' Compensation." Under their reading, the general insurance obligation only extended to those liabilities Transocean assumed under the Drilling Contract, with a "Workers' Compensation" exception. Judge Barbier concluded that BP's interpretation was not reasonable, because BP and Transocean made specific "blow-by-blow" allocations of liabilities between themselves, and they should not be presumed to have undone that by writing in an insurance provision that would require BP to be an additional insured as to the lion's share of responsibilities assumed by BP. *Id.* at 568. In Judge Barbier's view, the only reasonable reading of the Drilling Contract's AI provision involved inserting a notional comma after the words "Workers Compensation," whereby the insurance obligation is "*for Transocean to name BP as an additional insured in all policies (except workers' compensation policies) for only those liabilities that Transocean assumed under the Drilling Contract.*" *Id.* (emphasis in original). Judge Barbier relied upon Texas law which supported the proposition that punctuation, or the absence of punctuation, will not of itself create an ambiguity, and that a court may insert a comma "to ascertain from the words used the intention of the parties." *Id.* at 567, (quoting *Anderson & Kerr Drilling Co. v. Bruhlmeyer*, 136 S.W.2d 800, 803-04 (Tex. 1940)).

5 *Id.* at 564-71.

6 256 S.W.3d 660 (Tex. 2008). In *ATOFINA*, ATOFINA demanded coverage from Evanston as an additional insured under an umbrella policy pursuant to an AI provision which defined insured to include "[a] person or organization for whom you have agreed to provide insurance as is afforded by this policy." *Id.* at 664. In turn, the service contract required that ATOFINA "shall be named as additional insured in each of [Triple S's] policies." *Id.* at 670. Another portion of the service agreement provided that ATOFINA disclaimed any right of indemnity for losses "attributable to [its] concurrent or sole negligence." *Id.* at 663. Relying upon *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992), the *ATOFINA* court held that it was "unmistakable that the agreement in this case to extend *direct* insurance 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." 256 S.W.3d at 670 (emphasis in original). Thus, ATOFINA was covered under the umbrella policy for losses resulting from its own negligence. An earlier portion of the *ATOFINA* court's opinion also notes: "Instead of looking, as the court of appeals did, to the indemnity agreement and the service contract to determine the scope of any coverage, we base our decision on the terms of the umbrella insurance policy itself." *Id.* at 664.

7 566 F.3d 483 (5th Cir. 2009). In *Aubris*, the Fifth Circuit was presented with a policy which included an additional insured endorsement which defined insured as "[a]ny person or organization that you agree in a written contract for insurance to add as an additional protected person. . . *if that written contract for insurance specifically requires such coverages* . . . ." *Id.* at 487 (emphasis in original). The services agreement provided that United "shall be named as additional insureds in each of Contractor's policies, except Workers' Compensation; *however, such extension of coverage shall not apply with respect to any obligations for which UNITED has specifically agreed to indemnify Contractor.*" *Id.* (emphasis in original). Based in part on *ATOFINA*, the *Aubris* court looked to the service agreement's additional insured provision to determine whether there was additional insured coverage, finding it not material to the *ATOFINA* rule whether the scope of the additional insured obligation was determined in the policy or with the aid of the parties' service contract. *Id.* at 489. The *Aubris* court eventually would read the word "specifically" in the AI provision to reflect an intention that United intended to forego additional insured coverage only in the event that United made a separately considered extra-contractual decision to specifically agree to indemnify the contractor. Because there was no specific, extra-contractual agreement

each was compelled by the underlying contract and policy language, rather than a "policies alone" rule which had been advocated by BP.[8] Judge Barbier then found that, under the only reasonable interpretation of the Policies in conjunction with the Drilling Contract, BP was not entitled to AI coverage for subsurface pollution. In reaching his ruling, Judge Barbier was guided by the language of the Drilling Contract:

> The Court finds that BP, under the Drilling Contract, assumed responsibility for Macondo well oil release pollution liabilities. BP's assumption of pollution responsibility is found in Article 24.2, in which BP assumes pollution liabilities not assumed by Transocean in Article 24.1. Article 24.1 allocates the Transocean liabilities for pollution originating on or above the surface of the water. The *Deepwater Horizon* Incident entailed a subsurface release; thus, Transocean did not assume pollution liabilities arising from the Incident. Further, because Transocean did not assume these liabilities under Article 24.1 of the Drilling Contract, BP assumed them under Article 24.2's catch-all provision: responsibility for pollution arising out of or connected with operations under the contract and not assumed by Transocean in Article 24.1. Because Transocean did not assume these liabilities, there is no additional insured obligation in favor of BP for these liabilities.[9]

Judge Barbier was also guided by his desire to uphold the reasonable expectations of the two parties to the Drilling Contract, BP and Transocean:

