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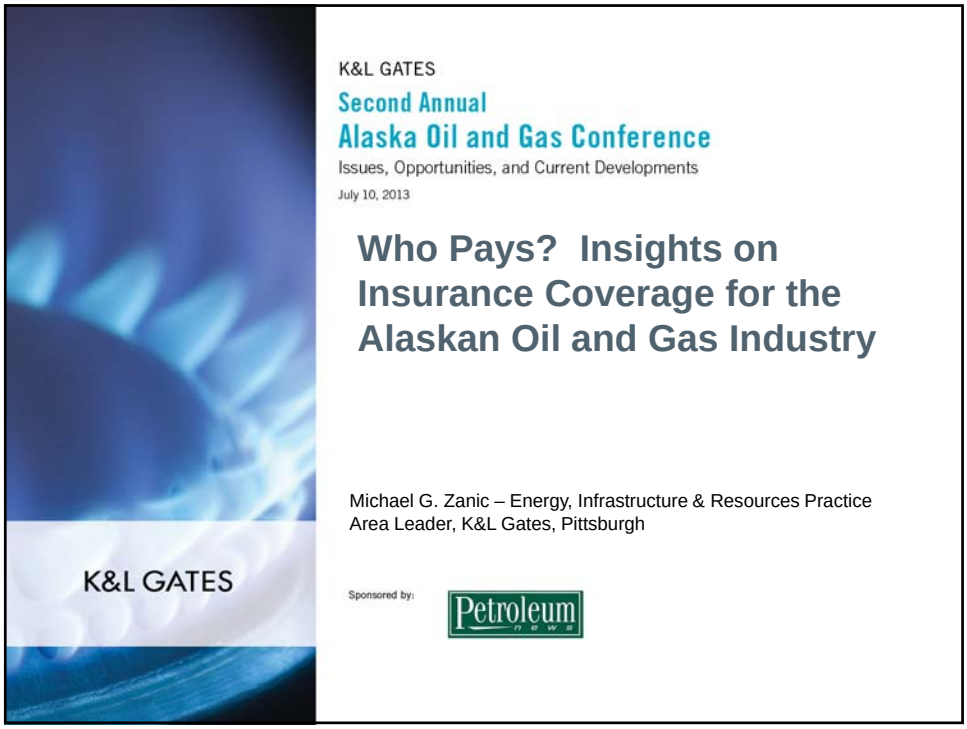
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Who Pays? Insights on Insurance Coverage for the Alaskan Oil and Gas Industry
Michael G. Zanic – Energy, Infrastructure & Resources Practice Area Leader, K&L Gates, Pittsburgh
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Certain Key Insurance Coverage Issues for Offshore and Onshore Operations

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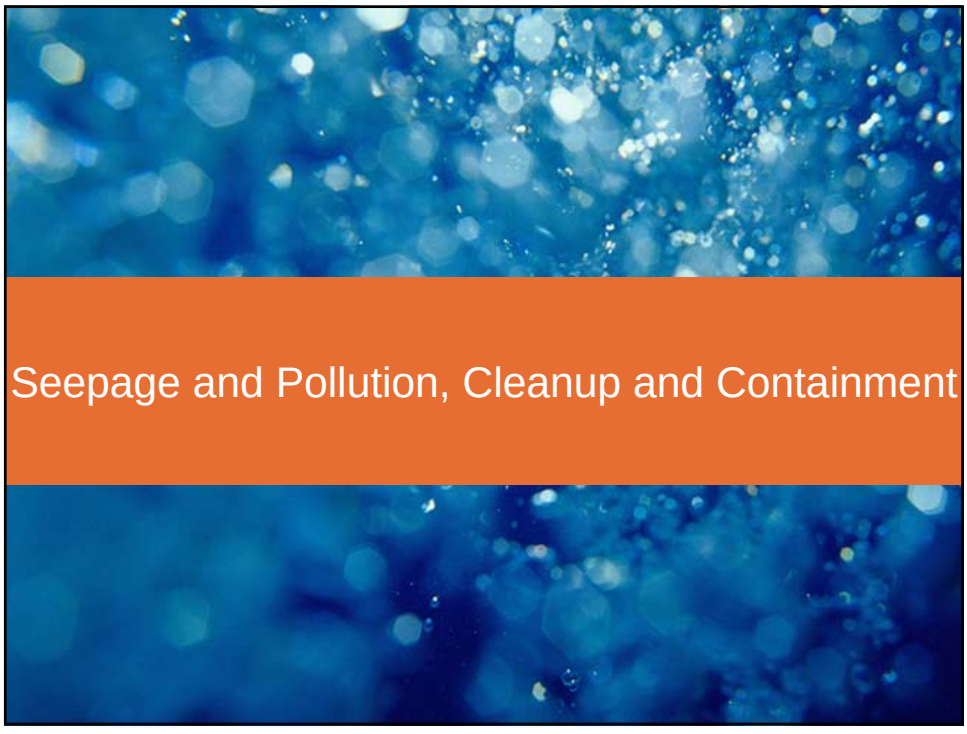
Key Insurance Coverage Issues

- Seepage and Pollution, Cleanup and Containment
- Civil Fines/Penalties and Punitive Damages
- Additional Insured Coverage
- Jurisdiction and Choice of Law



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Common Issues for Pollution Coverage

- Covered or Excluded?
- Expected Insurer Arguments for Non-Coverage
- Number of Occurrences
- Alleged Breach of Policy Provisions

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Common Issues for Pollution Coverage (cont.)

Common Issues for Pollution Coverage

- Three (3) Separate Coverage Grants:

a) All sums assured shall by law or under terms of lease or license be liable to pay for remedial measures and/or as damages for bodily injury and/or loss of, damage to or loss of use of property caused directly by seepage, pollution or contamination arising from insured wells

b) The cost of, or any attempt at, removing, nullifying or cleaning up seeping, polluting or contaminating substances from insured wells, including cost of containing/directing substances or preventing them from reaching shore

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Common Issues for Pollution Coverage (cont.)

(c) Defense cost for any claim or claims resulting from actual or alleged seepage, pollution or contamination arising from insured wells

- Covered circumstances:
  - (a) Legal obligation to clean up seeping/polluting oil emanating from covered wells, whether by statute or under lease agreement
  - (b) Costs of or attempts to remove, nullify or clean up the contamination
  - (c) Defense costs: Defending against a "claim": governmental administrative directives/orders requiring investigation and remediation (?) [Allegations alone sufficient.]

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Common Issues for Pollution Coverage (cont.)

Expected Insurer Arguments for Non-Coverage

- Expected or Intended
- Sudden or Accidental
- Number of Occurrences
- Prove pollution is emanating from covered wells
- Efforts to drill relief wells do not constitute "remedial measures"
  - ❖Remedial measures undefined

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Common Issues for Pollution Coverage (cont.)

- Activities are mere decommission activities required at every lease end
- Underwriters did not intend to cover typical plug and abandon activities under this coverage, even if ordered by the government
- No “property damage” to soil or water on “international waters”
- Government administrative actions not “claims”

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Common Issues for Pollution Coverage (cont.)

- Alleged Breach of Policy Provisions
  - Late Notice
  - Failure to Cooperate
  - Lack of Consent to Settle
  - Settlements v. Judgments (Underlying Exhaustion)

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Civil Fines/Penalties and Punitive Damages

- Incidents such as *Deepwater Horizon* create potential for fines and/or penalties.
- Certain policies explicitly exclude civil or criminal fines or penalties.
  - ❖Coverage grant obligates insurer to "indemnify Insured for Ultimate Net Loss…by reason of liability imposed by law for '*Damages*' on account of…"
  - ❖"Damages" defined as follows:

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Civil Fines/Penalties and Punitive Damages (cont.)

"Damages" means all forms of compensatory damages, monetary damages and statutory damages, punitive or exemplary damages and costs of compliance with equitable relief, *other than governmental (civil or criminal) fines or penalties*, which the **Insured** shall be obligated to pay by reason of judgment or settlement for liability on account of **Personal Injury**, **Property Damages** and/or **Advertising Liability** covered by this Policy, and shall include **Defense Costs.**

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Civil Fines/Penalties and Punitive Damages (cont.)

- Policy language which does not explicitly exclude fines and penalties.

…Underwriters will indemnify the Insured for the amount of the Ultimate Net Sum Payable which the Insured shall be obligated to pay by reason of the liability:

(a) imposed upon the Insured by law, or
(b) assumed by the Insured under contract or agreement, for damages on account of:-

(i) Personal Injuries,
(ii) Property Damage,
(iii) Advertising Injury,

resulting from each Loss

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Civil Fines/Penalties and Punitive Damages (cont.)

- "Ultimate Net Sum Payable" is defined as "the total sum the Insured is obligated to pay, either through adjudication or compromise, as damages in respect of any Loss…" and "Loss" is defined as "an accident, including continuous or repeated exposure to the same general harmful conditions."
- The term "damages" is not defined.
- Even when term "damages" not defined, underwriters argue that term does not include fines or penalties.
- Issue may turn on applicable law and whether the fine or penalty is compensatory (as opposed to punitive) in nature.

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Civil Fines/Penalties and Punitive Damages (cont.)

- Insurance Coverage for Punitive Damages
  - ❖Most states have held punitive damages are insurable (*e.g.*, Alaska and Texas)
  - ❖Minority of states have held that insuring punitive damages violates public policy (*e.g.*, California, New York)
  - ❖Certain states permit coverage for punitive damages if liability is vicariously imposed (*e.g.*, Illinois, Pennsylvania)
  - ❖Policy language is still key

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Additional Insured Coverage

- Securing additional insured status under policies issued to contractors and other entities or making certain one's own policies are not improperly eroded by others can be important components of a company's overall strategy to transfer and mitigate risk.
- It is important to consider the relationship between additional insured coverage and contractual indemnification and insurance provisions, and take steps to ensure that the provisions are consistent.
- Do not rely upon certificates of insurance; obtain a copy of the pertinent insurance policy provisions granting additional insured status.

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Additional Insured Coverage (cont.)

- Today's discussion focuses on several key issues and practical considerations associated with additional insured coverage
  - Nature, purpose and common contexts of additional insured coverage
  - Examples of typical policy provisions/endorsements
  - Scope of additional insured coverage
  - The insurance contract vs. the underlying contract
  - Additional insured coverage vs. anti-indemnification laws
  - 2013 ISO standard form additional insured endorsements

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Additional Insured Coverage (cont.)

Nature, Purpose, and Common Contexts

- An "additional insured" is an individual or entity that is added to an existing insurance policy at the request of the policyholder, typically by endorsement.
- Additional insured coverage is a mechanism for allocating risk between parties (and insurers) that have overlapping and/or interrelated liability risk exposure. For example:
  - contractor and subcontractor
  - product manufacturer and component parts supplier
  - manufacturer and distributor
  - banks/credit holder with insurable interest in debtors' property
  - other contexts where risk allocation between multiple parties for shared and/or overlapping risks is desired

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions

- Additional insured endorsements come in two basic types:
  - An endorsement expressly identifying the individual or entity as an additional insured on the policy
  - An "automatic" additional insured endorsement, or an expanded definition of "insured" in the insuring agreement, that does not expressly identify any particular additional insured

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions (cont.)

- Example of ISO endorsement expressly identifying additional insured:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Section II – Who Is An Insured is amended to include as an additional insured ***the person(s) or organization(s) shown in the Schedule[.]***

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions (cont.)

- Other examples of provisions expressly identifying additional insured:
  - "The 'Person Insured' provision is amended to include as an insured the person or organization named below but only with respect to liability arising out of operations performed for such insured by or on behalf of the named insured." *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 254 (10th Cir. 1993)
  - "Who is an insured is amended to include as an insured the person or organization shown in the schedule, but only with respect to liability arising out of [policyholder's] operations or premises owned by or rented to [policyholder]." *Koala Miami Realty Holding Co., Inc. v. Valiant Ins. Co.*, 913 So. 2d 25, 26 (Fla. Dist. Ct. App. 2005)

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions (cont.)

- Example of ISO "automatic" endorsement that does not expressly identify additional insured:

> This endorsement modifies insurance provided under the following:
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> **A. Section II – Who Is An Insured** is amended to include as an additional insured ***any person or organization for whom you are performing operations*** when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions (cont.)

