

THE SUPREME COURT OF TEXAS DECIDES THE INSURANCE DISPUTE IN THE BP OIL SPILL



On the evening of April 20, 2010, a blowout, explosions, and fire occurred aboard the oil drilling rig the DEEPWATER HORIZON as it was in the process of temporarily abandoning a well it had drilled on the Outer Continental Shelf off the coast of Louisiana. Eleven men died and at least 17 others were injured in the incident.

The explosions and/or fire should have triggered the automatic function on the blow out protector (BOP), but that function either failed to activate the BOP or the BOP otherwise failed to shut in the well. Several vessels attempted to extinguish the fire with their water cannons. Despite these efforts, the DEEPWATER HORIZON burned continuously until mid-morning on April 22, when it capsized and sank into the Gulf of Mexico.

As the rig descended, the marine riser - the approximately 5,000 feet of pipe that connected the rig to the BOP - collapsed and broke. Millions of gallons of oil discharged into the Gulf of Mexico over the next 87 days. The well was finally capped and the discharge halted on July 15, 2010.

It was not long after the initial explosions that the first lawsuits were filed. Since that time, approximately 3,000 cases, with over 100,000 named claimants, have been filed in federal and state courts across the nation. These suits asserted a wide array of claims including wrongful death and personal injury due to the explosion and fire, post-incident personal injury resulting from exposure to oil and/or the chemical dispersants used during the oil spill response, damage to property or natural resources, and economic losses resulting from the oil spill.¹

THE INSURANCE DISPUTE

Both BP², the oil field developer, and Transocean³, the drilling rig owner, sought coverage under Transocean's liability insurance program. For its worldwide drilling operations, Transocean purchased a primary liability policy of \$50 million with Ranger Insurance Ltd. and excess liability policies with various insurers in four layers with total limits of \$700 million⁴, providing Transocean \$750 million of liability insurance coverage.

While Transocean was a named insured on the policy, the coverage dispute concerned the scope of coverage BP was afforded under Transocean's policy as an additional insured.

BP argued that as an additional insured, its coverage under the Transocean policy was not limited – it provided BP with coverage for all “liability imposed by law.” Transocean and its insurers agreed that BP was an additional insured – but argued the scope of BP's coverage as an additional insured was limited by the underlying Drilling Contract between BP and Transocean.

THE DRILLING CONTRACT LIMITATIONS

The Drilling Contract included a “knock for knock” allocation of risk provision that is standard for the oil and gas industry⁵. Among the indemnity provisions, Transocean agreed to indemnify BP for above-surface pollution – regardless of fault – and BP agreed to indemnify Transocean for all pollution risks that Transocean did not assume, i.e., subsurface pollution⁶. In addition, the Drilling Contract required Transocean to have certain types of insurance, and was charged with including BP and its affiliates, etc. as an additional insured.

Transocean did not name BP as an additional insured on any of the policies; BP qualified as an additional insured because Transocean was obligated in an “insured contract” to provide BP insurance. An “insured contract” was defined to mean an agreement to assume the tort liability of another.

THE COVERAGE LITIGATION

While both BP and Transocean eventually agreed the Drilling Contract was an “insured contract,” at the heart of this coverage dispute was whether the indemnity agreements found in the Drilling Contract between BP and Transocean limited the insurance coverage provided to BP.

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CONTACT

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By claiming that Transocean's insurance included coverage for BP as an insured without limitation, BP was claiming coverage for subsurface pollution under Transocean's liability policies, even though BP had assumed liability for subsurface pollution in the Drilling Contract.

Transocean was claiming BP was an insured only for liability Transocean had assumed in the Drilling Contract – and as Transocean did not assume liability for subsurface pollution, BP should not be granted coverage for claims emanating from subsurface pollution.

Summary of Legal Arguments

BP contended that under applicable law, coverage for an additional insured is determined solely by the policy wording and that the indemnity portions of the Drilling Contract were not to be considered.

BP also argued that under the law, additional insured and indemnity provisions are separate and an indemnity clause does not limit the scope of additional insured coverage. Finally, as respects the insurance requirements section of the Drilling Contract requiring Transocean to include BP as an additional insured, BP points out there was comma before but not after “except Workers’ Compensation.” The wording (Subsection 3 of Exhibit C) in the Drilling Contract requiring Transocean to include BP as an additional insured stated:

BP...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 reads the insurance requirement (Subsection 3 of Exhibit C) to require Transocean to obtain coverage for all of BP's liabilities, even those that BP assumed, except for workers' compensation liabilities that Transocean assumed.

Transocean contended that under applicable law a separate contract can be incorporated into an insurance policy by an explicit reference clearly indicating the parties' intent to do so – and that the Drilling Contract was incorporated into Transocean's liability insurance policies. As respects the insurance requirement wording in Subsection 3 of Exhibit C, Transocean argued that the “for liabilities assumed by [Transocean] under the terms of this contract” was reference to all insurance, not just workers' compensation.