> The Court notes that reference to the foregoing indemnity provisions to determine the scope of insurance coverage upholds the reasonable expectations of the parties. As already stated, BP would have the Court look to the Drilling Contract to find that it is an "Insured Contract," but stop there. Stopping there would ignore the allocation of risks under the "Insured Contract," which is the Drilling Contract. As Transocean convincingly argues, it is absurd that (1) in the Drilling Contract, BP would assume liability for subsurface oil releases; but then (2) in that same contract, oblige Transocean to name it as an additional insured providing coverage as to liability that *BP* assumed. BP does not disagree that *some* reference *must* be made to the Drilling Contract as to the question of additional insured coverage, because the *Policies do not mention BP* – only "Insured Contract[s]."[10]

And finally, Judge Barbier was guided by his desire to uphold the reasonable expectations of the insurers:

> Insurers have to know what risks they are insuring to be able to appropriately calculate the premiums they must collect. Thus, Ranger and the Excess Insurers would not reasonably have agreed to permit Transocean to name additional insureds as to *any* conceivable risk. At the same time, insurance is a contract between the parties: The Insurers and Transocean. But where that contract of insurance requires reference to the underlying Drilling Contract – its insurance provision, which in turn references underlying indemnities – it is within the intent of the Insurers and Transocean that those indemnities shape the extent of additional insured coverage. At least, that is the parties' intent given the language of the *policies at issue* – which is the language that matters.[11]

B. Key Rulings by Judge Barbier

In his Order and Reasons, Judge Barbier made four key rulings related to risk-transfer and Texas Insurance Law.

1. <u>"ATOFINA Is Distinguishable".</u>

Judge Barbier held that *ATOFINA* was distinguishable. He reasoned that the *ATOFINA* court was face-to-face with a policy that made "*absolutely no reference to the service contract in determining the scope of available insurance coverage, which is* ***diametrically*** *opposed to the Policies at issue in the present case*."[12] In contrast to *ATOFINA*, the

related to the Garza litigation at issue, United was covered under the contractor's policy. *Id.* at 490.

8 *See In re Deepwater Horizon*, 2012 A.M.C.. at 548-51 ("*ATOFINA* Is Distinguishable"), 552-55 ("*Aubris* Does Not Apply").

9 *Id.* at 570-71.

10 *Id.* at 571 (emphasis in original).

11 *Id.* at 571 (emphasis in original).

12 *Id.* at 550 (emphasis in opinion). As Judge Barbier observed, Transocean's Policies contained language incorporating an "Insured Contract" under which Transocean assumed the tort liability of another entity, in this case, BP. *Id.* Judge Barbier observed that the policies in *ATOFINA* issued to Triple S did not

Transocean Policies limited the scope of additional insured coverage by their explicit language which granted additional insured only where Transocean is "obliged by any oral or written 'Insured Contract'" to provide insurance and the definition of "Insured Contract" as a contract under which Transocean "assumes the tort liability of another party."[13]

2. "*Aubris* Does Not Apply".

Judge Barbier also held that the Fifth Circuit's ruling in *Aubris* did not apply, because in *Aubris*, the AI language of the service agreement was, in his own words, "striking."[14] It provided that coverage would not apply "'with respect to any obligations for which United had *specifically agreed* to indemnify [J&R].'"[15] In *Aubris*, Judge Barbier observed, the Fifth Circuit had simply adopted United's reasonable interpretation of this language: The general indemnity provision was not enough to constitute a specific agreement of indemnity that would exclude J&R's additional insurance obligation. In order for United to "specifically agree" to indemnify J&R, and thus exclude additional insurance coverage, a "separately considered and extra-contractual decision" was required.[16] Thus, *Aubris* was "factually distinguishable," Judge Barbier reasoned, because the Drilling Contract's AI provision required coverage only for "liabilities assumed. . . *under the terms of this Contract*.[17] In Judge Barbier's words, "while the *Aubris* contract required reference to extra-contractual indemnities, the Drilling Contract permits reference to intra-contractual indemnities."[18]

3. The AI Provision Was Not Separate and Additional to the Indemnity Provisions.

Judge Barbier also held that the Drilling Contract's AI provision was not separate from and additional to the Drilling Contract's indemnity provisions, because the Drilling Contract's AI provision stated that BP was to be named as an additional insured "for liabilities assumed by [Transocean] under the terms of this Contract."[19] As Judge Barbier reasoned, "the insurance provision, in stating the scope of additional insured coverage, incorporates, without limitation, the 'terms of this Contract' – which is the Drilling Contract."[20]

4. The Policies and Drilling Contract Were Not Ambiguous, Therefore *Contra Proferentem* Did Not Apply.

Judge Barbier discussed, but did not apply *contra proferentem* – construction of an ambiguous policy term or provision in a way that most favors the insured. Judge Barbier observed that Texas' version of the *contra proferentem* rule is "stronger yet" than the rule as applied in many jurisdictions, providing that "[t]he court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent."[21] Judge Barbier correctly observed that *contra proferentem* may only apply if there was more than one reasonable interpretation offered. Because Judge Barbier concluded that BP did not advance a reasonable interpretation of the Policies and the Drilling Contract, he determined that he was not required to apply *contra proferentem*, or consider whether the sophisticated insured exception to the *contra proferentem* rule applied.

