Texas Supreme Court holds entire limits of insurance policy are available to reimburse Anadarko's defense fees and expenses related to Macondo Well blowout claims.

In another dispute over insurance coverage related to the Macondo Well blowout (a/k/a Deep Water Horizon incident),[1] the Texas Supreme Court held that an endorsement reducing a policy's limits for "liability" stemming from a joint venture does not apply to defense fees and expenses because those costs are not "liabilities" as that term is used in the policy.

The blowout resulted in numerous claims against BP entities, Anadarko Petroleum Corporation and Anadarko E&P company, L.P. (collectively, "Anadarko") and MOEX Offshore 2007 LLC. BP and Anadarko eventually entered a settlement under which Anadarko transferred its entire 25% ownership interest and a payment of $4 billion to BP in exchange for BP's release of claims against Anadarko and indemnification of Anadarko for all other liabilities arising out of the blowout. BP did not agree to cover Anadarko's legal fees and other defense expenses, totaling over $100 million.

Before the incident, Anadarko purchased an "energy package" insurance policy ("Policy") that provides excess-liability coverage limited to $150 million per occurrence. The Policy requires the consortium of insurance companies that issued the policy (collectively, "Underwriters") to reimburse Anadarko for its defense fees and expenses as part of Underwriters' indemnity obligation for Anadarko's "Ultimate Net Loss." And, it defines that term as "the amount [Anadarko] is obligated to pay, by judgment or settlement, as damages resulting from an 'Occurrence' covered by this Policy, *including* the service of suit, institution of arbitration proceedings *and all 'Defence Expenses'* in respect of such 'Occurrence.'" [Emphasis added.] The Policy also contains a Joint Venture Provision endorsement reducing the $150 million limit when Anadarko's *liability* arises out of the operation of a joint venture in which Anadarko has an ownership interest ("Endorsement"). The Endorsement's main clause reduces the coverage limit based on Anadarko's percentage ownership in the joint venture from which the *liability* arises – here, to 25% of the limits for the joint venture.

The parties disputed the applicability of the Endorsement to Anadarko's defense fees and expenses. Because Underwriters previously paid Anadarko $37.5 million (25% of the $150 million limit) as reimbursement towards the $4 billion Anadarko paid BP, Underwriters argued that they had no further obligation and refused to cover Anadarko's defense fees and expenses. Anadarko claimed that the Endorsement does not apply to defense fees and expenses, but rather only to payments to third parties to which it had become *liable*. The trial court agreed with Underwriters in part, applying the Endorsement as well as one of the exceptions that potentially increases Underwriters' obligation beyond $37.5 million. The Beaumont Court of Appeals affirmed in part, holding that the Endorsement's main clause applies, the exceptions do not, and Underwriters already satisfied the coverage limits of $37.5 million.

Reversing the Beaumont Court of Appeals, the Texas Supreme Court determined that the Endorsement does not apply to Anadarko's defense fees and expenses. The Court first analyzed

[1] In February 2015, the Texas Supreme Court resolved a coverage dispute over the scope of additional insured coverage available to majority interest owner BP under insurance policies issued to Transocean Offshore Deepwater Drilling, Inc. *See In Re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015).

the Endorsement's main clause and, in particular, its introductory phrase *"[a]s regards any liability of [Anadarko]* which is insured under this Section . . . ." [Emphasis added.] Because the Policy does not define "liability," the Court determined its common, ordinary meaning by first looking to dictionary definitions and then other authorities. Noting that the dictionary definition of "liability" is broad, the Court considered the term's use throughout the Policy and held that there is a consistent distinction between Anadarko's "liabilities" and its "expenses." Consistent with the term's common meaning within insurance and other legal contexts, the Court concluded that "liability" in the Policy refers to an obligation imposed on Anadarko by law to pay for damages sustained by a third party who submits a written claim.

Recognizing that the term "Ultimate Net Loss" includes defense fees and expenses in its definition, the Court held that the definition includes two components: (1) damages awarded to third parties and (2) defense fees and expenses. The Court noted that the inclusion of the phrase "including the service of suit, institution of arbitration proceedings and all 'Defence Expenses' in respect of such 'Occurrence'" does not make the defense fees and expenses "damages" and thus a "liability." The definition of "Ultimate Net Loss" refers only to damages that a judgment or settlement obligates Anadarko to pay [*i.e.*, liability to third parties]; judgments and settlements typically do not order a party to pay its own defense expenses. Instead, the phrase "including . . . 'Defence Expenses'" describes only the first phrase "the amount [Anadarko] is obligated to pay." The Court concluded that Anadarko's "liabilities" do not include its defense fees and expenses and that this result is consistent with the meaning of "liability" in other contexts.

The Court remanded the case to the trial court for resolution of the dispute over the amount of Anadarko's defense fees and expenses.

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