- Other examples of "automatic" provisions that do not expressly identify additional insured:
  - "Who Is An Insured (Section II) is amended to include as an insured any person or organization from whom you lease equipment when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy*." Transp. Int'l Pool, Inc. v. Cont'l Ins. Co.*, 166 S.W.3d 781, 785 (Tex. Ct. App. 2005)
  - Policy definition of "insured" includes: "any person or entity to whom the 'Insured' is obliged by any oral or written 'Insured Contract' (including contracts which are in agreement but have not been formally concluded in writing) entered into before any relevant 'Occurrence', to provide insurance such as is afforded by this Policy…" *In re Oil Spill by the Oil Rig "Deepwater Horizon"*, MDL No. 2179, 2011 WL 5547259, at *3 (E.D. La. Nov. 15, 2011)

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions (cont.)

- Certificates of Insurance are NOT an example of an additional insured policy provision
  - Agents/brokers will sometimes issue a certificate of insurance for informational purposes to an additional insured as proof that the policyholder has insurance to cover work or operations being performed for the additional insured and that the policyholder has had the additional insured so named on the policyholder's insurance policy

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions (cont.)

- Certificates of insurance are not insurance policies – they do not establish a contractual relationship between the insurer and the purported additional insured
- The commonly used "Acord" certificate expressly states:

  THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER.

  IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed.

- Policy language is the basis for additional insured status
  - *See, e.g., Am. Hardware Mut. Ins. Co. v. BIM, Inc.*, 885 F.2d 132, 139 (4th Cir. 1989) ("[a] certificate of insurance is not a contract of insurance but is merely the evidence that a contract has been issued, and that the validity of any certificate actually provided therefore is conditioned upon the issuance and existence of a policy….")

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Additional Insured Coverage (cont.)

Examples of Typical Policy Provisions (cont.)

- Certificates of insurance can constitute evidence of insurance for jurisdictional purposes
  - *See, e.g., Int'l Ship Repair & Marine Servs., Inc. v. N. Assur. Co. of Am.*, 8:10-CV-2049-T-26AEP, 2012 WL 1059793 (M.D. Fla. Mar. 28, 2012) ("[I]n circumstances where the actual insurance policy has been delivered to an insured outside Florida, but some evidence of insurance (such as an insurance certificate) is delivered to the insured who resides in Florida, the policy is held to have been delivered in Florida for purposes of the Florida insurance statutes.")

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Additional Insured Coverage (cont.)

Scope of Coverage

- Scope of any additional insured coverage is critically important for both the policyholder and the additional insured
- Do additional insured provisions grant coverage for an additional insured's own acts, or only for the acts of the policyholder for whom the additional insured is vicariously liable?
- It depends on the policy language

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract

- It is common among parties to drilling contracts, oil field service contracts and construction projects to allocate risk through a combination of contractual indemnification provisions and insurance requirements
- In addition to indemnification, indemnitees often require "additional insured" status on the indemnitor's/named insured's liability insurance policy
  - effectively gives the additional insured/indemnitee direct coverage rights under the indemnitor's insurance policy
  - preserves the indemnitee's own liability coverage
  - may protect the indemnitee in the event the contractual indemnification provision in the parties' contract is determined to be void and unenforceable

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- Typical example – commercial contract contains an indemnity provision and a separate insurance provision:
  - Indemnity provision provides that Company A will indemnify Company B
  - Insurance provision provides that Company A will:
    - carry general liability insurance (and possibly other types of insurance) in a certain minimum amount; and
    - list Company B as an additional insured under the policy
- The indemnity and insurance scheme has precipitated frequently conflicting judicial decisions on numerous and complex issues

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- **QUESTION**: What if the scope of additional insured coverage under Company A's insurance policy is inconsistent with the underlying contract provisions?
- For example, what if the indemnity provision in the underlying contract is narrower in scope than the coverage afforded under the insurance policy?
- Some decisions have held that the scope and validity of the contractual indemnification provisions have no impact upon the scope and validity of the additional insured coverage
  - *See, e.g., In re Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013)

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- *In re Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013)
  - Transocean Holdings, Inc.—owner of the Deepwater Horizon offshore drilling unit that exploded and sank into the Gulf of Mexico—and its insurers disputed the extent to which Transocean's insurance policies would cover the pollution-related liabilities of BP
  - At the time of the incident, Deepwater Horizon was engaged in drilling activities pursuant to a contract that contained indemnification provisions and required Transocean, a contractor of BP, to: (1) maintain certain insurance coverage for the benefit of BP; and (2) name BP and its affiliated entities as additional insureds under the Transocean policies (the "Drilling Contract")

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- The Drilling Contract provided that:

  "[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***." *Id*. at 342 (court's emphasis)
- Transocean's indemnification obligations extended only to:

  "***pollution or contamination***, including control and removal thereof, ***originating on or above the surface of the land or water***." *Id*. at 343 n.5 (court's emphasis)
- **IMPORTANT**: No indemnity to BP for pollution originating subsurface, such as the well blowout

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- The Insurance Policies did not specifically name BP as an "additional insured," but defined "Insured" to include the "Named Insured" (*i.e.*, Transocean) and:

  "any person or entity to whom the 'Insured' is obliged by any oral or written 'Insured Contract' … to provide insurance such as is afforded by th[e] Policy." *Id*. at 341.

- "Insured Contract" was defined as:

  "any written or oral contract or agreement entered into by the 'Insured' … under which the 'Insured' assumes the tort liability of another party[.]" *Id*. at 341-42.

- The insurers conceded that the drilling contract constituted an "Insured Contract" and therefore BP was an additional insured

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- The parties disagreed regarding the relevance of the limited scope of contractual indemnification to pollution originating above-surface
  - The insurers (and Transocean) contended that their coverage obligations to BP were limited by the scope of Transocean's indemnification obligations to BP as set forth in the drilling contract
  - BP contended that only the terms of the insurance policies governed the scope of BP's coverage rights as an additional insured and that the scope of Transocean's indemnification obligation to BP as set forth within the underlying drilling contract, and to which the insurers were not parties, did not affect its coverage rights

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- The District Court agreed with the insurers:

  "Because Transocean did not assume the oil pollution risks pertaining to the Deepwater Horizon Incident—BP did—Transocean was not required to name BP as an additional insured as to those risks. Because there is no insurance obligation as to those risks, BP is not an 'Insured' (or 'additional insured') for those risks."

  In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 2011 WL 5547259, at *24 (E.D.La. Nov. 15, 2011)

- BP appealed and the Fifth Circuit reversed

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- According to the Fifth Circuit: "where an additional insured provision is separate from and additional to an indemnity provision … only the [insurance] policy itself may establish limits upon the extent to which an additional insured is covered[.]" 710 F.3d at 347, 350.
- Applying this rule of law to the facts:
  - It was "unmistakable" that Drilling Contract provision "extending insured status to BP [wa]s separate and independent from BP's agreement to forego contractual indemnity…." *Id.* at 349.
  - The policies at issue did "not contain any limitation on additional insured coverage …." *Id*. at 347.
  - The language in the drilling contract, which "limit[ed] additional insured coverage to liabilities assumed by [Transocean]," was "virtually identical" to the language at issue in controlling precedent. *Id*. at 347.

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- Therefore, BP was "entitled to coverage under each of Transocean's policies … as a matter of law." *Id.* at 350.
- Note: Alaska law is similar to Texas law. *See Dressler Industries, Inc. v. Foss Launch and Tug Co.*, 560 P.2d 393 (Alaska 1977).

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Additional Insured Coverage (cont.)

The Insurance Contract vs. The Underlying Contract (cont.)

- **Key Takeaway**
  - Review both the insurance contract and the underlying contract documents to make sure they consistently express the parties' intent with respect to risk allocation and additional insured coverage

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Additional Insured Coverage (cont.)

Additional Insured vs. Anti-Indemnification Laws

- At least forty-five states have enacted anti-indemnification statutes that restrict, modify, or invalidate indemnification agreements in construction and certain other contracts
- The statutes frequently prohibit the transfer of an indemnitee's sole and/or concurrent negligence through indemnification provisions
  - *See*, *e.g.*, Ak. St. § 45.45.900 ("A provision, clause, covenant, or agreement contained in, collateral to, or affecting a construction contract that purports to indemnify the promisee against liability for damages for (1) death or bodily injury to persons, (2) injury to property, (3) design defects, or (4) other loss, damage or expense arising under (1), (2), or (3) of this section from the sole negligence or wilful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, is against public policy and is void and unenforceable; however, this provision does not affect the validity of an insurance contract workers' compensation, or agreement issued by an insurer subject to the provisions of AS21, or a provision, clause, covenant, or agreement of indemnification respecting the handling, containment, or cleanup of oil or hazardous substances as defined in AS46.")

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Additional Insured Coverage (cont.)

Additional Insured vs. Anti-Indemnification Laws (cont.)

- Even where the anti-indemnification statute would render a contractual indemnification provision unenforceable, a number of courts have upheld additional insured coverage—even with respect to the additional insured's *sole* negligence
  - *See*, *e.g.*, *Marathon Ashland Pipe Line LLC v. Maryland Cas. Co.*, 243 F.3d 1232, 1240 (10th Cir. 2001) (Wyoming law) ("we conclude this policy language does not limit coverage to the additional insured's vicarious liability")
  - *See*, *e.g.*, *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 254 (10th Cir. 1993) ("we believe that the Kansas courts … would conclude that the additional insured endorsement does not limit the policy's coverage to cases where [the named insured] is held vicariously liable for [the named insured]s' negligence")

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Additional Insured Coverage (cont.)

Additional Insured vs. Anti-Indemnification Laws (cont.)

- As part of its 2004 revisions to the additional insured endorsements, ISO substituted "in whole or in part" language in its additional insured endorsements with the phrase "arising out of"

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Additional Insured Coverage (cont.)

Additional Insured vs. Anti-Indemnification Laws (cont.)

1997 ISO Language:

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Person Or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

Who Is An Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only ***with respect to liability arising out of your ongoing operations*** performed for that insured.

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Additional Insured Coverage (cont.)

Additional Insured vs. Anti-Indemnification Laws (cont.)

- 2004 ISO Language

> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only ***with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part***, by:
>
> **1.** Your acts or omissions; or
>
> **2.** The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

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Additional Insured Coverage (cont.)

Additional Insured vs. Anti-Indemnification Laws (cont.)

- Under the 2004 language, the additional insured has coverage for its own liability provided that the acts or omissions of the named insured (or those acting on its behalf, such as subcontractors) played at least some *part* in causing the injury or damage at issue
- This is so even if a state anti-indemnification law might prohibit the transfer of *any* of the indemnitee's negligence through contractual indemnification

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Additional Insured Coverage (cont.)

2013 ISO AI Endorsements

- Effective April 1, 2013, ISO revised its standard CGL forms and endorsements, including 24 of its 31 standard additional insured endorsements
- The new endorsements have the potential to further complicate an already complex area of law and may negatively impact both additional and named insureds
- The basic ISO forms are used by a majority of insurers and it is likely that these new forms will come into use in the near future
- Three significant modifications are of particular concern to contracting parties that attempt to tie, and thereby limit, the scope of additional insured coverage to the underlying contract provisions

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Additional Insured Coverage (cont.)

2013 ISO AI Endorsements (cont.)

- **"To The Extent Permitted By Law"**

> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> **1.** Your acts or omissions; or
>
> **2.** The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.
>
> However:
>
> ***1. The insurance afforded to such additional insured only applies to the extent permitted by law[.]***

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Additional Insured Coverage (cont.)

2013 ISO AI Endorsements (cont.)

- **"To The Extent Permitted By Law"**
  - Intent is unclear
    - to address circumstances in which the 2004 language provides broader coverage than is allowed under anti-indemnification laws?
    - to harmonize, without the need for state-specific endorsements, the scope of coverage where the state anti-indemnification law at issue extends to additional insured coverage?
    - to serve as a "savings clause" to preserve additional insured coverage in circumstances in which the contractual indemnification provision is determined to be void and unenforceable under the state anti-indemnification statute?

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Additional Insured Coverage (cont.)

2013 ISO AI Endorsements (cont.)

- **Coverage "Will Not Be Broader Than" The Contract**

> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> **1.** Your acts or omissions; or
>
> **2.** The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.
>
> However: *****
>
> ***2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.***

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Additional Insured Coverage (cont.)

2013 ISO AI Endorsements (cont.)

- **Coverage "Will Not Be Broader Than" The Contract**
  - Again the intent is unclear
    - to limit the scope of coverage to the scope of indemnification provisions?
    - to incorporate into the insurance policy any express limits on additional insured coverage that the parties have specified in the contract?
  - Whatever its intent, reference to the terms of the underlying contract documents to determine the scope of coverage afforded to additional insureds is bound to create areas of disagreement

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Additional Insured Coverage (cont.)

