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Complex Insurance Coverage and Dispute Resolution Issues

James Ferguson

Author Contact Information:
James Ferguson, Senior VP and
Deputy General Counsel, Halliburton
Houston, Texas
james.ferguson@halliburton.com
281.871.2608

I. Introduction[1]

High stakes, catastrophic events such as the *Deepwater Horizon* blowout can put enormous stress on long-term contractual relationships that are deeply embedded in the off-shore energy industry. Indeed, such events can cause parties to attempt to escape from contractual indemnification obligations that previously appeared settled, and can have a lasting effect on a well-established system of commercial and contractual understandings. Recent examples of this include the myriad of contractual indemnification disputes that spawned from the *Deepwater Horizon* blowout[2] and rippled through the industry.

These sorts of catastrophic events also expose and cause commercial stress on insurance relationships between insureds and their insurers. The disharmony exposed by this type of stress is particularly acute with respect to certain policy provisions found in the so-called Bermuda Form – a type of insurance policy providing high-level excess liability insurance available from the Bermuda insurance market and common in the offshore and maritime arenas, which will be the central focus of this paper.

In the more general insurance space, one well-publicized area where the increased tension and scrutiny caused by the *Deepwater Horizon* event recently played out was in the application and interpretation of "Additional Insured" provisions in various policies.[3] Although far less publicized, the "dispute resolution provision" and mechanisms of the Bermuda Form policy create substantial insured/insurer commercial stresses when insureds are faced with catastrophic losses. The Bermuda Form policies make up a significant portion of off-shore

[1] The Author thanks Tom Birsic and Mary Thibadeau for their contributions to this paper.
[2] *See, e.g.*, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 841 F. Supp. 2d 988 (E.D. La. 2012).
[3] *See* In re Deepwater Horizon, 470 S.W.3d 452 (Tex. 2015).

energy companies' liability insurance programs, and an awareness of the effect and implications of the dispute resolution mechanisms in these policies is of critical importance in industries, such as exploration and production, where insureds seek to protect themselves from risks associated with catastrophic events.

II. The Emergence of the Bermuda Form

It is well understood that in order to protect themselves from the costs and expenses of unexpected liabilities and litigation, companies purchase liability insurance policies, including both primary policies and excess policies. Primary commercial general liability (or "CGL") policies, for example, generally provide initial coverage for claims for damages arising from risks because of bodily injury, property damage, advertising, personal injury and other risks and involve payment of covered claims up to policy limits. Often this first layer of coverage includes large deductibles or self-insured retentions. However, the risk of truly catastrophic losses, such as the *Deepwater Horizon* incident or Hurricane Katrina, requires companies to purchase "umbrella" or "excess" policies that provide much higher layers of coverage. These policies generally attach "in excess" of underlying policy limits and/or any self-insured retention.

The London and U.S. insurance markets offer umbrella policies providing insurance to U.S. companies with "per occurrence" coverage in excess of underlying primary policies usually with a per insurance policy aggregate limit. Many U.S. companies, including those in the oil and gas industry, purchase insurance from these markets.

Typically, excess policies available from the U.S. and London markets do not contain express choice-of-law or venue provisions. Moreover, the London Market policies often have a "Service of Suit" provision, which provides that the London insurers and/or underwriters will submit to the jurisdiction of U.S. Courts. These policies typically provide:

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