C. The Rule 54(b) Final Judgment.

Following further submissions of the parties, the district court entered a Partial Final Judgment on the insurers' complaints (and Transocean's Complaint) under Rule 54(b). With effect from March 1, 2012, the district court held "by its terms, the Court's Order and Reasons [on BP's Motion for Judgment on the Pleadings] not only denied BP's motion but also granted judgment on the pleadings against the BP Parties and in favor of the Plaintiff Insurers on the

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incorporate, or even reference, the underlying service contract. *Id.* The ATOFINA policy defined an "insured" as

> A person or organization for whom you have 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 you or on your behalf, or facilities owned or used by you.

256 S.W.3d 660, 664.

[13] *Id.* at 550.

[14] *Id.* at 553.

[15] *Id.* at 552 (quoting *Aubris*, 556 F.3d at 487) (emphasis added).

[16] *Id.* at 554 (citing *Aubris*, 556 F.3d at 490) (emphasis added).

[17] *Id.* at 554 (emphasis in original).

[18] *Id.*

[19] *Id.* at 555.

[20] *Id.*

[21] *Id.* at 557 (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991)) (hereinafter "Hudson Energy").

Plaintiff Insurers' Complaints."[22] Partial final judgment was entered in favor of Transocean's Excess Insurers, Ranger, and Transocean against BP on the insurers' complaints, "declaring that all claims by BP, Anadarko and MOEX for additional insured coverage under the Policies for the sub-surface pollution liabilities BP, Anadarko, and MOEX have incurred and will incur with respect to the Macondo well oil release are dismissed with prejudice."[23]

VI. THE MARCH 1, 2013 FIFTH CIRCUIT RULING

BP timely appealed the Rule 54(b) judgment dismissing its well pollution claims with prejudice. Following oral argument on December 1, 2012, Judge Jolly, writing for the unanimous three judge panel of the Fifth Circuit (Jolly, Benevides and Higginson), issued its first ruling on March 1, 2013.[24]

A. Summary of the Panel's March 1, 2013 Ruling.

The Preamble to the Panel's March 1, 2013 ruling summarized the Panel's ultimate holding:

> Applying Texas Law, especially as clarified since the district court's decision,[25] we find that the umbrella insurance policy – not the indemnity provisions of Transocean's and BP's contract – controls the extent to which BP is covered for its operations under the Drilling Contract. Because we find this policy imposes no relevant limitations upon which BP is covered, we REVERSE the judgment of the district court and REMAND the case for entry of an appropriate judgment in accordance with this opinion.[26]

Part II of the Panel's ruling briefly sets out the Texas insurance contract interpretation standards, and notes that the Texas version of the *contra proferentem* rule requires the court to interpret ambiguities in favor of the insured even if the insurer's interpretation is *more* reasonable than the insured's.[27]

Part III of the Panel's March 1, 2013 ruling contains the bulk of its reasoning. The Panel observed that there were two principal questions which must be resolved: (1) Whether the umbrella policy between the Insurers and Transocean itself limits coverage for any additional insureds, including BP and (2) whether the Drilling Contract's additional insured provision is separate from and additional to the Drilling Contract's indemnity provisions.

As to the first question, the Panel began by adopting a "policies only" approach, stating that the "case law makes clear to us that only the umbrella policy itself may establish limits upon the extent to which an additional insured is covered in situations such as the one now before us."[28] Then, looking only to Transocean's Policies, the Panel held that there was no relevant limitation to BP's coverage under Transocean's Policies as an additional insured.[29]

Having answered the first question, the Panel next addressed whether the Drilling Contract's additional insured provision was separate from and additional to the indemnity provisions under the Supreme Court of Texas' decision in *Getty Oil Co. v. Insurance Co. of North America.*[30] The Panel commenced its analysis by noting that, in *ATOFINA* and *Aubris*, each of the additional insured provisions were found to be separate and independent of the indemnity provisions. The Panel found the BP/Transocean "set-up" to be "similar to the contract in *Getty Oil*," and "nearly identical" to the additional insured provision in *ATOFINA*.[31] Accordingly, the Panel held that, under Texas law, the Drilling Contract's AI provision was separate and independent from BP's agreement to forego contractual indemnity for its well pollution risks.

Finally, in Section IV of the Court's Opinion, the Panel summarized its answers to the two questions and found that "BP is entitled to coverage under each of Transocean's Policies as an additional insured as a matter of law," and as a result, remanded the case to Judge Barbier for entry of judgment in accordance with the Court's first ruling.[32]

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22 *In re Deepwater Horizon*, No. 2:10-md-02179-CJB-SS, at 1 (E.D. La. March 1, 2012) ECF No. 5938.

23 *Id.* at 2.

24 *In re Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013), *withdrawn*, No. 12-30230, 2013 U.S. App. LEXIS 18087, __ F.3d.__ (5th Cir. Aug. 29, 2013).

25 This reference refers to a decision handed down by the Fourteenth Court of Civil Appeals following Judge Barbier's initial ruling. *Pasadena Refining System, Inc. v. McCraven*, Nos. 14-10-00837-CV, 14-10-00860-CV, 2012 WL 1693697 (Tex. App. – Houston [14th Dist.] May 15, 2012).

