

## Will *Deepwater Horizon* Change a Long Standing Rule of Law?

*In re Deepwater Horizon*, 710 F.3d 338 (5<sup>th</sup> Cir. 2013, withdrawn on r'hrng).

*In re Deepwater Horizon*, 728 F.3d 491 (5<sup>th</sup> Cir. 2013).

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## ACCIDENT

- Transocean owned the *Deepwater Horizon*, a semi-submersible, mobile offshore drilling unit.
- The *Deepwater Horizon* was engaged in exploratory drilling under a drilling contract between BP America Production Company and Transocean's predecessor.
- An onboard explosion resulted in *Deepwater Horizon* sinking after burning for two days.
- A spill occurred underwater.

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## Insurance Provisions in the Drilling Contract

- 20.1 Insurance: "Without limiting the indemnity obligations or liabilities of [Transocean] or its insurer, at all times during the term of this contract, [Transocean] shall maintain insurance covering the operations to be performed under this contract as set forth in Exhibit C."
- Exhibit C, Paragraph 1(c): "The insurance required to be carried by [Transocean] . . . is as follows: (c) Comprehensive General Liability Insurance, **including contractual liability insuring the indemnity agreement** as set forth in the Contract."
- Exhibit C, Paragraph 3: "[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."

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## Indemnity Provisions of the Drilling Contract

- Art. 24.1: “[Transocean] shall assume full responsibility for and . . . indemnify . . . BP . . . for pollution or contamination . . . **originating on or above the surface of the land or water . . .**”
- Art. 24.2: “[BP] shall assume full responsibility for and . . . indemnify . . . [Transocean] . . . for pollution or contamination . . . **arising out of or connected with operations under this Contract hereunder and not assumed by [Transocean] in Article 24.1 above.**”

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## Transocean’s Insurance

- Primary: \$50 million of general liability coverage.
- Excess policies (4 layers): \$700 million of additional general liability coverage.
- These policies contain materially identical provisions.

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## Is BP an Additional Insured?

- Definition of “Insured” includes:
  - “(c) any person or entity to whom the “Insured” is obligated by any oral or written “Insured Contract” . . . to provide insurance such as is afforded by this Policy . . . .”
- Definition of “Insured Contract”
  - “. . . shall mean any written or oral contract or agreement entered into by the “Insured” . . . . And pertaining to business under which the “Insured” assumes the tort liability of another party . . . .”
- BP is an additional insured under the primary and excess policies.

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## The Insurance Policies

- The primary and excess policies do not incorporate any of the limitations on additional insured coverage set forth in the drilling contract.

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## Will the Drilling Contract's Limitations Impact Interpretation of the Insurance Policies?

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## Is There Coverage for BP?

- BP only sought coverage on the basis of being an additional insured; it did not seek indemnity.
- Facts:
  - Accident occurred when *Deepwater Horizon* was engaged in drilling for BP.
  - Spill occurred underwater.
- Drilling Contract
  - BP would not receive indemnity from Transocean under the indemnity provisions of Article 24.
  - BP is to be an additional insured for liabilities assumed by Transocean under the contract.
- There should not be coverage based on the scope of coverage that should have been obtained under the terms of the drilling contract.

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## District Court

- The District Court examined the scope of coverage in light of the limitations imposed by the Drilling Contract.
- Under Article 24 of the Drilling Contract, Transocean did not have to indemnify BP as the spill occurred beneath the surface of the water.
- BP was not entitled to coverage as an additional insured.

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## Texas Law: *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*

- To determine “whether a commercial umbrella 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,” the court must look at the policy’s terms rather than the underlying contract. *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 664 (Tex. 2008).
- Courts must follow this rule so long as the **indemnity and additional insured provisions** of the underlying contract are **separate and distinct**. *Id.*

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## Texas Law

- If a policy is susceptible to more than one reasonable interpretation, the policy provision must be interpreted in favor of the insured as long as the interpretation is reasonable. *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).
  - This must be done even if the insurer’s interpretation is more reasonable. *ATOFINA Petrochemicals, Inc. v. Cont’l Cas. Co.*, 185 S.W.3d 440, 444 (Tex. 2005).
- “[A]n intent to exclude coverage must be expressed in clear and unambiguous language.” *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008).

