

Client Alert

Insurance Coverage & Recovery Practice Group

May 9, 2013

Negotiating Additional Insured Provisions in the Wake of the *Deepwater Horizon* Decision

Companies should re-examine their approach to additional insured provisions in their business contracts and insurance policies in light of the Fifth Circuit's recent decision in *In re Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013).

The Claim

Transocean Holdings, Inc., the drilling contractor to BP America Production Company at the Macondo Well, maintained liability coverage in the amount of \$750 million at the time of the explosion and sinking of the Deepwater Horizon. BP asserted claims for insurance coverage as an additional insured under Transocean's liability insurance policies for BP's subsurface pollution liabilities.

The Terms of the Business Contract

The drilling contract required that BP "shall be named as additional insured[] in each of [Transocean's] policies ... for liabilities assumed by [Transocean] under this contract." The contract required Transocean to indemnify BP for pollution originating on or above the surface of the land or water, but Transocean did not assume liability for spills originating below the surface of the water.

The Additional Insured Provision in the Policies

The additional insured provision in Transocean's insurance policies specified that: "The term 'Insured' shall include: ... (c) any person to whom the 'Insured' is obliged by any oral or written 'Insured Contract' ... to provide insurance such as is afforded by this Policy."

The Court's Ruling

- The district court below held that BP was not an additional insured for its subsurface liabilities, reasoning that the insurance policies extend coverage only to the extent that Transocean "is obliged by any oral or written 'Insured Contract' to provide insurance" and that Transocean was obliged to provide additional insured coverage only for liabilities assumed by Transocean in the drilling contract. Since Transocean did not assume liability for subsurface spills, the district

For more information, contact:

John H. Fontham

+1 202 626 5543

jfontham@kslaw.com

Martin M. McNerney

+1 202 626 5447

mmcnerney@kslaw.com

**King & Spalding
Washington, D.C.**

1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707

Tel: +1 202 737 0500

Fax: +1 202 626 3737

www.kslaw.com

Client Alert

Insurance Coverage & Recovery Practice Group

court held that BP was not an additional insured for the losses at issue.

- The Fifth Circuit reversed, holding that even if the drilling contract specifies that BP is to be “an additional insured under Transocean’s policies *only* for liabilities specifically assumed in the drilling contract ... we are bound to look only to the policy itself to determine whether BP is covered in the current case.” 710 F.3d at 348. The Court further explained that the “case law makes clear to us that only the ... policy itself may establish limits on the extent to which an additional insured is covered,” and the policy language in Transocean’s policies “imposes no relevant limitations upon the extent to which BP is covered.” 710 F.3d at 347, 350.
- **The result is that BP now has full access to Transocean’s \$750 million liability insurance limits for liabilities that Transocean never agreed to insure.**
- Notably, the Fifth Circuit’s ruling followed two nearly identical predecessor cases, with very similar contract and policy language -- *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660 (Tex. 2008) and *Aubris Resources L.P. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483 (5th Cir. 2009). So, *Deepwater Horizon* should not be dismissed a “one-off,” result-oriented stretch that can be readily distinguished in the future.

Potential Consequences of an Adverse Ruling

- Unintended erosion or exhaustion of a company’s liability insurance limits.
- Potential direct liability for the named insured to the extent that the insurance program incorporates self-insurance features (*e.g.*, deductibles, retentions, retrospective premiums, claims liability for the participating share of a captive insurer).

Key Points to Remember

- Limiting language in the business contract, no matter how specific, may not be enough to shield a company’s insurance program from overly broad additional insured exposure.
- If additional insured status is to be extended to a contracting counter-party, limitations on the scope of coverage must be expressly stated in the insurance policy. Companies should work with their insurers and broker to incorporate narrow additional insured language into their policies.
- If a catastrophic event arises, companies should remember the potential opportunities presented by the *Deepwater Horizon* ruling, and consider whether they may be entitled to unrestricted additional insured coverage in policies issued to their contracting counter-parties.

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.