26 710 F.3d at 341.

27 *Id.* at 344.

28 *Id.* at 347.

29 *Id.* at 348.

30 *Id.* (citing 845 S.W.2d 794, 804 (Tex. 1992)).

31 710 F.3d at 349 (citing 256 S.W.3d 660, 670 (Tex. 2008)).

32 *Id.* at 350.

B. Key Rulings by the Fifth Circuit

In its first Opinion, the Panel made four key rulings related to Texas Insurance Law and risk-transfer.

1. Look Only to the Policies, Not to the Drilling Contract.

The Panel held that *ATOFINA*, *Aubris*, and *Pasadena Refining* made it clear that "only the umbrella policy itself may establish limits upon the extent to which an additional insured is covered in situations such as the one now before us."[33] Thus, the Fifth Circuit adopted a policies only approach, as urged by BP.

2. *ATOFINA* Is Controlling.

Looking only to the policy language, the Panel also found the language of Transocean's Policies to be "very similar" to the language in the umbrella policies in *ATOFINA*, *Aubris*, and *Pasadena Refining*.[34] In particular, the Panel held that there was no "principled distinction" between the policy language in those three cases and the language in Transocean's Policies: "Just as the policies in these three earlier cases did not limit coverage, so here the policy itself does not contain any limitation on additional insured coverage nor incorporate any limits from the underlying Drilling Contract."[35]

3. The AI *Provision* Was Separate and Additional to the Indemnity Provisions.

The Panel next addressed the second question, whether the Drilling Contract's additional insured provision is separate from and additional to the indemnity provisions.[36] Addressing the holdings in *Getty Oil*, *ATOFINA*, and the Texas Supreme Court's earlier decision in *Firemen's Fund v. Commercial Standard Insurance Co.*,[37] the Panel ruled that:

> to render an additional insured provision separate from and additional to an indemnity provision, Texas law only requires that the additional insured provision be a discreet requirement. As evidenced in *Getty Oil* and *ATOFINA*, it need not be an entirely separate provision of the contract, and its independent status is not altered merely by the fact that the contract also includes a provision requiring the relevant party to obtain insurance to cover its liabilities under the contract.[38]

The Panel concluded that it is "unmistakable" that the provision in the Drilling Contract extending direct insured status to BP is separate and independent from BP's agreement to forego contractual indemnity.[39]

4. BP Offers a Reasonable Interpretation, Therefore *Contra proferentem* Applies

Finally, the Panel ruled that it was compelled to interpret the insurance policy provisions in favor of BP, as long as BP's interpretation was reasonable under Texas' version of the *contra proferentem* rule as expressed in *Hudson Energy*.[40] The Panel did not consider whether the Texas Supreme Court would apply a sophisticated insured exception to the *contra proferentem* rule.[41]

VII. THE PETITIONS FOR REHEARING *EN BANC*

Transocean's Insurers and Transocean petitioned for rehearing *en banc*. The Fifth Circuit requested that BP file a response, and BP filed its opposition to the petitions. A joint *amicus* Petition for Rehearing *en banc* was later filed by the Lloyd's Market Association[42] and International Underwriting Association.[43] BP opposed this filing, but the Fifth Circuit accepted the LMA's/IUA's Petition.

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33 *Id.* at 347.

34 *Id.*

35 *Id.*

36 *Id.* at 348-49.

37 490 S.W.2d 818 (Tex. 1972).

38 *In re Deepwater Horizon*, 710 F.3d at 349.

39 *Id.*

40 *Id.* at 350 (citing *Nat'l Union Fire Ins. Co. of Pittsburgh Pa. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991)).

41 The Panel also did not address Judge Barbier's treatment of the "missing coma" issue because it found that the court was "bound to look only to the policy itself to determine whether BP is covered in the current case." *Id.* at 349. Thus, the Panel determined that it "need not now decide this contentious issue." *Id.*

42 The Lloyd's Market Association ("LMA") is made up of all of the managing agents in the Lloyd's, London underwriting and claims community, who together manage a gross premium of nearly $37 billion annually. The purpose of the LMA is to represent the interests of its underwriting and claims community. In 2011, the LMA Members underwrote business amounting to 58.1% of the premiums of the offshore energy markets. More than 50% of the business underwritten by the Members of the LMA is from the United States.

43 The International Underwriting Association ("IUA") is made up of international insurance companies that have a base in London. Its Members together manage a gross premium of more than $34 billion annually. The IUA

The *amicus curiae* Petition for Rehearing urged reconsideration *en banc*, and advanced various policy arguments in favor of the Petition. The LMA/IUA argued that the Panel Decision of March 1, 2011 adversely impacted insurers by injecting uncertainty into the interpretation of thousands of existing contracts by radically reapportioning the agreed-upon liability and insurance risks, creating obligations that neither the contracting parties, nor their insurers, intended. The LMA/IUA further argued that the Panel's Decision of March 1, 2013 constituted an atypical interpretation of a frequently used additional insured clause, with the result that the ruling imposed significant coverage obligations not found either in the policy terms or the underlying service agreements. The LMA/IUA further urged the full Court to reject the Panel's policies only approach and urged the full Court to reexamine the Panel's interpretation of *ATOFINA* and *Aubris* as applied to the specific language in Transocean's Policies and the BP/Transocean AI provision.