2013 ISO AI Endorsements (cont.)

- **Limits Lesser of Contract Requirement or Policy**

> **C.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**
> If coverage provided to the additional insured is required by a contract or agreement, ***the most we will pay on behalf of the additional insured is the amount of insurance:***
> ***1. Required by the contract or agreement; or***
> ***2. Available under the applicable Limits of Insurance shown in the Declarations; whichever is less***.
> This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

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Additional Insured Coverage (cont.)

2013 ISO AI Endorsements (cont.)

- **Limits Lesser of Contract Requirement or Policy**
  - Intent is to limit the insurer's exposure to the lesser of the policy limits or the amount agreed to by the contracting parties
  - Seems reasonable at first glance, but may come as an unpleasant surprise to contracting parties
  - Surprises can leave both parties exposed

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Additional Insured Coverage (cont.)

Key Takeaways - Pay Close Attention To:

- potentially applicable law, including potentially applicable anti-indemnification statutes
- the underlying contract provisions setting forth the scope of contractual indemnification and additional insured requirements
- the specific terms of the insurance policy under which additional insured protection is to be afforded

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Jurisdiction and Choice of Law

Governing Law, Dispute Resolution and Venue

- Three separate issues
- Inconsistencies can lead to:
  - Greater costs (due to multiple “battles”)
  - Inconsistent decisions
- Inconsistencies might be unavoidable

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Jurisdiction and Choice of Law (cont.)

Governing Law, Dispute Resolution and Venue

- Governing Law
  - Policies without pre-determined choice of law or venue provisions
  - Typical service of suit or venue provision:

> "It is agreed that in the event of a failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any court of competent jurisdiction within the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States."

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Jurisdiction and Choice of Law (cont.)

- Choice of law provisions
  - U.S. state-specific choice of law rules
  - Some factors influencing "interests" test: (i) place of contracting, (ii) policyholder headquarters, (iii) location of facilities
  - Significant implications:
    - Bad faith claims
    - *Contra proferentem*
    - Punitive damages

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Jurisdiction and Choice of Law (cont.)

Choice of Dispute Resolution

- Court v. Arbitration
- Mandatory mediation followed by choice of dispute resolution forum

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Jurisdiction and Choice of Law (cont.)

Venue

- Open-ended provision
- Specific location/locale

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Jurisdiction and Choice of Law (cont.)

Examples of Insurance Provisions

- Bermuda Form Approach
  - Modified version of New York law
    - New York law, but Condition O purports to disapply certain pro-policyholder canons of construction adopted in New York law, specifically *contra proferentem*, and parol evidence.
    - Other underwriters adopting this approach by designating New York law with following qualification:

> "…provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between **Insured** and the **Company**; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in a manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard

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Jurisdiction and Choice of Law (cont.)

> to the authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company or reference to the reasonable expectations of either thereof or to contra proferentem and without reference to parol or other extrinsic evidence). To the extent that New York law is inapplicable by virtue of any exception or proviso enumerated above or otherwise, and as respects arbitration procedure pursuant to Condition N, the internal laws of England and Wales shall apply."

- Treatment of New York precedent decided based on application of rules of construction

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Arbitration and Pre-determined Venue Provisions

A. Typical Bermuda Form Arbitration Provision (in part)

"Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act of 1996 ("Act") and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows: …."

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Other Arbitration Provisions

"In the event of a disagreement between the Company and the Insured under this Policy, the disagreement shall be submitted to binding arbitration before a panel of three (3) arbitrators.

. . .

The arbitration proceedings shall take place in or in the vicinity of New York, N.Y. The procedural rules applicable to this arbitration shall, except as provided otherwise herein, be in accordance with the Commercial Arbitration Rules of the American Arbitration Association."


Q & A

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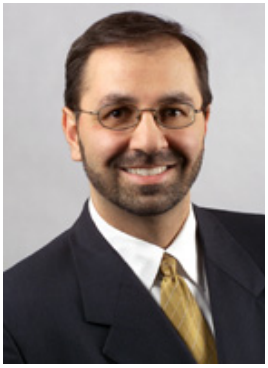

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OVERVIEW

Mr. Zanic focuses his practice on providing strategic advice to energy, manufacturing and construction companies, including in the areas of insurance coverage, anti-corruption laws, including the Foreign Corrupt Practices Act, and innovative solutions to toxic-tort-related problems. Mr. Zanic has litigated major environmental, asbestos, product liability, property damage and business interruption insurance coverage cases, under property and general liability insurance policies, in the courts of California, Connecticut, Delaware, Florida, Massachusetts, New Jersey, Ohio, Pennsylvania, Puerto Rico, Tennessee, Texas and Washington. The policyholders that Mr. Zanic has represented have recovered in excess of $1.75 billion on their insurance coverage claims. Mr. Zanic's experience in toxic tort-related bankruptcies includes representation of debtors and third party non-debtors, including representation of the debtors in the largest asbestos and silica-related pre-packaged Chapter 11 bankruptcy filed in the United States. Further, Mr. Zanic's practice has included representations involving business operations or disputes in Afghanistan, Algeria, Brazil, Canada, China, Egypt, India, Iraq, Lebanon, Nigeria, Qatar, Russia, the UAE, the United Kingdom, and other countries around the world.

PROFESSIONAL BACKGROUND

Mr. Zanic joined K&L Gates in 1989 and became a partner in 1997. Since 2000, he has served on the firm's Management Committee, from 2000 to 2004 as Practice Area Leader-Litigation and from 2005 to 2011 as the Administrative Partner of the Pittsburgh office. Effective August 1, 2011, Mr. Zanic became the Practice Area Leader of the firm's global Energy, Infrastructure and Resources Practice. From 2010 to 2012, he also has served on the firm's Executive Committee.

PROFESSIONAL/CIVIC ACTIVITIES

- Pittsburgh Parks Conservancy (Board Member: 2007-present; Secretary: 2008-present)
- Pennsylvania Business Council (Policy Roundtable Member: 2011-present)
- Leadership Pittsburgh, Inc. (Board Member: 2011-present)
- Dress for Success - Pittsburgh (Advisory Board: 2006-present)

Michael G. Zanic (continued)

Since 2003, Mr. Zanic has been recognized by his peers and by various publications:

- *Chambers USA Client's Guide* (Chambers and Partners Legal Publishers) for litigation (2006), litigation-insurance coverage (2007-2010) and litigation-commercial (2011-2013)
- *The Best Lawyers in America*® (Woodward/White, Inc.) for business litigation (2003/4, 2005), commercial litigation (2006 – 2013)and insurance law (2006 - 2013)
- *Who's Who in Energy* published by The Pittsburgh Business Times, Dallas Business Journal and Houston Business Journal (2011-2012)
- *The Young Litigators Fab Fifty*® (The American Lawyer) list of 50 up-and-coming litigators, aged 45 and under (2007)
- *Pennsylvania Super Lawyer*® (Law and Politics magazine) for insurance coverage (2004-2012) and energy & natural resources (2012-2013)
- *Guide to the World's Leading Insurance and Reinsurance Lawyers* (Legal Media Group) (2006 - 2013)
- Local Litigation Star in *Euromoney's Benchmark Litigation 2010* in Pennsylvania for Insurance and Products Liability
- Listed in *Euromoney's* 2013 Insurance and Reinsurance Expert Guide
- *Lawdragon Magazine's* "The Lawdragon 500: New Stars, New Worlds" (Summer 2006)
- Selected as a "Fast Tracker" by the *Pittsburgh Business Times* (2004), an award recognizing business professionals under the age of 45 who are making a difference in Pittsburgh and the surrounding community

PRESENTATIONS

- K&L Gates' Developing North Carolina Shale Gas: Lessons Learned from the Marcellus and Utica Shale Plays, "Learning from the Marcellus Shale – Success and Challenges", March 29, 2012, Raleigh, North Carolina.

ADMISSIONS

- Pennsylvania
- Supreme Court of Pennsylvania
- U.S. Court of Appeals, Third and Ninth Circuits
- U.S. District Court for the Western District of Pennsylvania

EDUCATION

J.D., University of Pittsburgh, 1989 *(magna cum laude*; Order of the Coif; Notes and Comments Editor, *The Journal of Law and Commerce*)

B.A., University of Pittsburgh, 1986 *(summa cum laude)*

710 F.3d 338
(Cite as: 710 F.3d 338)

H

United States Court of Appeals,
Fifth Circuit.
In re DEEPWATER HORIZON.
Ranger Insurance, Limited, Plaintiff–Appellee
v.
Transocean Offshore Deepwater Drilling, Incorporated; Transocean Holdings, L.L.C.; Transocean Deepwater, Incorporated; Triton Asset Leasing GMBH, Intervenor Plaintiffs–Appellees
v.
BP P.L.C.; BP Exploration & Production, Incorporated; BP American Production Company; BP Corporation North America, Incorporated; BP Company North America, Incorporated; BP Products North America, Incorporated; BP America, Incorporated; BP Holdings North America, Limited, Defendants–Intervenor Defendants–Appellants
Certain Underwriters at Lloyd's London, Plaintiff–Appellee
Transocean Offshore Deepwater Drilling, Incorporated; Transocean Holdings, L.L.C.; Transocean Deepwater, Incorporated; Triton Asset Leasing GMBH, Intervenor Plaintiffs–Appellees
v.
BP P.L.C.; BP Exploration & Production, Incorporated; BP American Production Company; BP Corporation North America, Incorporated; BP Company North America, Incorporated; BP Products North America, Incorporated; BP America, Incorporated; BP Holdings North America, Limited, Defendants–Intervenor Defendants–Appellants.

No. 12–30230.
March 1, 2013.

Background: Primary liability and excess-liability insurers for owner of mobile offshore drilling unit brought declaratory judgment action against oil company which had entered into drilling contract with owner, alleging insurers had no additional-insured obligation to oil company with respect to pollution claims against oil company for oil spill resulting from drilling unit's onboard explosion known as Deepwater Horizon incident. Drilling unit owner intervened. The United States District Court for the Eastern District of Louisiana, Carl J. Barbier, J., 2011 WL 5547259, denied oil company's motion for judgment on the pleadings, and entered partial final judgment in favor of insurers. Oil company appealed.

Holding: The Court of Appeals, E. Grady Jolly, Circuit Judge, held that under Texas law, additional-insured status was governed by the insurance policies, not the drilling contract.

Reversed and remanded for entry of judgment.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Court of appeals reviews de novo a district court's grant of judgment on the pleadings. Fed.Rules Civ.Proc.Rule 12(c), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1041

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(L) Judgment on the Pleadings

170AVII(L)1 In General
170Ak1041 k. In general. Most Cited Cases

The standard for dismissal on a motion for judgment on the pleadings is the same as that for dismissal on a motion to dismiss for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1772 k. Insufficiency in general. Most Cited Cases

To survive a motion to dismiss for failure to state a claim, the plaintiff must plead facts sufficient to state a claim to relief that is plausible on its face. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Issues of contract interpretation are reviewed de novo.

[5] Insurance 217 1806

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1806 k. Application of rules of contract construction. Most Cited Cases

Under Texas law, the same general rules apply to the interpretation of contracts and insurance policies.

[6] Contracts 95 143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a whole. Most Cited Cases

Under Texas law, courts interpreting a contract should consider the contract as a whole, affording each part of the contract effect.

[7] Insurance 217 1813

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1813 k. Language of policies. Most Cited Cases

Under Texas law, when interpreting an insurance policy, discerning the parties' true intent, as expressed in the language of the policy, is the court's primary concern.

[8] Insurance 217 1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a whole. Most Cited Cases

Under Texas law, the court may not adopt a construction of an insurance policy that renders any portion of the policy meaningless, useless, or inexplicable.

[9] Insurance 217 1835(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1835 Particular Portions or Provisions of Policies
217k1835(1) k. In general. Most Cited Cases

Under Texas law, if an insurance coverage provision is susceptible to more than one reasonable interpretation, the court must interpret that provision in favor of the insured, so long as that interpretation is reasonable, even if the insurer's interpretation is more reasonable than the insured's.

[10] Insurance 217 1835(2)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1835 Particular Portions or Provisions of Policies
217k1835(2) k. Exclusions, exceptions or limitations. Most Cited Cases

Under Texas law, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured.

[11] Insurance 217 2098

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2098 k. Exclusions and limitations in general. Most Cited Cases

Under Texas law, an intent to exclude insurance coverage must be expressed in clear and unambiguous language.

[12] Insurance 217 2396

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2394 Excess and Umbrella Liability Coverage
217k2396 k. Scope of coverage. Most Cited Cases

Under Texas law, to discern 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, the court looks to the terms of the umbrella insurance policy itself, instead of looking to the indemnity agreement in the underlying service contract, and the court applies this analysis so long as the indemnity agreement and the insurance coverage provision are separate and independent.