Court Decisions

In late 2011, the U.S District⁷ court decided the coverage matter in favor of Transocean, finding Transocean was not required to name BP as an additional insured for liabilities not assumed by Transocean in the Drilling Contract. On appeal, the Fifth Circuit⁸ court reversed the District court's decision, finding that the applicable law (Texas) compelled examining only the wording of the insurance policy, which did not impose any limitation as to the extent BP was an additional insured. However, upon re-hearing the Fifth Circuit withdrew its opinion and certified two questions⁹ to the Supreme Court of Texas, observing “Where state law governs such an issue, these policy factors are better gauged by the state high court than by a federal court.”¹⁰

The Supreme Court of Texas

The Court observed the wording of the insurance policy such as “where required” and as “obligated” required consulting the Drilling Contract. After all, BP would not have been an additional insured at all if not for the Drilling Contract; therefore, their coverage inquiry could not be limited to the policy wording alone. Further, Texas law had long allowed policies to incorporate other documents by reference – if directed to do so by the policy wording itself.

Although additional insured and indemnity provisions are often separate and independent in that an indemnity clause found in a contract extrinsic to an insurance policy does not usually affect additional insured coverage, the Court concluded that here the plain language of the insurance requirements that provided BP status as an insured was “inexorably linked” to Transocean's indemnity obligations.

Missing Comma

As respects the missing comma in insurance requirements, the Court found Transocean's reading of the clause the only reasonable reading, considering the entirety of the Drilling Contract and in light of the allocation of liabilities in the contract. The Court also found the reading urged by BP was also contrary to the section of the insurance requirements that required Transocean to purchase workers' compensation for its own employees, with no mention of purchasing workers' compensation coverage for workers employed by others.

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Summary of the Opinion

The court ruled:

"Because BP is not named as an insured in the Transocean policies or any certificates of insurance, the insurance policies direct us to the additional-insured provision in the Drilling Contract to determine the existence and scope of coverage. Applying the only reasonable construction of that provision, we conclude that, as it pertains to the damages at issue, *BP is an additional insured under the Transocean policies only to the extent of the liability Transocean assumed for above-surface pollution.* [Emphasis added]

We therefore answer the first certified question in the negative and refrain from answering the second question."

CONCLUSION

The above is intended only as general summary of the holdings in this case and therefore by necessity does not address all of the many nuances of the arguments by the parties or findings by the courts. However, what is important to recognize is that this decision does not stand for the general proposition that additional insured coverage is always limited by an indemnity clause found in a related contract. In fact, the Court did not overrule or otherwise void the cases relied upon by BP in its arguments of law. Rather, the Court found important distinctions in the facts of DEEPWATER HORIZON case compared to such cases.

Additionally, the case also does not stand for the proposition that courts must always look outside of the insurance policy wording to determine coverage.

The Court clearly stated as much in describing the limitations it would apply to such an approach "*Unless obligated to do so by the terms of the policy, however, we do not consider coverage limitations in the underlying transactional documents.*"¹¹ [Emphasis added]

Finally, it should also be kept in mind that Transocean's insurance policies are manuscript non-ISO policies written to conform to the custom and practice of the offshore drilling industry. Therefore, this decision is unlikely to have any impact on most additional insured coverage interpretations.

About the Author - Craig F. Stanovich, CPCU, CIC, CRM, AU is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based risk management, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com

¹ In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL 2179, Findings of Facts and Conclusions of Law, United States District Judge Carl J. Barbier, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, September 4, 2014

² "BP" refers to BP America Production Company; BP Exploration & Production Inc.; BP Corporation North America Inc.; BP Company North America Inc.; BP Products North America Inc.; BP America Inc.; BP Holdings North America Limited; and BP p.l.c.

³ "Transocean" refers to Transocean Offshore Deepwater Drilling, Inc.; Transocean Holdings, L.L.C.; Transocean Deepwater Incorporated; and Triton Asset Leasing GmbH.

⁴ In RE DEEPWATER HORIZON, RELATOR – IN THE SUPREME COURT OF TEXAS, Opinion Delivered February 13, 2015, pg. 5

⁵ In RE DEEPWATER HORIZON, RELATOR – IN THE SUPREME COURT OF TEXAS, Opinion Delivered February 13, 2015, pg. 3 See footnote 5. "knock for knock" indemnity agreements require each party to contractually assume responsibility for injuries to its own employees and damage to its own property without regard to who caused the injury or how the damage occurred.

⁶ In RE DEEPWATER HORIZON, RELATOR – IN THE SUPREME COURT OF TEXAS, Opinion Delivered February 13, 2015, pg. 3-4

⁷ In re OIL SPILL BY THE OIL RIG 'DEEPWATER HORIZON' IN THE GULF OF MEXICO, ON APRIL 20, 2010, MDL No. 2179, 2011, WL 5547259 (E.D. La. November 15, 2011)

⁸ In re DEEPWATER HORIZON, 710 F.3d 338 (5th Cir. 2013) issued March 1, 2013

⁹ 1. Whether Evanston Insurance Co. v. ATOFINA Petrochemicals, 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 so 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?

¹⁰ In RE DEEPWATER HORIZON, 728 F.3d 491 (5th Cir 2013) Filed August 29, 2013

¹¹ In RE DEEPWATER HORIZON, RELATOR – IN THE SUPREME COURT OF TEXAS, Opinion Delivered February 13, 2015, pg. 10