VIII. THE FIFTH CIRCUIT WITHDRAWS ITS MARCH 1, 2013, OPINION AND CERTIFIED TWO QUESTIONS FOR THE TEXAS SUPREME COURT

On August 29, 2013, the original panel withdrew its opinion of March 1, 2013, and substituted two certified questions to the Supreme Court of Texas for resolution.[44] In the Fifth Circuit's published, non-dispositive opinion, it held that "this case involves important and determinative questions of Texas law as to which there is no controlling Texas Supreme Court precedent."[45] It further noted that there are "potentially important distinctions between the facts of the instant case and *ATOFINA*, thus, the outcome is not entirely clear."[46]

The Fifth Circuit certified the following two questions:

1. Whether *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and as long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?
2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 256 S.W.3d at 668, given the facts of this case?

On September 6, 2013, the Texas Supreme Court accepted the certified questions and established a briefing schedule for their resolution.

IX. THE FIRST CERTIFIED QUESTION

The Panel's first question is a restatement of the two principal questions that the Fifth Circuit stated and resolved in Part III of its withdrawn Panel Opinion:

1. Under *ATOFINA*, whether the umbrella policy between the Insurers and Transocean itself limits coverage for any additional insured, including BP?
2. Under *Getty Oil*, whether the Drilling Contract's additional insured provision is separate from and additional to the Drilling Contract's indemnity provisions?

A. Does ATOFINA Control?

The first question which the Texas Supreme Court will address is the application of *ATOFINA* to the language of the Transocean Policies and Drilling Contract and to the facts of the BP/Transocean insurance dispute. While the *ATOFINA* holding is unquestionably relevant, there are a number of differences between *ATOFINA* and the BP/Transocean dispute. The first and perhaps most important of these differences involves the policy language itself. *ATOFINA* involved a particularly worded policy which was unlimited in scope, other than to require that the claim arise from "operations performed" by on behalf of the named insured at the named insured's facilities. The *ATOFINA* policy defined an "insured" as

> A person or organization for whom you have 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 you or on your behalf, or facilities owned or used by you.[47]

In contrast, the Transocean Policies limit the scope of additional insured coverage. They do so in

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represents insurance and reinsurance companies in the international insurance and reinsurance market working in and throughout Europe. In 2011, the IUA Members underwrote business amounting to 3.5% of the world's offshore energy premiums.

[44] *In re Deepwater Horizon*, No. 12-30230, 2013 U.S. App. LEXIS 18087, __ F.3d __ (5th Cir. Aug. 29, 2013).

[45] *Id.* at 2.

[46] *Id.* at 12.

[47] *ATOFINA*, 256 S.W.3d at 664.

three ways. First, Endorsement No. 1 of the Policies recognizes additional insureds only "where required by written contract." Second, the Policies grant additional insured status only where Transocean is "obliged by any oral or written 'Insured Contract'" to provide insurance. And third, the Policies expressly define "Insured Contract" as a contract under which Transocean "assumes the tort liability of another party." These definitions (and the language of Endorsement 1) require resort to the Drilling Contract to determine whether Transocean has assumed the tort liability of another – in this case, BP's tort liability for well pollution, which Transocean did not contractually assume.

Indeed, the terminology "Insured Contract" in Transocean's Policies appears to be one of the most critical differences between Transocean's Policies and the policy in *ATOFINA*, which lacked such language. The term "Insured Contract" has been recognized to be a "commonly used term of art in Texas insurance law" that means "a separate contract that acts as insurance."[48] The policy in *ATOFINA* lacked this commonly used term of art in Texas insurance law.

These differences in the policy language invoke the application of a variation of the *Eight Corners* rule to the coverage context. Should a court, in construing a policy, look only to the policy, or should the court read the policy in conjunction with another agreement, if that agreement is incorporated into the policy by the policy's own language? Texas law appears to have a simple answer to this question, as Texas law supports the general proposition that a policy may incorporate a separate "written contract for insurance" by reference.[49] Under Texas law, when a document is incorporated into another by reference, both instruments *must* be read and construed together.[50]

ATOFINA is also factually distinguishable from the BP/Transocean dispute in another important way. The coverage interpretational issues presented in *ATOFINA* did not revolve around the underlying service contract, but rather, they revolved around the interpretation of the language of the umbrella insurance policy and consideration of the underlying primary insurance policy. In contrast, the BP/Transocean dispute involves insurance policies that at least require some reference to the underlying Drilling Contract to determine the additional insured issue. Indeed, a critical distinction between *ATOFINA* and the BP/Transocean dispute is that, in *ATOFINA*, it was never claimed that ATOFINA agreed to indemnify Triple S for the claim at issue. Therefore, the indemnity agreement between ATOFINA and Triple S never came into play. In the BP/Transocean dispute, however, the Drilling Contract's indemnity provisions are triggered and are the central focus of the parties' dispute.