[13] Insurance 217 1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases

Insurance 217 2316

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2316 k. Contractually assumed liabilities. Most Cited Cases

Insurance 217 2396

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2394 Excess and Umbrella Liability Coverage
217k2396 k. Scope of coverage. Most Cited Cases

Under Texas law, as long as insurance requirement in drilling contract between owner of mobile offshore drilling unit and oil company, obligating drilling unit owner to obtain liability insurance naming oil company as additional insured, was separate from and independent of drilling contract's indemnification obligations, which included requirement that drilling unit owner obtain insurance for its contractual indemnification obligations to oil company, the extent to which oil company was covered as additional insured with respect to pollution claims against oil company for below-surface oil spill resulting from drilling unit's onboard explosion known as Deepwater Horizon incident was to be determined solely by language of additional-insured provisions of commercial umbrella insurance policies obtained by drilling unit owner, even if drilling contract's additional-insured requirement could be construed to mean that oil company was additional insured only for liabilities that drilling unit owner specifically assumed in drilling contract, which liabilities did not include pollution-related liability for oil spills originating below water surface.

[14] Insurance 217 1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases

Insurance 217 2316

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2316 k. Contractually assumed liabilities. Most Cited Cases

Insurance 217 2396

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2394 Excess and Umbrella Liability Coverage
217k2396 k. Scope of coverage. Most Cited Cases

Insurance requirement in drilling contract between owner of mobile offshore drilling unit and oil company, obligating drilling unit owner to obtain liability insurance naming oil company as additional insured, was separate from and independent of drilling contract's indemnification obligations, which included requirement that drilling unit owner obtain insurance for its contractual indemnification obligations to oil company, and thus, under Texas law the extent to which oil company was covered as additional insured with respect to pollution claims against oil company for below-surface oil spill resulting from drilling unit's onboard explosion known as Deepwater Horizon incident was to be determined solely by language of additional-insured provisions of commercial umbrella

insurance policies obtained by drilling unit owner, even if drilling contract's additional-insured requirement could be construed to mean that oil company was additional insured only for liabilities that drilling unit owner specifically assumed in drilling contract, which liabilities did not include pollution-related liability for oil spills originating below water surface; separateness and independence of drilling contract's additional-insured requirement and indemnification obligations were not altered by inclusion of requirement that drilling unit owner obtain insurance for its contractual indemnification obligations.

[15] Insurance 217 ⚿1702

217 Insurance
217XII Procurement of Insurance by Persons Other Than Agents
217k1702 k. Contracts. Most Cited Cases

Insurance 217 ⚿2361

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2359 Manufacturers' or Contractors' Liabilities
217k2361 k. Scope of coverage. Most Cited Cases

To render a service contract's additional insured provision separate from and additional to the contract's indemnity provision, Texas law only requires the additional insured provision be a discrete requirement.

***340** Michael John Maloney, Maloney, Martin & Associates, David Wallace Holman, Holman Law Firm, P.C., Byron Charles Keeling, Keeling & Downes, P.C., Houston, TX, for Plaintiff–Appellee Ranger Insurance Limited.

Steven Lynn Roberts, Rachel Giesber Clingman, Kent C. Sullivan, Sutherland Asbill & Brennan, L.L.P., John Michael Elsley, Royston, Rayzor, Vickery & Williams, L.L.P., Daniel O. Goforth, Goforth Geren Easterling, L.L.P., Houston, TX, Brad D. Brian, Daniel Benjamin Levin, Munger, Tolles & Olson, L.L.P., Los Angeles, CA, Edward F. Kohnke, IV, Preis & Roy, A.P.L.C, Kerry J. Miller, Frilot, L.L.C., New Orleans, LA, Edwin G. Preis, Jr., Preis & Roy, A.P.L.C., Lafayette, LA, for Intervenor Plaintiffs–Appellees.

David B. Goodwin, Covington & Burling, L.L.P., San Francisco, CA, Allan Baron Moore, Covington & Burling, L.L.P., Washington, DC, for Defendants–Intervenor Defendants–Appellants.

Richard N. Dicharry, Evans Martin McLeod, Phelps Dunbar, L.L.P., New Orleans, LA, Kyle S. Moran, Attorney, Phelps Dunbar, L.L.P., Gulfport, MS, for Plaintiff–Appellee Certain Underwriters at Lloyd's London.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JOLLY, BENAVIDES, and HIGGINSON, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal presents only one of the many disputes that have arisen and will arise from the explosion and sinking of ***341** Transocean's *Deepwater Horizon* in April 2010. Today we address the obligations of Transocean's primary and excess-liability insurers to cover BP's pollution-related liabilities deriving from the ensuing oil spill in the Gulf of Mexico. Applying Texas law, especially as clarified since the district court's decision, we find that the umbrella insurance policy—not the indemnity provisions of Transocean's and BP's contract—controls the

extent to which BP is covered for its operations under the Drilling Contract. Because we find this policy imposes no relevant limitations upon the extent to which BP is covered, we REVERSE the judgment of the district court and REMAND the case for entry of an appropriate judgment in accordance with this opinion.

I.

Transocean Holdings, Inc. ("Transocean") owned the *Deepwater Horizon*, a semi-submersible, mobile offshore drilling unit. In April 2010, the *Deepwater Horizon* sank into the Gulf of Mexico after burning for two days following an onboard explosion ("Incident" or "*Deepwater Horizon* Incident"). At the time of the Incident, the *Deepwater Horizon* was engaged in exploratory drilling activities at the Macondo Well under a Drilling Contract between the Appellant BP America Production Company's (together with its affiliates, "BP") predecessor and Transocean's predecessor. This Contract required Transocean to maintain certain minimum insurance coverages for the benefit of BP. The extent to which these policies covered BP's pollution-related liabilities arising from the *Deepwater Horizon* Incident is the subject of this appeal.

The Insurance Policies

Transocean held insurance policies with a primary liability insurer, Ranger Insurance Ltd. ("Ranger"), as well as several excess liability insurers led by London market syndicates ("Excess Insurers;" together with Ranger, "Insurers"). Transocean's insurance policy with Ranger provided at least $50 million of general liability coverage, and its policies with the Excess Insurers formed four layers of excess coverage directly above the Ranger Policy that provided at least $700 million of additional general liability coverage. The Ranger and Excess Policies contain materially identical provisions. [FN1] The Policy terms that are important to this case are "Insured" and "Insured Contract." The Policies define "Insured" as including the Named Insured, other parties, and

FN1. As the district court noted (and the Insurers have not disputed), this similarity allows the court to treat all of the Insurers as one for purposes of analysis in this case.

(c) any person or entity to whom the "Insured" is obliged by any oral or written "Insured Contract" (including contracts which are in agreement but have not been formally concluded in writing) entered into before any relevant "Occurrence", to provide insurance such as is afforded by this Policy....

The Policies define "Insured Contract" as follows:

The words "Insured Contract", whenever used in this Policy, shall mean any written or oral contract or agreement entered into by the "Insured" (including contracts which are in agreement but have not been formally concluded in writing) and pertaining to business under which the "Insured" assumes the tort liability of another party to pay for "Bodily Injury", "Property Damage", "Personal Injury" or "Advertising Injury" to a "Third Party" or organization. Tort Liability means a liability that ***342** would be imposed by law in the absence of any contract or agreement.[FN2]

FN2. The Policies contain further provisions addressing other insureds. Endorsement 1 provides a general condition that additional insureds are automatically included where required by written contract. Condition D.1 to Section I coverage limits the coverage of additional insureds: Transocean has the privilege to name additional insureds only to the extent as is required under contract or agreement.

The Drilling Contract

The Drilling Contract defines BP's and Transocean's obligations to one another, separately identi-

fying the liabilities each party assumes. Article 20 of the Contract is a singular provision that imposes upon Transocean an insurance requirement:

> 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.**

(Emphasis added.) Exhibit C to the Drilling Contract is titled "Insurance Requirements" and establishes the types and minimum level of coverage that Transocean is obligated to maintain. This Exhibit provides that Transocean shall carry all insurance at its own expense and that the policies "shall be endorsed to provide that there will be no recourse against [BP] for payment of premium." Further, Exhibit C states:

> [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.**
>
> (Emphasis added.)

The Procedural History

Following the Incident, BP notified the Insurers of its *Deepwater Horizon*-related losses. The Excess Insurers and Ranger each filed a one-count declaratory judgment action against BP.[FN3] The Insurers' complaints are substantively identical—both request a declaration that the Insurers have "no additional-insured obligation to BP with respect to pollution claims against BP for oil emanating from BP's well" as a result of the *Deepwater Horizon* Incident. The Insurers acknowledge that "the [D]rilling [C]ontract requires additional insured protection in favor of certain BP entities." Thus, all parties concede that the Drilling Contract is an "insured contract" under the policies and that the policies provide some insurance coverage to BP as an additional insured. The issue in contention is the scope of BP's insurance coverage.

> FN3. In February 2011, the Judicial Panel on Multidistrict Litigation transferred both cases to the United States District Court for the Eastern District of Louisiana for coordinated pretrial proceedings with the other *Deepwater Horizon*-related litigation pending in that court. In March 2011, Transocean moved for leave to intervene in the consolidated actions, which motion the court granted.

In July 2011, BP moved for judgment on the pleadings, under Rule 12(c) of the Federal Rules of Civil Procedure, against the Insurers. Relying upon Texas and Fifth Circuit precedent as developed in *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660 (Tex.2008), and in *Aubris Resources LP v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483 (5th Cir.2009), BP argued (1) it was an "additional ***343** insured" under the insurance policies at issue and (2) the insurance policies alone—and not the indemnities detailed in the Drilling Contract—govern the scope of BP's coverage rights as an "additional insured." [FN4]

> FN4. BP argues this motion did not require a determination of any rights or obligations of BP or Transocean to one another under any provisions of the Drilling Contract. We agree.

The district court found *ATOFINA* and *Aubris* are distinguishable from the case at hand and denied BP's Rule 12(c) motion in November 2011. In partic-

ular, the court read Transocean's insurance obligation in Exhibit C to be to name BP as an "additional insured[ ] in each of [Transocean's] policies ... for liabilities assumed by [Transocean] under the terms of the contract." That is, the district court found BP's proffered reading of this clause unreasonable, and read the clause as if there were a comma following the phrase "except Workers' Compensation;" this reading rendered those three words their own discrete carve out from liability. Reasoning further that this interpretation required Transocean to name BP as an insured only for liabilities Transocean explicitly assumed under the contract, the court then looked to Article 24 of the Drilling Contract to conclude that BP was not covered under Transocean's policy for the pollution-related liabilities deriving from the *Deepwater Horizon* Incident (as the spill originated below the surface of the water).[FN5]

FN5. With respect to pollution-related liabilities, Article 24.1 of the Contract provides:

> CONTRACTOR [Transocean] shall assume full responsibility for and shall protect, release, defend, indemnify, and hold COMPANY [BP] and its joint owners harmless from and against any loss, damage, expense, claim, fine, penalty, demand, or liability **for pollution or contamination,** including control and removal thereof, **originating on or above the surface of the land or water,** from spills, leaks, or discharges of fuels, lubricants, motor oils, pipe dope, paints, solvents, ballast, air emissions, bilge sludge, garbage, or any other liquid or solid whatsoever in possession and control of CONTRACTOR....
>
> (Emphasis added.) Article 24.2 then provides:
>
> COMPANY [BP] shall assume full responsibility for and shall protect, release, defend, indemnify, and hold CONTRACTOR [Transocean] harmless from and against any loss, damage, expense, claim, fine, penalty, demand, or liability **for pollution or contamination,** including control and removal thereof, **arising out of or connected with operations under this CONTRACT hereunder and not assumed by CONTRACTOR in Article 24.1 above**....
>
> (Emphasis added.)

Following further submissions of the parties, the district court then entered a partial final judgment on the Insurers' complaints under Rule 54(b). Effective March 1, 2012, the court held "by its terms, the Court's Order and Reasons [on BP's motion for judgment on the pleadings] not only denied BP's motion but also granted judgment on the pleadings against [BP] and in favor of the Plaintiff Insurers on the Plaintiff Insurers' complaints." [FN6] BP timely appealed.

FN6. In its brief, BP notes that this partial final judgment was entered in favor of the Insurers "and Transocean" and argues that Transocean is not a proper party to this order. BP's Rule 12(c) motion was directed only to the Insurer's complaints and claims—not against Transocean.

