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IN THE MONEY: BP FINDS \$750 MILLION IN ADDITIONAL COVERAGE FROM TRANSOCEAN'S INSURANCE

In the recent decision of *In re Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013), the Fifth Circuit Court of Appeals ruled in favor of BP America Production Company's ("BP") argument that it was entitled to additional insured protection under Transocean Holdings, Inc.'s ("Transocean") primary and excess liability policies for BP's pollution-related liabilities. In so doing, the court focused principally on the insurance requirements of the drilling contract rather than the indemnity provisions, and held that the language of the insurance policy itself, not the indemnity provisions of the drilling contract, controlled.

The facts surrounding BP's request for coverage are certainly well-known. Here, the Transocean insurance policies contained typical language regarding who is an "Insured" and what is an "Insured Contract." The drilling contract contained both insurance and indemnity provisions, again of a typical nature. The drilling contract required Transocean to maintain insurance covering its operations:

20.1 INSURANCE

Without limiting the indemnity obligations or liabilities of CONTRACTOR [Transocean] or its insurer, at all times during the term of this CONTRACT, CONTRACTOR shall maintain insurance covering the operations to be performed under this CONTRACT as set forth in Exhibit C.

Exhibit "C" set forth the specific insurance schedule and also contained the following clause:

[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.**

BP moved for judgment on the pleadings, seeking insurance coverage from Transocean's insurers. The district court decided the matter against BP, finding that the intent of the language quoted above was that BP be named as additional insured *only* for liabilities assumed in the drilling contract. In the Fifth Circuit's view, the district court read the clause as if a comma was placed after "Workers Compensation" and before "for," as below:

[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.

The district court went on to distinguish two decisions issued under Texas law—one by the Texas Supreme Court and one by the Fifth Circuit—that BP relied upon to argue that the insurance policies alone governed the scope of BP's additional insured rights. BP's arguments, rejected by the district court, fell on more receptive ears on appeal.



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The Fifth Circuit, after an extensive discussion of *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), and *Aubris Resources LP v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483 (5th Cir. 2009), made clear that the appropriate inquiry under Texas law is "whether a commercial umbrella insurance policy that was purchased to secure the insured's indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party." In such a scenario, a court should look to the "terms of the umbrella insurance policy itself," instead of looking to the indemnity agreement in the underlying service contract. *In re Deepwater Horizon*, 710 F.3d at 344. In the court's view, Texas "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." *Id.* at 347.

On that basis, the Fifth Circuit reversed the district court and held that the language in Exhibit C, quoted above, did not limit BP's additional insured protection. The court noted that the language was materially identical to language the Texas Supreme Court construed in the *ATOFINA* matter, which the Texas Supreme Court found insufficient to limit coverage. *Id.* at 348. In the words of the panel, the "policy itself does not contain any limitation on additional insured coverage nor incorporate any limits from the underlying Drilling Contract." *Id.* at 347. The Fifth Circuit therefore held "that there is no relevant limitation to BP's coverage under the policy as an additional insured, that is, so long as the insurance provision and the indemnities clauses in the Drilling Contract are separate and independent." *Id.*

The court then turned to an analysis of whether, under Texas law, the insurance provisions and indemnity clauses were indeed separate and independent. Relying on *Getty Oil Co. v. Ins. of N. Am.*, 845 S.W.2d 794 (Tex. 1992), the court concluded that it was "unmistakable" that the insurance provisions in the drilling contract extending "direct insured" status to BP was separate and independent from BP's agreement on contractual indemnity. Thus, the court reversed and remanded to the district court for entry of judgment in favor of BP.

Practically, it is not clear what impact this decision may have on the case. One would expect that limits of Transocean's insurance were already at risk. The Fifth Circuit's pronouncement on the issue may be the final word. On a going forward basis, however, this decision should serve as a stark reminder of the importance and interplay between insurance and indemnity provisions. This is a topic that the Fifth Circuit has touched on before under maritime law, *see, e.g., Ogea v. Loffland Brothers Co.*, 622 F.2d 186, 190 (5th Cir. 1980) and *Tullier v. Halliburton Geophysical Services, Inc.*, 81 F.3d 552 (5th Cir. 1996), but it is unclear whether the same result would be obtained. Additionally, no Louisiana decisions have directly addressed this issue, but persuasive arguments exist under Louisiana law to separate the indemnity and insurance provisions of a contract. Taking the time to understand these issues in the drafting process, and incorporating terms that remove all ambiguity, is an obviously important task.

— [L. Etienne Balart](#)



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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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