B. Is the Drilling Contract's AI Provision Separate and Independent?

The second issue which will have to be addressed by the Texas Supreme Court as part of the first question certified by the Panel involves the "separate and independent" analysis. The "separate and independent" analysis originated in *Getty Oil*,[51] a case in which Getty claimed coverage under an unconditional, stand-alone provision in the service contract requiring unlimited additional insured status. The actual language of the *Getty Oil* service contract was:

> All insurance coverages carried by Seller, ***whether or not required hereby***, shall extend to and protect Purchaser. . . to the full amount of such coverages. . . .[52]

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48 *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 594 (5th Cir. 2011), (citing *Gilbert Tech. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124-25 (Tex. 2010)).

49 The principle that a contract may incorporate terms from another contract is well established in Texas law. As the Texas Supreme Court has stated: "Innumerable contracts are consummated everyday in Texas that incorporate other documents by reference." *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 781 (Tex. 2006). "A contractual term is not rendered invalid merely because it exists in a document incorporated by reference." *Id.* This principle applies equally to insurance policies. *See, e.g., Urrutia v. Decker*, 992 S.W.2d 440, 442 (Tex. 1999) ("Texas law has long provided that a separate contract can be incorporated into an insurance policy by an explicit reference clearly indicating the parties' intention to include that contract as part of their agreement.").

50 *In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311, 320 (Tex. App. – Houston [1st Dist.] 2006, no pet.) (orig. proceeding) ("When one document is incorporated into another by reference, the two documents must be read together."); *Tribble & Stephens Co. v. RGM Constructors, LP*, 154 S.W.3d 639, 663 (Tex. App – Houston [14th Dist.] 2004, pet denied); *In re C&H News Co.,* 133 S.W.3d 642, 645-46 (Tex. App. – Corpus Christi 2003, no pet.) (orig. proceeding); *see also in re Enron Corp.*, 391 F. Supp. 2d 541, 582 n.45 (S.D. Tex. 2005) (noting that "Texas doctrine of incorporation by reference is relaxed.").

51 845 S.W.2d at 797.

52 *Id.* (emphasis added).

Considering this language, the *Getty Oil* court's separate and independent holding was succinct:

> Moreover, the additional insured provision required that NL extend insurance coverage to Getty "whether or not required [by the other provisions of the contract]." Thus, the additional insured provision of the contract does not support the indemnity agreement, but rather is a separate obligation.[53]

Critical to the *Getty Oil* holding is the specific language of its AI provision, which extended the seller's insurance coverage to protect the Purchaser "whether or not required hereby." In discussing this language, the court in *Getty Oil* logically substituted "the other provisions of the contract" for "hereby." This language led to the natural holding that the indemnity provisions and the AI provision were separate and independent. This was because the AI coverage was to apply "***whether or not required***" by the other provisions of the service contract.

The BP/Transocean Drilling Contract's AI provision, however, contains the language "for liabilities assumed by [Transocean] under the terms of this Contract," which, unlike *Getty Oil*, textually ties Transocean's insurance obligations to, and makes them dependent upon, the Drilling Contract's indemnity provisions, because the indemnity provisions are simply "terms" of the Contract. This type of textual tie-in to the indemnity provisions was not only absent in *Getty Oil*, but was disclaimed by the "***whether or not required***" language. Stated another way, *Getty Oil* involved the precise opposite of the AI provision in the BP/Transocean Drilling Contract.

X. THE SECOND CERTIFIED QUESTION

A. Does Contra Proferentem Apply?

The second question certified by the Panel is whether the doctrine of *contra proferentem* should apply, given the facts of the case. The rule that an ambiguous contract term should be interpreted against the party that supplied the term is commonly referred to in insurance law sources by its Latin name, *contra proferentem*, which means "against the one bringing forth."[54] The standard justification for the rule builds on the idea that the supplier of a term in a contract is generally in the best position to avoid ambiguity in the wording of the terms, since the supplier drafted or, at the very least, chose to offer a contract containing that term. The rationale appears to apply most notably to situations involving standard form terms, where one party supplies the terms and the other party either accepts or rejects them but is not given the option of suggesting alternative wording.[55] The rule gives the supplier of the terms the incentive to take all reasonable steps to eliminate ambiguity in the drafting of terms.

Texas applies its own version of the *contra proferentem* rule. Under Texas law, the court must adopt a construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.[56] Judge Barbier concluded that BP did not advance a reasonable interpretation of the Policies and the Drilling Contract; therefore, he did not apply *contra proferentem*, or otherwise consider whether the sophisticated insured exception to the rule should be applied. The Fifth Circuit Panel, however, implicitly found that both Transocean's and BP's interpretations of the Policies were reasonable, thus resulting in an ambiguity, and applied the rule against Transocean's interpretation.