II.

[1][2][3] We review *de novo* a district court's grant of judgment on the pleadings under Rule 12(c). *United States v. Renda Marine, Inc.*, 667 F.3d 651, 654 (5th Cir.2012). The standard for dismissal under Rule 12(c) is the same as that for dismissal under Rule 12(b)(6). ***344***Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir.2004). To survive a Rule 12(b)(6) motion, the plaintiff must plead facts sufficient "to 'state a claim to relief that is plausible on its

face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

[4][5][6][7][8] We similarly review issues of contract interpretation *de novo*. *One Beacon Ins. Co. v. Crowley Marine Servs. Inc.*, 648 F.3d 258, 262 (5th Cir.2011). The parties agree that Texas law governs interpretation of the Policies, under the Policies' choice-of-law provisions. "Under Texas law, the same general rules apply to the interpretation of contracts and insurance policies." *Aubris*, 566 F.3d at 486 (citing *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex.2003)). Courts should consider contracts "as a whole," affording "each part of the contract ... effect." *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex.1994). Discerning the parties' true intent, as expressed in the language of the policy, is the court's primary concern. *Kelley–Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex.1998). And the court may not adopt a construction that renders any portion of a policy meaningless, useless, or inexplicable. *ATOFINA Petrochemicals, Inc. v. Cont'l Cas. Co.*, 185 S.W.3d 440, 444 (Tex.2005).

[9][10][11] If an insurance coverage provision is susceptible to more than one reasonable interpretation, the court must interpret that provision in favor of the insured, so long as that interpretation is reasonable. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991). The court must do so even if the insurer's interpretation is *more* reasonable than the insured's—"[i]n particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured," *id.*, and "[a]n intent to exclude coverage must be expressed in clear and unambiguous language." *ATOFINA*, 256 S.W.3d at 668, 668 n. 27 (citing *Hudson Energy Co.*, 811 S.W.2d at 555); *see also Certain Underwriters at Lloyds, London v. Law*, 570 F.3d 574, 577 (5th Cir.2009) ("If ... ambiguity is found, the contractual language will be 'liberally' construed in favor of the insured." (citing *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex.1987))).

III.

[12] Under Texas law, to discern "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," we look to the "terms of the umbrella insurance policy itself," instead of looking to the indemnity agreement in the underlying service contract. *ATOFINA*, 256 S.W.3d at 662, 664; *see also Aubris*, 566 F.3d at 488–89. We apply this analysis so long as the indemnity agreement and the insurance coverage provision are separate and independent. *ATOFINA*, 256 S.W.3d at 664 n. 5 (citing *Getty Oil Co. v. Ins. of N. Am.*, 845 S.W.2d 794, 804 (Tex.1992)); *Aubris*, 566 F.3d at 489. We examine each step of the analysis in turn.

A.

First, we ask whether the umbrella policy between the Insurers and Transocean itself limits coverage for any additional insureds, including BP. *ATOFINA* is instructive, as its facts significantly parallel the facts of the case now before us. 256 S.W.3d 660. ATOFINA owned an oil refinery***345** at which it hired Triple S to perform maintenance functions. *Id.* at 662. ATOFINA and Triple S entered a services contract which stipulated that ATOFINA was to be named an additional insured in each of Triple S's policies. *Id.* at 663. Specifically, this provision stated:

> [ATOFINA], its parents, subsidiaries and affiliated companies, and their respective employees, officers and agents shall be named as additional insured in each of [Triple S's] policies, except Workers' Compensation; however, such extension of coverage shall not apply with respect to any obligations for which [ATOFINA] has specifically agreed to indemnify [Triple S].[FN7]

> FN7. Petitioner's Br. on the Merits, *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex.2008) (No. 03–0647), 2004 WL 1047377, at *4.

After a Triple S employee drowned while servicing the ATOFINA refinery, his estate sued ATOFINA and Triple S for wrongful death. *Id.* at 663. Triple S's insurer, Evanston, and ATOFINA disagreed over who was required to pay for the litigation; ATOFINA contended it was an additional insured and thus covered, while Evanston argued ATOFINA's agreement to indemnify Triple S for ATOFINA's sole negligence precluded coverage. *Id.*

The Texas Supreme Court began by noting that ATOFINA sought coverage from Evanston on the basis that it was Triple S's additional insured—and had not sought indemnity directly from Triple S. *Id.* at 663–64. The court next looked to Section III.B.6 of the policy, which defined who is an insured as

> A person or organization for whom you have agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you.

Id. at 664. Because, by its own terms, this Section covered ATOFINA "with respect to operations performed by" Triple S, the court found this Section provided ATOFINA direct coverage even for its sole negligence. *Id.* at 667. Moreover, the court stated that "had the parties intended to insure ATOFINA for vicarious liability only, 'language clearly embodying that intention was available.' " *Id.* at 666 ing *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 255 (10th Cir.1993)).

This Court subsequently applied *ATOFINA*'s teachings in *Aubris.* 566 F.3d 483. Again, this case involved a particularly analogous set of facts: United hired J & R Valley to service its oilfields pursuant to a services contract that required J & R Valley to name United as an additional insured in its commercial general liability policy. *Id.* at 485. The agreement further contained a general indemnity provision requiring United to indemnify J & R Valley for causes of action deriving from United's own negligence. *Id.* at 485–86. The court noted that "[o]ur starting point is the insurance policy itself." *Id.* at 487. This policy defined an additional insured as

> Any person or organization that you agree in a written contract for insurance to add as an additional protected person under this agreement is also a protected person for the following **if that written contract for insurance specifically requires such coverages** for that person or organization[.]

Id. (emphasis in original). Because this definition referred to a "written contract for insurance," the court then looked to the additional insured provision in the services agreement to determine whether coverage was required. *Id.* That provision stated, in relevant part:

> ***346** UNITED ... shall be named as additional insureds in each of [J & R Valley's] policies, except Workers' Compensation; **however, such extension of coverage shall not apply with respect to obligations for which UNITED has specifically agreed to indemnify [J & R Valley].**

Id. (emphasis in original). On the basis of this term, J & R Valley's insurer argued the general indemnity provision of the services agreement prevented United from being covered. *Id.*

The court disagreed, stating, "[w]e take from [*ATOFINA*] that in determining whether there is coverage, a court looks only to the additional insured provision itself; that indemnity is a separate, and later arising, question from coverage." *Id.* at 488. Again,

the court noted that United sought coverage from J & R Valley's insurer and not indemnity from J & R Valley itself—just as ATOFINA sought coverage from Evanston and not indemnity from Triple S. *Id.* at 489.

The court held:

> [I]t is not material to the [*ATOFINA*] 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 *ATOFINA*, 256 S.W.3d at 664 (citing *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 804 (Tex.1992)).

Most recently, and subsequent to the district court's ruling, the Texas Court of Appeals addressed this same question of coverage in *Pasadena Refining System, Inc. v. McCraven*, Nos. 14–10–00837–CV, 14–10–00860–CV, 2012 WL 1693697 (Tex.App. May 15, 2012). The umbrella policy there provided a broad definition of "additional insured," [FN8] and the services agreement required the

FN8. 2012 WL 1693697, at *14–15:

> Any person or organization ... for whom the named insured ... has specifically agreed by written contract to procure bodily injury ... insurance, provided that:
>
> a. This insurance applies only to the type of coverage which is otherwise provided by this policy and which the named insured has agreed to provide by contract, but in no event shall the coverage exceed, in type or amount, the coverage otherwise provided by this policy;
>
> b. The amount of insurance is limited to the minimum amount required by such written contract, or to the limits of liability provided by this policy, whichever is lower;
>
> c. The insurance applies only with respect to liability arising out of the work done by or on behalf of the named insured under such written contract; and
>
> d. This insurance shall apply as primary insurance with regard to the additional insured for whom the named insured has agreed by written contract to provide insurance on a primary basis, and in such cases, any other insurance or self insurance available to the additional insured shall be excess to, and not contributory with, the insurance afforded by this policy to that additional insured. However, if the contract does not specifically require that this insurance be primary, this insurance shall be excess over and not contributory with any other valid and collectible insurance or self insurance available to the additional insured whether such other insurance or self insurance is primary, excess, or contingent, or on any other basis.
>
> COMPANY be named as an additional insured in all such certificates, except insurance providing protection against ***347** worker's or workmen's compensation claims, to the extent of the coverage required and only in the minimum amount required by contract, and only with respect to liability arising

> out of work done by or on behalf of the named insured, and only to the extent COMPANY is indemnified by CONTRACTOR under the terms of the contract.

Id. at *14. The insurer argued that this clause in the services agreement expressed the parties' clear intent to limit additional insured coverage to the indemnities listed in that agreement. *Id.* at *16. The court, however, applied *ATOFINA* and *Shell Chemical L.P. v. Discover Property & Casualty Insurance Co.*, CIV. A. No. H–09–2583, 2010 WL 1338068 (S.D.Tex. Mar. 29, 2010), and concluded that only the *policy* could limit the scope of additional insured status. 2012 WL 1693697, at *15–16. Looking to the "unambiguous [umbrella] policy, which neither contains a limitation on additional insured coverage concerning indemnity under the [services] agreement nor incorporates any such limitation," the court held the company was an additional insured entitled to coverage as a matter of law. 2012 WL 1693697, at *14, *16–17.

[13] This 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. As an initial matter we note that here, as in *ATOFINA* and *Aubris*, BP is not seeking indemnity from Transocean, but is seeking coverage from the Insurers. The umbrella policy in this case defines an additional insured as "any person or entity to whom the 'Insured' is obliged by any oral or written 'Insurance Contract' ... to provide insurance such as is afforded by this policy." And it defines "Insurance Contract" as "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 to pay for 'Bodily Injury', 'Property Damage', 'Personal Injury' or 'Advertising Injury' to a 'Third Party' or organization." This language is very similar to the language in the umbrella policies in *ATOFINA*, *Aubris*, and *Pasadena Refining*—indeed, we can find no principled distinction between the policy language in these three cases and in the case now at hand.[FN9] Just as the policies in these three earlier cases did not limit coverage, so here the policy itself does not contain any limitation on additional insured coverage nor incorporate any limits from the underlying Drilling Contract.

> FN9. The district court distinguished the current case from *ATOFINA* by noting that the policy in that case, in defining "additional insured," did not specifically refer to an underlying services contract. This is a true, but ultimately an unpersuasive distinction. First, that policy did include in its additional insured definition language referencing entities "for whom you have agreed to provide insurance as is afforded by this policy." Second, the policies in both *Aubris* and *Pasadena Refining* specifically reference an underlying contract requiring insurance coverage in their definitions of additional insureds, yet in each of these cases the respective courts found this reference insufficient to constitute a limit on coverage.

The Insurers, however, argue that the additional insured provision in the Drilling Contract specifically limits BP's status as an additional insured to circumstances involving those liabilities Transocean specifically assumes under the Contract. This argument is simply not persuasive given how Texas law has developed. The language to which the Insurers cite for support is virtually identical to the additional insured provision contained in the services agreement in *ATOFINA;* additionally, it is very similar to the language in both ***348***Aubris* and *Pasadena Refining*. To make the parallels clear, we note again that the agreement in *ATOFINA* provided that

> [ATOFINA], its parents, subsidiaries and affiliated companies, and their respective employees, officers and agents shall be named as additional insured in each of [Triple S's] policies, except Workers' Compensation; however, such extension of cover-

> age shall not apply with respect to any obligations for which [ATOFINA] has specifically agreed to indemnify [Triple S].
>
> And the Drilling Contract here requires:
> [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.

While the parties ardently disagree as to how this clause in the Drilling Contract should be interpreted, we find, in the light of *ATOFINA*, that we need not now decide this contentious issue. Even if the clause is construed as the Insurers desire, that is, even if it is understood to mean that BP is an additional insured under Transocean's policies *only* for liabilities Transocean specifically assumed in the Drilling Contract, the outcome is a clause materially identical to the additional insured provision in *ATOFINA*—and the Texas Supreme Court found that this clause was insufficient to limit coverage. Despite the services contract's language, the *ATOFINA* court found the umbrella policy controlled coverage. Accordingly, we find we are bound to look only to the policy itself to determine whether BP is covered in the current case. Because the umbrella policy's provision describing an additional insured is substantially similar to the pertinent policy provisions in *ATOFINA*, *Aubris*, and *Pasadena Refining*, we hold 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. *See* *ATOFINA*, 256 S.W.3d at 664 n. 5, 670; *Getty Oil*, 845 S.W.2d at 804.

B.