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*Evanston Ins. Co. v. ATOFINA  
Petrochems., Ins.*

- A Triple S employee drowned while servicing the ATOFINA refinery.
- Under the services contract, ATOFINA was to be named as an additional insured under Triple S's policies.
  - However, the obligation would not extend to any obligations for which ATOFINA agreed to indemnify Triple S.
  - ATOFINA had agreed to indemnify Triple S for ATOFINA's sole negligence.
- ATOFINA sought coverage as Triple S's additional insured and did not seek indemnity from Triple S.

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*Evanston Ins. Co. v. ATOFINA  
Petrochems., Ins.*

- ATOFINA was an additional insured under the policy.
- The Texas Supreme Court looked only at the insurance policy, which covered ATOFINA "with respect to operations performed by Triple S."
  - The policy did not contain any limitations based on the services contract (no coverage when ATOFINA was solely negligent).
  - The services contract's limitations were not considered.
  - The services contract's indemnity and additional insured obligations were separate and distinct.

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*Aubris Resources LP v. St. Paul  
Fire & Marine Ins. Co., 566 F.3d  
483 (5<sup>th</sup> Cir. 2009)*

- Fifth Circuit applied *ATOFINA*.
- United hired J&R to service its oil fields. Under the services contract, J&R was to name United as an additional insured, and United had to indemnify J&R for actions stemming from United's own negligence.
- The services contract and the insurance policy's language were similar to the contracts from *ATOFINA*.
- United sought coverage as an additional insured under J&R's CGL policy but did not seek indemnity under the services contract.

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*Aubris Resources LP v. St. Paul  
Fire & Marine Ins. Co.*

■ “[I]t is not material to the [A<sub>T</sub>O<sub>F</sub>I<sub>N</sub>A] rule whether the additional insured provision is finally determined in the policy or with the aid of the parties’ service contract. The separate indemnity provision is not applied to limit the scope of coverage. Indeed, on this point the Texas Supreme Court could not have been clearer:

“We have noted that where an additional insured provision is separate from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity clause.”

*Id.* at 489 (quoting *A<sub>T</sub>O<sub>F</sub>I<sub>N</sub>A*, 256 S.W.3d at 664).

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*In re Deepwater Horizon*, 710  
F.3d 338 (5<sup>th</sup> Cir. 2013,  
withdrawn on r’hrng).

First Opinion

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Only Look at the Policy? Or  
Examine the Drilling Contract too?

■ Under Texas law, the Court was bound to look only at the policies to determine if BP was covered as an additional insured under the policies.

■ Whether the Drilling Contract should be interpreted to say that BP is an additional insured only for liabilities assumed by Transocean under the contract was immaterial.

*In re Deepwater Horizon*, 710 F.3d 338, 347-348 (5<sup>th</sup> Cir. 2013, withdrawn on r’hrng).

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## Only Look at the Policy!!

- Only the umbrella policies could establish the limits placed upon coverage for an additional insured.
- The policies' language was very similar to the policies in *ATOFINA* and *Aubris*.
- The policy did not place any limitations on the additional insured coverage.

*Id.*

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## Was the additional insured requirement separate and distinct from the indemnity clause?

- The additional insured requirement only needs to be a discrete requirement for it to be separate from and additional to an indemnity provision.
- Art. 20.1: Insurance requirements set forth in Exh. C.
  - Exhibit C, Paragraph 1(c): "The insurance required to be carried by [Transocean] . . . is as follows: (c) Comprehensive General Liability Insurance, **including contractual liability insuring the indemnity agreement** as set forth in the Contract."
  - Exhibit C, Paragraph 3: "[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."
- Art. 24.1 and 24.2: Indemnity Provisions

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## Separate and Distinct Provisions

- The Drilling Contract:
  - One paragraph of Exhibit C required Transocean to name BP as an additional insured.
  - A separate paragraph required Transocean to obtain a CGL policy that included contractual liability insuring the indemnity agreement.
- "[T]he provision in the Drilling Contract extending direct insured status to BP is separate and independent from BP's agreement to forego contractual indemnity in various other circumstances." *Id.* at 349.