Some courts purport to apply a more mechanical version of the *contra proferentem* rule, in which the drafter always loses whenever a term is found to be facially ambiguous when applied to the claim in question, without any reference to extrinsic evidence to ascertain the best meaning. This mechanical version of the rule is problematic because it sometimes produces outcomes that are not consistent with the reasonable expectations of the insured. Fortunately, in Texas, *contra proferentem* has been said to be a rule of "last resort" – a tie-breaking device – employed by Texas courts when other secondary rules of interpretation fail.[57] It "is not one of the favored rules of construction."[58] Therefore, Texas would appear to

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[53] *Id.* at 804 (bracketed expression in original).

[54] *Contra proferentem* is a general rule of contract-law interpretation. RESTATEMENT (SECOND), CONTRACTS § 206 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

[55] 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 2011).

[56] *Hudson Energy*, 811 S.W.2d at 555.

[57] *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039, 1043-44 (5th Cir. 1991). S*ee, e.g., Evergreen Nat'l Indem Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 676-77 (Tex. App. – Austin 2003, no pet.) (*contra proferentem* is a device of "last resort" or a tie-breaking device).

[58] *Clardy Mfg. Co. v. Marine Midland Bus. Loans, Inc.*, 88 F.3d 347, 355 (5th Cir. 1996), (quoting *Smith v. Davis*, 453 S.W.2d 340, 343 (Tex. App. – Fort Worth 1970, writ ref'd n.r.e.)).

support the view that *contra proferentem* should only be applied when the court is unable to determine the meaning of an insurance policy term after using all other permissible sources of meaning. For example, in Texas, a court will consider a contract's surrounding circumstances that inform, rather than vary from or contradict, the contract text.[59] This approach is more likely to result in outcomes that are consistent with the reasonable expectations of the insured.

The surrounding circumstances would include customs and usages relevant to the contractual context in which the parties negotiated. In the case of the BP/Transocean insurance dispute, the surrounding circumstances include the industry-norm, common-sense division of pollution liability that has developed over many years in the offshore drilling industry: Well owners assume the risk for pollution from the well, because they control the well operations and receive the economic reward from the oil production; and drilling contractors are hired to complete an assigned job, they receive no economic reward for oil extracted from the well, and they assume only the risk of pollution from the drilling rig.[60] And finally, BP, like most super-major oil companies, self-insures its well pollution risks out of its own capital.[61]

This raises another related question which the Texas Supreme Court may have to consider. Must the Court first consider the parties' intent before resorting to the tie-breaking rule of *contra proferentem*, and if so, whose intent controls? As to the first part of this question, Texas law provides that the parties' intent should be considered before resorting to the tie-breaking rule of *contra proferentem*.[62] As to the second part of this question, notably, while BP may be an additional insured for some purposes, it was not a party to the negotiations of Transocean's Policies. The Policies were negotiated by Transocean and its insurers. Transocean and its insurers are in agreement regarding their intent: BP has additional insured status only to the extent Transocean assumed liabilities under the Drilling Contract, and as Transocean did not assume the liability for subsurface pollution, BP is not an additional insured for these purposes.

Moreover, if the insurance Policies are ambiguous, and if the tie-breaker rule of *contra proferentem* is to be employed because the parties' intent is unclear, the *contra proferentem* rule states that the reasonable construction that favors coverage should be adopted. But this raises another question – coverage for whom? Manifestly, the coverage-favoring reasonable interpretation should favor coverage for the insured who negotiated and purchased the Policies – the named insured, here, Transocean – rather than favoring coverage for a third-party who was a complete stranger to the negotiations, who did not pay for the Policies, and whose proposed interpretation would deprive the named insured of virtually all benefit of its Policies. And this also raises another critical difference between the BP/Transocean insurance disputes and *ATOFINA* and *Aubris*, where only the additional insured and the insurer were the parties vying for policy proceeds, and the question effectively was: Will the insurers pay the claim at all? In the case of the Macondo incident, however, there are billions of dollars in claims. The question here is: Will the insurers exhaust their Policies to pay for Transocean's liabilities or BP's liabilities? Exhaustion of the Policies may well occur, in any event. Does it make sense at all to apply *contra proferentem* in the context where the dispute is between a named insured and an additional insured? The answer would seem to be no.

B. If Contra Proferentem Applies, Will Texas Recognize a Sophisticated Insured Exception?

Some courts have suggested, and some commentators have recommended, that the *contra proferentem* doctrine not be applied to insurance policies entered into by sophisticated commercial insureds – for example, large corporations that are represented by counsel. Indeed, over the last few decades, insurers have begun to contest the wholesale application of *contra proferentem* by arguing that in certain circumstances it defies common sense or

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[59] *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469-70 (Tex. 2011).

[60] BP's then CEO, Tony Hayward, testified as follows:

Q. In general, what was the industry allocation of environmental risks between an Operator such as BP and subcontractors who work for the Operator while drilling wells for the Operator?

A. The industry norm would be, in most circumstances, that the Operator would take that risk.

Q. Right. But that was the industry standard?

A. M-h'm, yeah.

Q. Has been that way for years, hasn't it?

A. Yeah, it is.

Hayward Deposition, R. 1173-74.