[14] And now that is the question we must next resolve: Whether the Drilling Contract's additional insured provision is separate from and additional to the indemnity provisions. *Getty Oil*, 845 S.W.2d at 804. Notably, in *ATOFINA*, *Aubris*, and *Pasadena Refining*, the respective courts found the additional insured provisions were independent of the indemnity provisions. *ATOFINA* considered two cases in reaching this conclusion. First, it examined *Fireman's Fund v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex.1972), in which the Texas Supreme Court held GM was not entitled to indemnity because the contract did not extend indemnity to GM's negligence. In that case, GM had contracted with Sam P. Wallace Co., Inc. ("Wallace") to perform work on GM's Arlington assembly plant, and, in the contract, Wallace agreed to indemnify GM for any losses arising from Wallace's own negligence and to obtain liability insurance to satisfy that obligation. *Id.* at 820. The *ATOFINA* court distinguished that case by noting that in *Fireman's Fund*, GM was not an additional insured under Wallace's liability policy—while Wallace was required to obtain insurance to cover its liabilities, it was not further required to name GM as an additional insured in those policies. 256 S.W.3d at 669–70. As described below, this same distinction applies to the case now before us.

Second, the *ATOFINA* court looked to *Getty Oil*, 845 S.W.2d 794. Getty contracted with NL Industries to purchase chemicals, and the services contract included an ***349** indemnity provision as well as a broad insurance requirement providing, in paragraph 1, that "[a]ll insurance coverages carried by [NL], whether or not required hereby, shall extend to and protect [Getty.]" *Id.* at 797. The *Getty Oil* court found this contract was "significantly different from that in *Fireman's Fund*." *Id.* at 804. It reasoned that, while the indemnity provision in paragraphs 3–4 of the relevant contract was supported by an insurance provision, this provision was "separate from and additional to the additional insured provision in paragraphs 1–2." *Id.*

The *ATOFINA* court applied the reasoning in these cases to find that, "[a]lthough the service con-

tract in this case does not include an insurance requirement quite as clear as the one in *Getty*, it is clear enough—it requires that ATOFINA 'shall be named as additional insured in each of [Triple S's] policies.' " 256 S.W.3d at 670 (alteration in original). The court then concluded it was

> unmistakable that the agreement in this case to extend *direct* insured status to ATOFINA as an additional insured is separate and independent from ATOFINA's agreement to forego *contractual* indemnity for its own negligence. We disapprove the view that this kind of additional insured requirement fails to establish a separate and independent obligation for insuring liability.

Id. (emphasis in original).

[15] Accordingly, to render an additional insured provision separate from and additional to an indemnity provision, Texas law only requires the additional insured provision be a discrete requirement. As evidenced in *Getty Oil* and *ATOFINA*, it need not be an entirely separate provision of the contract, and its independent status is not altered merely by the fact that the contract also includes a provision requiring the relevant party to obtain insurance to cover its liabilities under the contract.

Here, as the Insurers note, one clause of Exhibit C (describing Transocean's insurance obligations) requires Transocean to obtain coverage for its contractual liabilities,[FN10] while another provision simply requires Transocean to name BP as an additional insured.[FN11] This setup is similar to the contract in *Getty Oil*, which imposed a requirement that NL obtain insurance for its contractual liabilities in paragraphs 3–4, while requiring Getty be named an additional insured in paragraphs 1–2. Moreover, the additional insured provision here is nearly identical to the additional insured provision in *ATOFINA*. Accordingly, we hold, under Texas case law, it is "unmistakable" that the 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. *See* *ATOFINA*, 256 S.W.3d at 670.

FN10. *See* Exhibit C, ¶ 1.c:

> 1. The insurance required to be carried by [Transocean] under this Contract is as follows:
>
> ...
>
> c. Comprehensive General Liability Insurance, **including contractual liability insuring the indemnity agreement as set forth in the Contract** and products-completed operations coverage with a combined single limit of not less than $10,000,000 covering bodily injury, sickness, death and property damage.
>
> (Emphasis added.)

FN11. Exhibit C, ¶ 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."

IV.

Texas law compels us to interpret insurance coverage provisions in favor of the insured, so long as that interpretation is reasonable—and even if the insurer's proffered***350** interpretation denying coverage is more reasonable. *Id.* at 668, 668 n. 27; *Hudson Energy Co.*, 811 S.W.2d at 555. Texas law further establishes 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 claims.' " *Pasadena Refining*, 2012 WL 1693697, at *17 (quoting *ATOFINA*, 256 S.W.3d at 664 n. 5); *see also* *Aubris*, 566 F.3d at 488–89. Accordingly, we conclude: Because we find the umbrella policies between the Insurers and Transocean do not impose any relevant limitation upon the extent to which BP is an additional insured, and because the additional insured provision in the Drilling Contract is separate from and additional to the indemnity provisions therein, we find BP is entitled to coverage under each of Transocean's policies as an additional insured as a matter of law. We reverse the judgment of the district court and remand the case with instructions to enter the appropriate judgment consistent with this opinion.

REVERSED and REMANDED for entry of judgment.

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Determining the Scope of "Additional Insured" Coverage

Recent ISO CGL Insurance Form Revisions Merit Close Attention By Contracting Parties

By Roberta D. Anderson

It is common among parties to sophisticated construction projects, service agreements, leases, and many other types of projects and transactions, to assess the risks associated with their contractual activities and allocate those risks through a combination of contractual indemnification provisions and insurance requirements. In the construction setting, for example, project owners, general contractors and developers (so-called "upstream" parties) typically require their subcontractors and sub-subcontractors ("downstream" parties) to indemnify them for claims arising from the contract work. In addition to the contractual indemnification provisions, upstream parties frequently require that they be provided with "additional insured" status on the downstream indemnitor's/named insured's general liability insurance policy. This provides a number of benefits to the upstream indemnitee. It effectively gives the additional insured/indemnitee direct coverage rights under the indemnitor's insurance policy, preserves the indemnitee's own liability coverage and may protect the indemnitee in the event the contractual indemnification provision in the parties' contract is determined to be void and unenforceable.

Additional insured status may be achieved in several ways. Commonly, it is established through an omnibus definition of "Insured," which may include, for example, the named insured and entities for whom the named insured is obligated by "insured contract" to provide insurance. Alternatively, additional insured status is often achieved through the purchase of "blanket" or "scheduled" additional insured endorsements. The additional insured status under a liability policy is an important bargained-for asset in many types of transactions.

Of course, the extent of the benefit of additional insured status hinges on the actual terms of the insurance policy and applicable law. With respect to policy terms, the Insurance Services Office (ISO)[i] commercial general liability (CGL) coverage forms provide the basis for many general liability policies. Accordingly, familiarity with the ISO forms is important. With respect to applicable law, the indemnity and insurance scheme has precipitated frequently conflicting judicial decisions on numerous and complex issues. A number of these decisions, based upon the fact that the underlying agreement and the insurance policy are in fact separate contracts, have held that the scope and validity of the contractual indemnification provisions have no impact upon the scope and validity of the additional insured coverage—with the effect that additional insureds sometimes enjoy broader protection under the insurance policy than under the contractual indemnification provisions. By way of example, although anti-indemnification statutes in many states prohibit the transfer of an indemnitee's sole (and/or concurrent) negligence through contractual indemnity provisions, some courts have construed the terms of the insurance policy as encompassing and covering the additional insured's negligence even where the underlying contractual indemnification provision was void and unenforceable. In addition, some courts have held that, while the underlying contract may expressly limit the named insured's indemnification and insurance obligations to the additional insured, the

scope of additional insured coverage is not so limited, but rather is governed solely by the terms of the insurance policy.

Presumably in response to developing law impacting the scope of additional insured coverage, ISO has recently revised its standard CGL forms and endorsements, including twenty four of its thirty one standard additional insured endorsements. Although the true scope of their effect will remain unclear until clarified by ISO or by judicial decision, the new endorsements clearly have the potential to further complicate an already complex area of law and may potentially negatively impact both additional and named insureds. The new endorsements and developing law warrant the attention of named insureds, additional insureds, indemnitors, and indemnitees alike.

ISO CGL Insurance Form Revisions

ISO's new standard CGL policy forms, including both its "occurrence"-based form (CG 00 01 04 13) and claims-made form (CG 00 02 04 13), came into effect on April 1, 2013. In addition to the revised main forms, ISO has issued new and revised additional insured endorsements as part of its overall revisions to the standard CGL policy. ISO also has introduced a revised optional endorsement changing the definition of "insured contract." The basic ISO forms are used by a majority of insurers and it is likely that these new forms will come into use in the near future. At a minimum, the language in these new forms underscores that contracting parties are well advised to pay attention to, among other things, potentially applicable law, the terms of the underlying contract and the specific insurance policy terms so that they can most appropriately structure risk transfer provisions.

A. Additional Insured Endorsements

The revised ISO endorsements contain three significant modifications of particular concern to contracting parties. These are discussed in points 1, 2 and 3 below. Importantly, these revisions impact twenty four additional insured endorsement forms that cover a broad range of transactions[ii] and generally attempt to tie, and thereby limit, the scope of additional insured coverage to the underlying contract provisions. In addition, ISO has issued a new "blanket" additional insured endorsement and a new "other insurance" endorsement. These new endorsements are discussed in points 4 and 5 below.

1. Coverage Is Provided "To The Extent Permitted By Law."

The revised additional insured endorsements now state that the insurance afforded to the additional insured "only applies to the extent permitted by law." For example, the new "*Additional Insured—Owners, Lessees Or Contractors—Scheduled Person Or Organization*" (CG 20 10 04 13) endorsement states:

> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> **1.** Your acts or omissions; or
>
> **2.** The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.
>
> However:

Determining the Scope of "Additional Insured" Coverage

> 1. ***The insurance afforded to such additional insured only applies to the extent permitted by law[.]***
>
> (emphasis added)

Although it is not entirely clear what the italicized language is intended to accomplish, it clearly is attempting to address state anti-indemnification laws in some manner. By way of background, at least forty five states have enacted anti-indemnification statutes that restrict, modify, or invalidate indemnification agreements in construction and certain other contracts. These statutes (and/or common law) frequently prohibit the transfer of an indemnitee's sole and/or concurrent negligence through indemnification provisions. Even where the anti-indemnification statute would render a contractual indemnification provision unenforceable, however, a number of courts have upheld additional insured coverage—even with respect to the additional insured's *sole* negligence.[iii]

Against this backdrop, as part of its July 2004 revisions to the additional insured endorsements, ISO added the "in whole or in part" verbiage reflected at the end of the first Paragraph A of the above-quoted language (these words replaced the phrase "arising out of").[iv] The "in part" portion of the phrase, which is left undisturbed in the 2013 revision, means that the additional insured has coverage for its own liability provided that the acts or omissions of the named insured (or those acting on its behalf, such as subcontractors) played at least some *part* in causing the injury or damage at issue. Therefore, an indemnitee could maintain additional insured coverage for its own negligence even though the state anti-indemnification law might prohibit the transfer of *any* of the indemnitee's negligence through contractual indemnification.

Through the 2013 language, ISO could be attempting to address circumstances in which the 2004 language provides broader coverage than is allowed under the anti-indemnification laws of certain states, such that, for example, if a state anti-indemnification statute prohibits the transfer of *any* liability, the additional insured coverage would be limited to vicarious liability arising out of the named insured's acts or omissions.[v] Alternatively, a better reading appears to be that ISO is attempting to harmonize, without the need for state-specific endorsements, the scope of coverage where the state anti-indemnification law at issue extends to additional insured coverage. In this regard, some states have expanded their anti-indemnification statutes to void contract provisions that seek to transfer risk via additional insured coverage.[vi] Additionally, the italicized language could be intended as a "savings clause" to preserve additional insured coverage in circumstances in which the contractual indemnification provision is determined to be void and unenforceable under the state anti-indemnification statute. This may be in response to the fact that some courts have voided contractual additional insured provisions where, for example, such provisions were "inextricably tied" to the indemnification provisions.[vii]

There are likely to be disputes over the meaning of this wording and, when judicially tested, this language could have broad and negative implications for additional insureds. There also could be negative repercussions for indemnitors who may face breach of contract claims from indemnitees who thought they had bargained for and obtained broader additional insured coverage. The reach and impact of this additional language will remain unknown until it is clarified by ISO or through judicial decisions.[viii]

In the meantime, the language clearly carries the potential to reduce additional insured coverage, leaving indemnities without the expected coverage and indemnitors exposed to breach of contract litigation.

