



BP's Additional Insured Status in *DEEPWATER HORIZON* Finally Settled by Texas Supreme Court

Back in April 2013, the Fifth Circuit Court of Appeals ruled in favor of BP America Production Company (“BP”) regarding its status as an additional insured under Transocean Holdings, Inc.’s (“Transocean”) primary and excess liability policies for BP’s pollution related liability arising out of the [DEEPWATER HORIZON](#) oil spill. However, as explained in our [October 2013 E-lert](#), the Fifth Circuit took the matter under rehearing and in August 2013, withdrew its prior opinion and instead substituted two certified questions to the Supreme Court of Texas.

As we explained at that time, the Fifth Circuit determined that no controlling Texas precedent exists regarding the extent of coverage possibly afforded to BP. As such, the Fifth Circuit certified the following questions to the Texas Supreme Court:

1. Whether *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008) (“*ATOFINA*”), compelled a finding that BP was entitled to coverage for the damages in question, because the language of Transocean’s umbrella policies alone determined 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 were separate and independent of said insurance policies?; and
2. Whether the doctrine of *contra proferentem* applied to the interpretation of the insurance coverage provision of the Drilling Contract under *ATOFINA*, given the facts of the *DEEPWATER HORIZON* case?

At the time of our last update, it was unclear what impact the August 2013 Fifth Circuit decision may have on the limits of Transocean’s insurance, but we expected the decision would set an important precedent regarding the separation of indemnity and insurance provisions in service agreements, as well as the need for clarification of any ambiguous terms within insurance policies. In a much-anticipated 8-1 decision, the Supreme Court of Texas provided the answer to the first question: No. The Court determined its ruling did not reach the second question.

The opinion, issued by Judge Guzman, held that BP was not covered under Transocean’s primary and excess insurance policies. The Court’s ruling focused on the fact that Transocean’s insurance policies included

language that necessitated consulting the drilling contract to determine BP's status as an "additional insured." Moreover, the Court found that under the terms of the drilling contract, BP's status as an "additional insured" was "inextricably intertwined with limitations on the extent of coverage to be afforded under the Transocean policies." In other words, the Texas Supreme Court focused on the fact that BP's "additional insured" status was constrained by the underlying drilling contract.

The drilling contract contained an industry standard "knock-for-knock" allocation of risk agreement. However, Transocean only agreed to assume liability and indemnify BP for above-surface pollution. BP agreed to assume liability and indemnify Transocean for all subsurface pollution.

The Court's analysis specifically focused on what insurance obligations Transocean was required to satisfy under the drilling contract. Transocean was obligated to obtain certain types of insurance at its own expense and was charged with naming BP "as additional insured in each of [Transocean's] policies ... for liabilities assumed by [Transocean] under the terms of [the drilling] [c]ontract." This language was the linchpin for the Court's decision.

BP was not directly named as an "insured" under Transocean's policies, an endorsement or a certificate of coverage. However, under the terms and definitions of the policy, "insured" status extended to BP as a result of the drilling contract between BP and Transocean, which was recognized as an "insured contract." However, BP's status as an "additional insured" was arguably not universal, but limited by the terms of the drilling contract. The Supreme Court of Texas was charged with deciding whether to refer to the drilling contract to determine BP's "additional insured" status or limiting the issue to the terms of the applicable insurance policies.

BP argued that under *ATOFINA*, the existence and extent of coverage had to be ascertained exclusively from the "four corners" of Transocean's insurance policies, which broadly provided coverage and would have afforded coverage for subsurface pollution. Conversely, Transocean argued that the affordance of "additional insured" status to BP arose only by virtue of the drilling contract. As a result, Transocean argued that the Court must also look at the drilling contract to determine the scope of BP's "additional insured" status.

Relying on well-established Texas law, the Court noted that insurance policies can incorporate limitations outlined in other extrinsic documents by reference to those documents. In other words, limitations on coverage as conveyed in a contract, such as a drilling contract, can be incorporated into an insurance policy so long as the policy "clearly manifests an intent to include the contract as part of the policy." As the Court put it, "while our inquiry must begin with the language in an insurance policy, it does not necessarily end there." To the extent that an insurance policy references or directs the parties to another document (such as a contract), the courts can look to that document, but only to the extent required by the policy.

The language in Transocean's policies conferring "Insured" status to BP "where required by written contract, bid or work order" was sufficient to incorporate the drilling contract into the policies. In effect, the insurance policy language conferring additional-insured coverage "where required" and as "obliged" meant that the drilling contract had to be consulted in order to determine whether the applicable conditions for coverage existed. The Court then turned to the "liabilities assumed" language cited above and found that the drilling contract only obligated Transocean to indemnify or provide insurance to BP for above-surface pollution. Determining that no other reasonable interpretation existed for Transocean's policies and the drilling contract, the Court declined to address the second certified question.

Accordingly, BP was not entitled to coverage under Transocean’s primary and excess policies because the drilling contract did not require Transocean to indemnify for subsurface pollution. The Texas Supreme Court’s decision arguably expands the applicable law of what constitutes an “explicit reference” for purposes of determining the scope and extent of insurance coverage provided pursuant to or in conjunction with a service agreement. Ultimately, it will be interesting to watch how far the courts will go in consulting underlying contracts to determine the scope of coverage. This decision suggests that more courts may look outside the “four corners” of an insurance policy to the underlying agreement (or “eight corners” approach) to determine insurance and indemnity obligations, especially to the extent that an insurance policy contains language referencing an outside document. The Court’s decision, however, could also be read as limited to cases where a policy, an endorsement or certificate of insurance does not explicitly determine “additional insured” status, and instead the policy is silent on “additional insured” status. Based on *ATOFINA*, the existence of an endorsement or certificate of insurance may preclude looking toward the underlying contract to the extent that “additional insured” status is clearly defined in the insurance policy.

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