[61] BP's Tony Hayward also admitted that "certainly that BP is self-insured. We don't have insurance policies in place, correct." He further explained that self-insurance means that BP "didn't have an insurance policy against the risks it was – it was undertaking, in essence, and the – as it says here, we self-insured and took those risks on to our balance sheet." Hayward Deposition, R. 1172-73.

[62] *Clardy*, 88 F.3d at 355; *Evergreen*, 111 S.W.3d at 676.

fairness. Insurers have argued that sophisticated insureds do not need protective contract interpretation rules to level the playing field, and the justifications for applying *contra proferentem* are unfair to insurers when the parties' bargaining power was equal.[63] Thus, over the years, an exception to *contra proferentem* has developed which is often referred to as the sophisticated insured exception.[64] As one commentator has observed, "courts in the 1980's acted with increasing frequency in rejecting or modifying the ambiguity principle, i.e., *contra proferentem*, when the non-drafter was a sophisticated party or was sufficiently involved in the contracting drafting process."[65]

Some scholars have pointed to *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*,[66] as the "historical birth" of the sophisticated insured exception.[67] In *Eagle Leasing*, the court commented upon the inappropriateness of the application of the *contra proferentem* rule in the context of a sophisticated insured:

> We do not feel compelled to apply, or, indeed, justified in applying the general rule that an insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers. In substance the authorship of the policy is attributable to both parties alike. Significantly, the policy in question is not the usual printed form but is what is known as a "manuscript" policy, containing some standard printed clauses but confected especially for [the insured]. It is true, of course, as a trial judge observed, "Scriveners of insurance policies are acutely aware of the meaning and effect of the language." We comment: So too, are counsel for large companies carrying fleet insurance with annual premiums in six figures. There is no purpose in following a legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts.[68]

To date, the Texas Supreme Court has not commented upon whether a sophisticated insured exception should be applied. However, in *Vought Aircraft Indus., Inc. v. Falvey Cargo Underwriting, Ltd.*,[69] Judge Fitzwater of the Northern District of Texas surveyed the case law finding that "[n]either the court nor the parties are aware of a Texas case that addresses the sophisticated insured's exception."[70] However, the court made its *Eire*-guess that the Texas Supreme Court would apply the exception, reasoning as follows:

> But Texas courts have made clear that the traditional rule of construction is based on an insured's unequal bargaining power, the special relationship between the insured and the insurer, and the general principle that contracts are construed against the drafting party. Where the sophisticated insureds exception applies, these concerns are not in play. Such insureds draft the policy, or at least play a role in drafting it. They are not presented a policy that contains non-negotiable terms; rather, they can bargain for coverage, and they are able to interpret the policy on their own, lessening the likelihood that the insurer will take advantage of them. Accordingly, considering that Texas applies principles that are congruous with the sophisticated insureds exception, the court holds that Texas courts would apply the exception where the facts warrant.[71]

The Texas Supreme Court has yet to address the application of the sophisticated insured exception. The BP/Transocean insurance dispute may represent the first occasion for the Court to address the issue.

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63 Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORT TRIAL & INS. PRAC. L.J. 85, 86 (2003).

64 The exception has been and can also be referred to as the "sophisticated insured defense," the "sophisticated parties'" exception, the "sophisticated consumer" exception, and the "sophisticated policyholder defense."

65 Jeffrey Stempel, *Reassessing the "Sophisticated" Policyholder In Defense in Insurance Coverage Litigation*, 42 DRAKE. L. REV. 807, 832 (1993).

66 540 F.2d 1257 (5th Cir. 1976).

67 JEFFREY W. STEMPEL, PETER N. SWISHER & ERIK S. KNUDSEN, PRINCIPLES OF INSURANCE LAW 159 (4th ed. 2011).

68 540 F.2d 1257, 1261 (internal citations omitted).

69 729 F. Supp. 2d 814 (N.D. Tex. 2010).

70 *Id.* at 824.

71 *Id.* at 824-25 (internal citations omitted).

XI. CONCLUSION

The primary concern of a court in construing a written contract – including an insurance policy – is to ascertain the true intent of the parties as expressed in the instrument. In addressing the coverage issues, Judge Barbier was guided by his desire to uphold the reasonable expectations of the two parties to the Drilling Contract, BP and Transocean. He was also guided by his desire to uphold the reasonable expectations of the insurers. These expectations are unquestionably important, and should not be ignored. The link the Transocean Policies and the BP/Transocean Drilling Contract create between the allocation of risks and insurance coverage for well pollution reflects the common practice in the offshore drilling industry. The implications beyond the BP/Transocean insurance dispute of a super major oil company being able to deplete its drilling contractor's entire insurance program, without regard to those parties' contractual allocation of liabilities, cannot be overstated. The district court and the Fifth Circuit Panel came to opposite conclusions. With the recent withdrawal of the Panel Decision, it is now up to the Texas Supreme Court to authoritatively resolve the coverage issues.