Determining the Scope of "Additional Insured" Coverage

2. Coverage "Will Not Be Broader Than" The Contract Requires.

The additional endorsements now state that if the coverage is required by a contract or agreement, the insurance afforded to the additional insured "will not be broader than" the coverage that the insured is "required by the contract or agreement to provide." For example, the new "*Additional Insured—Owners, Lessees Or Contractors—Completed Operations*" (CG 20 37 04 13) endorsement states:

> **A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".
>
> However:
>
> ****
>
> ***2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured***.
>
> (emphasis added)

ISO has not provided guidance regarding the intent of this new language. However, it seems likely that the new language is intended to incorporate into the insurance policy any express limits on additional insured coverage that the parties have specified in the contract, *e.g.,* where the contract specifies that additional insured coverage will only extend to vicarious liability.

Whatever its intent, reference to the terms of the underlying contract documents to determine the scope of coverage afforded to additional insureds may well create areas of significant disagreement.

Again, the additional language underscores the need to carefully review the terms of the underlying contract and the specific insurance policy language to be used to satisfy additional insured requirements. To the extent the 2013 endorsement is used, contracting parties should ensure that the underlying contract language clearly reflects the parties' intent regarding the scope of additional insured coverage.

3. Limits Are The Lesser Of The Contract Requirement Or The Policy Declarations.

The additional insured endorsements now state that the most the insurer will pay on behalf of the additional insured is either: (1) the amount "[r]equired by the contract or agreement"; or (2) the applicable Limits of Insurance shown in the Declarations, whichever is less. For example, the new "*Additional Insured—Designated Person Or Organization*" form (CG 20 26 04 13) states:

> **B.** With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**
>
> If coverage provided to the additional insured is required by a contract or agreement, ***the most we will pay on behalf of the additional insured is the amount of insurance:***
>
> ***1. Required by the contract or agreement; or***
>
> ***2. Available under the applicable Limits of Insurance shown in the Declarations*;**
>
> ***whichever is less***.

> This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations
>
> (emphasis added)

It seems clear that the intent of the italicized language is to limit the insurer's exposure to the lesser of the policy limits or the amount agreed to by the contracting parties. And at first glance this might seem reasonable. This may come as an unpleasant surprise to contracting parties, however, because additional insureds often have access to the policy's full limits of liability—sometimes in cases in which the underlying contract or agreement requires that the named insured provide an amount less than the policy's limits. Unanticipated changes may leave both parties exposed. To the extent an additional insured has insufficient insurance to cover a loss, it may look to the named insured for indemnification for any amounts in excess of the insurance limits. Again, the new language reflects an attempt to link the scope of additional insured coverage to the underlying contract and further underscores the need for contracting parties to pay careful attention to contact language concerning the limits of insurance as well as the insurance policy documentation.

4. New Blanket Additional Insured Endorsement.

ISO has introduced a new blanket endorsement, entitled Additional Insured—Owners, Lessees Or Contractors—Automatic Status For Other Parties When Required In Written Construction Agreement (CG 20 38 04 13). This endorsement, which contains the same potentially problematic language discussed in points 1, 2 and 3 above, provides blanket additional insured status to all parties whom the named insured is "required to add as an additional insured under the contract or agreement":

> **A. Section II – Who Is An Insured** is amended to include as an additional insured:
>
> **1.** Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and
>
> ***2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above***.
>
> Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> **a.** Your acts or omissions; or
>
> **b.** The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.
>
> (emphasis added)

The endorsement extends additional insured status to an upstream party that is not a party to the underlying contract, where required, without the need for a specific listing. This has been termed a "broadening of coverage" by ISO,[ix] and may be a useful addition, since additional insured status is often required between entities who do not share a direct contractual relationship. In the construction context, for example, subcontractors often agree to provide additional insured status to upstream parties with whom the subcontractor may not share a direct contractual relationship. The prior blanket endorsement, CG 20 33 07 04, contains only the language in subparagraph A.1. of the above-quoted new endorsement.[x] The new endorsement should clarify that those upstream parties are covered

where the named insured is obligated in writing in a contract or agreement to name them as additional insureds—even though they are not in contractual privity with the named insured.

5. New Other Insurance Condition Endorsement.

ISO also has introduced another new optional endorsement, entitled *Primary And Noncontributory—Other Insurance Condition* (CG 20 01 04 13), which revises the "Other Insured Condition" to specifically state that the coverage made available to an additional insured is provided on a primary and noncontributory basis where the named insured has agreed to such in writing in the underlying contract documents:

> The following is added to the **Other Insurance Condition** and supersedes any provision to the contrary:
>
> **Primary And Noncontributory Insurance**
>
> This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:
>
> **(1)** The additional insured is a Named Insured under such other insurance; and
>
> **(2)** You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.
>
> (emphasis added)

This endorsement presumably has been introduced in response to typical contractual wording requiring coverage to be extended to the additional insured on a "primary and noncontributory" basis. The language is a useful addition, since it may clarify the parties' intent. One of the reasons that indemnitees bargain for additional insured status is to preserve their own insurance and this objective may be frustrated when the named insured's carrier turns to the additional insured's carrier for contribution pursuant to the "other insurance" clauses.[xi]

B. "Insured Contract" Definition Endorsement.

As part of its 2013 revisions, ISO has amended its *Amendment Of Insured Contract Definition* (CG 24 26 04 13). The endorsement changes the definition of the "insured contract," part f., to state that an indemnification provision in an underlying contract "shall only be considered an 'insured contract' to the extent [the named insured's] assumption of the tort liability is permitted by law." By way of background, although the main CGL coverage form excludes "'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," the form creates an exception for, among other things, liability for damages "[a]ssumed in a contract or agreement that is an 'insured contract' …." (CG 00 01 04 13, Section I.2.b.(2).) The key to the breadth of the exception lies with the definition of "insured contract," which includes "[t]hat part of any other contract or agreement pertaining to [the insured's] business … under which [the insured] assume[s] the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization…." (Section V.9.f.) The insured/indemnitor thus maintains coverage for liability it assumes to its indemnitee in a hold harmless or indemnity agreement. Indeed, the named insured's assumption of liability for the sole negligence of the indemnitee may be covered under the unendorsed "insured contract" definition, making the coverage potentially broader than coverage granted by many additional insured endorsements.

Determining the Scope of "Additional Insured" Coverage

As part of its 2004 revisions to the CGL policies, ISO added the *Amendment of Insured Contract Definition* (CG 24 26 07 04) endorsement to limit the definition of "insured contract" to those circumstances in which the liability assumed by the insured is caused "in whole or in part" by such insured. As noted, however, certain states do not allow a downstream party to indemnify an upstream party for *any* part of the upstream party's negligence. Now, as part of the 2013 revisions, ISO has modified the *Amendment of Insured Contract Definition* (CG 24 26 04 13) endorsement to add the qualification that "such part of a contract or agreement shall only be considered an 'insured contract' to the extent your assumption of tort liability is permitted by law":

> The definition of "insured contract" in the **Definitions** section is replaced by the following:
>
> "Insured contract" means:
>
> ****
>
> f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. ***However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law***. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
>
> (emphasis added)

When this endorsement is attached to a policy, the named insured presumably would not be provided coverage for the tort liability such named insured assumes of another party to the extent that the assumption of such liability is prohibited by applicable law. The new ISO language thus has the potential of further restricting coverage in states in which an indemnitor cannot indemnify the indemnitee for any part of the indemnitee's own negligence.

Conclusion

The important takeaway to contracting parties is to pay close attention to potentially applicable law, including potentially applicable anti-indemnification statutes, and the underlying contract provisions setting forth the scope of contractual indemnification and additional insured requirements. In addition, contracting parties are well advised to review the specific terms of the insurance policy under which additional insured protection is to be afforded, including all endorsements, to confirm the coverage terms and to understand the interplay between the underlying contract provisions and the additional insured coverage. Importantly, there are many different additional insured forms and there can be significant discrepancy in the breadth of coverage provided to additional insureds under the wordings of the various forms. By paying close attention to potentially applicable law, in addition to the specific contract and insurance policy terms, contracting parties may avoid potentially negative surprises, such as unexpected gaps or potential loss of insurance coverage.

For contracting parties to accurately evaluate risk transfer, they must be aware of evolving case law and the specific insurance terms and conditions—in addition to the terms and conditions of the underlying agreement. In light of ISO's recent issuance of new policy forms and endorsements that contain modifications to policy provisions addressing the scope of additional insured coverage, this

may be a precipitous time for contracting parties to assess contractual requirements and additional insured provisions to ensure that the terms and coverage are aligned with the parties' intentions.

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[i] ISO is an insurance industry organization whose role is to develop standard insurance policy forms and to have those forms approved by state insurance commissioners.

[ii] The revised ISO additional insured forms include: *Additional Insured—Concessionaires Trading Under Your Name* (CG 20 03 04 13), *Additional Insured—Controlling Interest* (CG 20 05 04 13), *Additional Insured—Engineers, Architects Or Surveyors* (CG 20 07 04 13), *Additional Insured—Owners, Lessees Or Contractors—Scheduled Person Or Organization* (CG 20 10 04 13), *Additional Insured—Managers Or Lessors Of Premises* (CG 20 11 04 13), *Additional Insured—State Or Governmental Agency Or Subdivision Or Political Subdivision—Permits Or Authorizations* (CG 20 12 04 13), *Additional Insured—State Or Governmental Agency Or Subdivision Or Political Subdivision—Permits Or Authorizations Relating To Premises* (CG 20 13 04 13), *Additional Insured—Vendors (CG 20 15 04 13), Additional Insured—Mortgagee, Assignee Or Receiver* (CG 20 18 04 13), *Additional Insured—Executors, Administrators, Trustees Or Beneficiaries* (CG 20 23 04 13), *Additional Insured—Owners Or Other Interest From Whom Land Has Been Leased* (CG 20 24 04 13), *Additional Insured—Designated Person Or Organization* (CG 20 26 04 13), *Additional Insured—Co-owner Of Insured Premises* (CG 20 27 04 13), *Additional Insured—Lessor Of Leased Equipment* (CG 20 28 04 13), *Additional Insured—Grantor Of Franchise* (CG 20 29 04 13), *Oil Or Gas Operations—Nonoperating, Working Interests* (CG 20 30 04 13), *Additional Insured—Engineers, Architects Or Surveyors* (CG 20 31 04 13), *Additional Insured—Engineers, Architects Or Surveyors Not Engaged By The Named Insured* (CG 20 32 04 13), *Additional Insured—Owners, Lessees Or Contractors—Automatic Status When Required In Construction Agreement With You* (CG 20 33 04 13), *Additional Insured—Lessor Of Leased Equipment—Automatic Status When Required In Lease Agreement With You* (CG 20 34 04 13), *Additional Insured—Grantor Of Licenses—Automatic Status When Required By Licensor* (CG 20 35 04 13), *Additional Insured—Grantor Of Licenses* (CG 20 36 04 13), *Additional Insured—Owners, Lessees Or Contractors—Completed Operations* (CG 20 37 04 13), and *Additional Insured—State Or*

Governmental Agency Or Subdivision Or Political Subdivision—Permits Or Authorizations (CG 29 35 04 13).

iii *See*, *e.g.*, *Marathon Ashland Pipe Line LLC v. Maryland Cas. Co*., 243 F.3d 1232, 1240 (10th Cir. 2001) (Wyoming law) ("we conclude this policy language does not limit coverage to the additional insured's vicarious liability"); *McIntosh v. Scottsdale Ins. Co*., 992 F.2d 251, 254 (10th Cir. 1993) (Kansas law) ("we believe that the Kansas courts, like courts in other jurisdictions that liberally construe ambiguous insurance policy provisions in favor of the the insured, would conclude that the additional insured endorsement does not limit the policy's coverage to cases where [the additional insured] is held vicariously liable for [the named insureds]' negligence").

iv *Compare Additional Insured—Owners, Lessees Or Contractors—Scheduled Person Or Organization* (CG 20 10 07 04) ("Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' ***caused, in whole or in part, by… Your acts or omissions***…") (emphasis added) *with Additional Insured—Owners, Lessees Or Contractors—Scheduled Person Or Organization* (CG 20 10 03 97) ("Who Is An Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability ***arising out*** of your ongoing operations performed for that insured.") (emphasis added).

v It should be noted that many of the states tthat have adopted some type of anti-indemnification statute also have adopted insurance savings provisions, which typically state that the statute does not affect the validity of an insurance contract. These savings provisions have been upheld. *See, e.g*., *Chrysler Corp. v. Merrell & Garaguso, Inc*., 796 A.2d 648, 653 (Del. 2002) (upholding the savings provision and noting that "if in fact an insurer issues an endorsement to cover the actions of a third party and charges a premium for that coverage, it should not be permitted to create an illusion that insurance exists").

vi *See* Joanne Wojcik, *States curb ability to shift contractor risk; Anti-indemnity changes cut additional insureds from some* CGL policies, Business Insurance, Vol. 46, No. 18 (Apr. 30, 2012) (noting that "at least three states—California, Louisiana and Texas—recently enacted legislation expanding their anti-indemnity statute to restrict risk transfer via additional insured coverage"); Paul Primavera, *Evolving AI Endorsement Interpretations Create More Headaches For Contractors*, Nat'l Underwriter - Prop. & Cas. Ins., 2009 WLNR 3489852 (Feb. 23, 2009) (noting that "courts in several jurisdictions —such as Colorado, Oregon, New Mexico and Montana—have linked anti-indemnity statutes to also apply to potentially broadly worded additional insured endorsements").

vii *Compare Federated Serv. Ins. Co. v. Alliance Const., LLC*, 805 N.W.2d 468, 477 (Neb. 2011) ("[E]ven if an indemnity agreement is invalid, its invalidity does not affect the coverage extended to another party under an additional insured endorsement.") *with Transcontinental Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 662 N.E.2d 500, 506 (Ill. App. Ct. 1996) ("the portion of the contract in which [the named insured] agreed to purchase insurance to insure its obligations under section 18 is also void because…it is inextricably tied to the void indemnity provision") *and W.E. O'Neil Const. Co. v. General Cas. Co. of Illinois*, 748 N.E.2d 667, 672-73 (Ill. App. Ct. 2001) (noting that "[c]ases have upheld the validity of provisions requiring the party named as indemnitee to be named as an additional insured on the indemnitor's insurance policy where the insurance provision is not inextricably tied to a void indemnity agreement").