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## First *Deepwater Horizon* Opinion

- The additional insured provision in the contract is separate from and additional to the indemnity provision.
- The umbrella policies do not impose any relevant limitations on the extent to which BP is an additional insured.
- BP is entitled to coverage as an additional insured under each of the policies as a matter of law. (Unanimous decision)  
*Id.* at 350.

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## Why Certify Questions to the Texas Supreme Court?

*In re Deepwater Horizon*, 728  
F.3d 491 (5<sup>th</sup> Cir. 2013)  
Second Opinion

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## Transocean and the Insurers' Arguments: Key Distinctions

- The Drilling Contract requires that BP be named as an additional insured only for liabilities Transocean assumed in the contract.
  - In contrast, the services contract in *ATOFINA* imposed a broad requirement for *ATOFINA* to be listed as an additional insured.
- The language in the Drilling Contract links the additional insured provision inextricably with the indemnity provision. These obligations are not separate and independent.
- The umbrella policy requires an "insured contract" to exist between Transocean and BP. No such contract was required by the policy in *AUTOFINA*.

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## Fifth Circuit's View

- The foregoing distinctions between this case and *ATOFINA* result in the outcome not being entirely clear.

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## First Certified Question

- “Whether *Evanston Ins. Co. v. ATOFINA Petrochems., Ins.*, 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?’”  
*In re Deepwater Horizon*, 728 F.3d 491, 500 (5<sup>th</sup> Cir. 2013).

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## How to Interpret the Drilling Contract?

- If the Court must consider whether the Drilling Contract imposes limitations on the additional insured coverage available to BP, then how should the additional insured provision of the contract be interpreted?
  - Apply the same rules of construction as when a policy is examined?
  - Construe against the Insurers?

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## Current Texas Law: Interpreting a Policy

- The court must interpret an insurance coverage provision in favor of the insured if there is more than one interpretation possible and that interpretation is reasonable.
  - Do this even if the insurer's interpretation is more reasonable than the insured's.
- An intent to exclude coverage must be clear and unambiguous.  
*Id.* at 499.

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## Why Favor the Insured?

- Why does Texas law favor the insured when interpreting the coverage provision of a policy?
    - The insured and insurer's unequal bargaining power.
    - Doctrine of *contra proferentem*: construe ambiguities against the drafter.
      - BUT: if the Court interprets the underlying contract, the insurer did not draft it.
- Id.*

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## Sophisticated Insured Exception?

- A Sophisticated Insured Exception could be created:
    - it could apply “when the policy is in some way negotiable”; and
    - “the insured is as capable as the insurer of interpreting the contract.”
- Id.*
- An exception may be appropriate where all the parties are highly capable contractors.

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## Would the Texas Supreme Court Recognize a Sophisticated Insured Exception?

- This case presents good arguments:
  - All parties are highly capable contractors.
  - The insurers were not involved in drafting the Drilling Contract, so it may be inappropriate to construe it against them.
- But the insurers drafted the umbrella policies and failed to limit coverage to the liabilities assumed by the insured in the “insured contracts”.

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## Second Certified Question

- “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?”

*Id.* at 500.

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## What Will the Texas Supreme Court Do?

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## Texas Insurance Code §151.104

- No additional insured provisions in construction contracts will be enforceable.
  - ONLY applies to construction contracts.
  - Numerous other industries use additional insured provisions.
- Only applies to construction contracts where the prime contract is entered into on or after January 1, 2012.
  - We will be dealing with the effects of the Texas Supreme Court's decision for the next few years.

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## Easiest Solution

- Insureds, agents, and insurers need to ensure that the policies only provide coverage for what the insured contracted for in the underlying agreement.
- Add language to the policies that narrows the additional insured coverage to the liabilities assumed by the named insured in the underlying agreement.

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