However, a number of courts have determined that "to the extent permitted by law"-type verbiage suffices to preserve the contract requirements to the extent they do not offend a state's anti-indemnification statute. *See*, *e.g*., *Thrash Commercial Contractors, Inc. v. Terracon Consultants, Inc*., 889 F.Supp.2d 868, 881 (S.D.Miss. 2012) (Mississippi law) ("[T]he limitation of liability provision in the parties' agreement herein recites that the limitation of liability is intended by the parties to operate 'to the fullest extent permitted by law.' Numerous courts have found that such language permits enforcement of a limitation of liability to the extent it does not offend a state's anti-indemnification statute.") (collecting cases).

[viii] To the extent the new language is ambiguous and/or contrary to the contracting parties' reasonable expectations, the language would be construed in favor of coverage under well-established rules of insurance policy interpretation. *See generally* 2 Couch on Insurance 3d § 22:31 ("provisos, exceptions, or exemptions, and words of limitation in the nature of an exception ... are strictly construed against the insurer where they are of uncertain import or reasonably susceptible of a double construction, or negate coverage provided elsewhere in the policy"); *id.* § 22:14 ("If an insurer uses language that is uncertain, any reasonable doubt will be resolved against it[.]"); *id.* § 22:11 ("the objectively reasonable expectations of [the insured] regarding the terms of insurance contracts will be honored even though a painstaking study of the insurance provisions would have negated those expectations").

At least one court has observed that "an endorsement that provides coverage only for the additional insured's vicarious liability may be illusory and provide no coverage at all." *Marathon Ashland*, 243 F.3d at 1240 n.5 (quoting Douglas R. Richmond & Darren S. Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds*, 44 DRAKE L. REV. 781, 806 (1996)).

[ix] *See 2012 General Liability Multistate Forms Revision To Policyholders* (CG P 015 04 13).

[x] Some decisions without the new language have held in favour of additional insured coverage in the absence of contractual privity. *See*, *e.g.*, *Pro Con, Inc. v. Interstate Fire & Cas. Co*., 794 F.Supp.2d 242, 251-252 (D.Me. 2011) (Maine law) (finding that the language in subparagraph A.1 does "not plainly restrict additional insured status only to those entities that have contracted directly with the named insured").

[xi] In a similar vein, the CGL "Other Insurance" provision, at Condition 4, has been revised to state that the insurance provided "is excess over [a]ny other primary insurance available to [the named insured] covering liability for damages … for which [the named insured] ha[s] been added as an additional insured"— whether by endorsement or any other means. (CG 00 01 12 04, Section IV.4.b.(1)(b).) The prior version stated that coverage is excess over any primary insurance for which the named insured had been added as an additional insured "by attachment of an endorsement." (CG 00 01 12 04, Section IV.4.b.(2).) This deletion of this phrase is generally helpful because some insurers provide additional insured status directly in their coverage form and not by endorsement.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – CONTROLLING INTEREST

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Person(s) Or Organization(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to their liability arising out of:

1. Their financial control of you; or

2. Premises they own, maintain or control while you lease or occupy these premises.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – ENGINEERS, ARCHITECTS OR SURVEYORS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. **Section II – Who Is An Insured** is amended to include as an additional insured any architect, engineer, or surveyor engaged by you but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

1. In connection with your premises; or

2. In the performance of your ongoing operations.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or the failure to render any professional services by or for you, including:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

2. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or the failure to render any professional services by or for you.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designation Of Premises (Part Leased To You):
Name Of Person(s) Or Organization(s) (Additional Insured):
Additional Premium: $
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person(s) or organization(s) shown in the Schedule.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS OR OTHER INTERESTS FROM WHOM LAND HAS BEEN LEASED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Person(s) Or Organization(s)	Designation Of Premises (Part Leased To You)
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability arising out of the ownership, maintenance or use of that part of the land leased to you and shown in the Schedule.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to lease that land;

2. Structural alterations, new construction or demolition operations performed by or on behalf of the person(s) or organization(s) shown in the Schedule.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

1. In the performance of your ongoing operations; or

2. In connection with your premises owned by or rented to you.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and

2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

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Insurance Coverage for Marcellus Shale Pollution Claims: Myth or Reality?

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It's no secret that domestic natural gas production is booming, particularly in the gas-rich Marcellus Shale region. The insurance implications of this boom are less well known. One important issue oil and gas producers operating in the Marcellus Shale region will face is whether they have meaningful insurance coverage for pollution claims.

Pollution claims come in many shapes and sizes, but the following hypothetical fact pattern illustrates some of the principal coverage issues that will likely be litigated over the next few years. A newspaper headline alleges possible drinking water contamination caused by drilling in a particular area. An investigation by the state department of environmental protection follows. Shortly thereafter, the producer responsible for drilling wells in that area is hit with multiple lawsuits filed by property owners alleging bodily injury and damage to their drinking water supply and property values. The costs associated with investigating, defending and potentially settling these types of claims can add up quickly. Fortunately, the producer purchased insurance for this very reason. But does that insurance provide coverage for these pollution-related liabilities?

General Liability Policies

Most oil and gas producers operating in the Marcellus Shale region carry general liability insurance. General liability insurance typically provides coverage for liability arising out of "bodily injury" or "property damage" caused by an "occurrence." An "occurrence" is generally defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."

While there are many different policy terms and conditions that may be relevant to determine whether coverage exists under a general liability policy for a particular claim, the most important provision will often be the pollution exclusion. As a result of the decades-long environmental coverage wars between policyholders and insurers following the passage of CERCLA and similar state environmental laws, many general liability policies now contain so-called "total" or "absolute" pollution exclusions, which effectively preclude coverage for most types of pollution claims.[1] As a result, many oil and gas producers facing pollution claims may need to look elsewhere for coverage.

Pollution Liability Policies

Many oil and gas producers purchased specialized pollution liability policies to fill the coverage gap left by the pollution exclusions in their general liability policies. Insurers marketed and sold these policies to producers as a way to protect against pollution-related liabilities, but it remains to be seen whether those same insurers will agree to provide meaningful coverage to policyholders facing large

[1] *See* Peter J. Kalis, Thomas M. Reiter & James R. Segerdahl, Policyholder's Guide to the Law of Insurance Coverage, §10.04 (1997).

pollution claims. As a result, the real battle in many cases involving pollution-related liabilities will be over the coverage provided by these specialized policies.

Pollution liability policies generally provide coverage for pollution-related clean-up costs and liability to third parties for pollution-related damage. Pollution liability insurance also typically provides coverage for civil fines or penalties that may be imposed by governmental entities, as well as for any investigative or defense costs incurred by the policyholder. This coverage can be extremely valuable, particularly if coverage for defense costs is provided outside policy limits.

The coverage provided by pollution liability policies, however, is only valuable if the insurers that issued the policies honor their coverage obligations. Early indications are that these insurers are operating from the same playbook they used decades ago when they began receiving large pollution claims under their general liability policies. That means an oil and gas producer making a large pollution claim is more likely to receive a "reservation of rights" or denial letter than a check. Producers should be careful not to accept such letters at face value or they risk losing a potentially valuable coverage asset.

Related Pollution Claims

One emerging coverage issue that can arise under a pollution liability policy is whether two or more related pollution claims can be grouped together for purposes of satisfying a policy deductible or exhausting policy limits. Pollution liability policies generally have a deductible that applies to all loss resulting from each "Pollution Incident." They also typically have a limit of liability that applies to each Pollution Incident and a separate aggregate limit of liability. Some policies define "Pollution Incident" as the "same, related or continuous Pollution Conditions." Other policies provide that "Pollution Conditions" which are "related to substantially the same general cause or conditions shall be deemed the same Pollution Incident." Under both types of policies claims arising out of "related" Pollution Conditions may be grouped together for purposes of satisfying the policy's deductible or exhausting policy limits. This may or may not be to the financial benefit of the policyholder, depending on the potential damages arising out of the Pollution Incident(s) at issue.

This policy language raises the following question: When are two or more Pollution Conditions sufficiently related to constitute a single Pollution Incident? The answer to this question can have important coverage implications. For example, the oil and gas producer in our fact pattern above may only be able to satisfy its deductible if it can show that the Pollution Condition alleged in each claim was somehow related. Even if the loss associated with a single claim satisfies the deductible, a policyholder may benefit from only having the deductible applied once. In other situations (*i.e.*, those involving larger claims), a policyholder may be more concerned about exhausting the per incident limit than it is about satisfying the deductible. In those situations, a policyholder may prefer to treat each claim as a separate Pollution Incident.

There is very little case law interpreting the definition of Pollution Incident in a pollution liability policy. In other coverage contexts, however, courts generally look to the cause of the loss to determine the number of occurrences or the relatedness of claims.[2] Taking this case law as the starting point, two or more Pollution Conditions may be related if the alleged pollution originates from the same source or otherwise has the same general cause. For example, two or more claims alleging Pollution Conditions that originated from the same well or drilling site may be related. Similarly, two or more claims alleging Pollution Conditions caused by the same negligent practice or procedure may

[2] *Id.* at §3.03[B] ("The clear majority of jurisdictions to address the number of occurrences issue has adopted the cause test.").

be related even if the pollution did not originate from the same source. Insurers will likely adopt whatever definition of "related" benefits them most (*i.e.*, restricts coverage). For example, they may try to slice and dice a single Pollution Incident into multiple Pollution Incidents to minimize or eliminate their coverage obligations. Accordingly, policyholders faced with multiple pollution claims may want to carefully consider whether the Pollution Conditions alleged in those claims are related before providing notice to their insurer.

Costs Imposed by Governmental Entities

Insurers may also try to limit or deny coverage for costs imposed by governmental entities in connection with pollution claims. In addition to costs incurred to defend against claims made by individual plaintiffs, producers will often incur costs to comply with demands made by federal or state environmental authorities. Insurers may try to minimize or eliminate their coverage obligations in these situations by adopting an overly narrow interpretation of the type of costs that are covered by their pollution liability policies. For example, the insurer in our hypothetical may argue that costs incurred by the producer to comply with demands made by the state department of environmental protection are not covered under the policy. The insurer may also try to limit coverage by refusing to provide coverage for fines or penalties imposed by the state. In each case, the relevant policy language controls, but producers may want to consider an insurer's coverage determination as the beginning rather than the end of the discussion.

Conclusion

Oil and gas producers operating in the Marcellus Shale region should review their insurance policies and carefully consider how those policies will respond to pollution claims. When faced with a pollution claim, producers should proactively evaluate the coverage provided by their policies rather than rely on their insurers' coverage analysis. If history is any guide, insurers will come up with a whole host of reasons why the policies they sold to provide coverage for pollution claims do not, in fact, provide coverage for a specific pollution claim. Producers should be prepared to push back or they risk losing a potentially valuable coverage asset.

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Insurance Coverage for Marcellus Shale Pollution Claims: Myth or Reality?