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## **Developments in Energy Insurance**

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## Developments in Energy Insurance

As the oil and gas industry has struggled with the challenges of the last year, Texas cases have provided guidance on risk-shifting and insurance issues in the oil and gas business. Many of these cases also provide important lessons for all insurers and insureds in the state. This paper highlights recent insurance cases relating to the oil and gas industry and discusses lessons to be learned from these opinions.\*

### **1. Additional insured provisions incorporate underlying contractual limitations if the policy references obligations or requirements in other written contracts.**

*In re Deepwater Horizon*, No. 13-0670, 2015 Tex. LEXIS 141 (Tex. Feb. 13, 2015)

**Key Issue:** May a court consider underlying indemnity contracts that limit additional insured status when determining whether a claimant qualifies as an additional insured?

**Facts:** Following the 2010 Deepwater Horizon disaster in the Gulf of Mexico and the subsequent monumental loss of life and property, BP sought to increase its insurance liability limits by arguing that it was an additional insured under driller Transocean's policies for pollution-related liability.

Transocean admitted that BP qualified as an additional insured because the drilling contract required Transocean to provide BP additional insured coverage "for liabilities assumed by [Transocean] under the terms of this Contract." However, it disputed that BP's additional insured coverage extended to liabilities arising from the massive release of subsea pollution from the out-of-control well because the drilling contract indemnities made Transocean liable only for pollution releases above the surface of the water. BP was contractually responsible for pollution liabilities arising below the surface of the water.

On a first appeal, the Fifth Circuit decided that coverage must be determined by the terms of the insurance policies alone, and that BP was entitled to coverage because the policy did not incorporate the underlying contract indemnities. On motions for rehearing, the Fifth Circuit withdrew the opinion and certified the question to the Texas Supreme Court. Specifically, the Texas Supreme Court was asked whether *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered because the policy wording alone controls the extent of BP's coverage as an additional insured.

**Held:** In a closely watched case, the Texas Supreme Court held that BP was not

**\*While Tamara Bruno represents and advises corporate policyholders in insurance recovery matters, Karen Milhollin represents and advises insurers. The opinions expressed in this paper do not necessarily reflect the views of either author, or their firms, clients or any of their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.**

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entitled to coverage as an additional insured under Transocean's policies. Reading the *Evanston* case differently than the Fifth Circuit, the Texas Supreme Court agreed that the insurance policy language alone determines the extent of additional insured coverage. But the court found the underlying indemnities had to be considered because "BP's status as an additional insured is inextricably intertwined with limitations on the extent of coverage to be afforded under the Transocean policies."

BP argued that under *Evanston*, it was entitled to full coverage because the policy wording did not explicitly include the limitations from the underlying contract. The Texas Supreme Court distinguished *Evanston* by noting that the policy at issue there did not mention written business agreements to provide insurance and the only restriction was that coverage extended only to "operations performed by [the named insured]." By contrast, "the Transocean policies require reference to the underlying Drilling contract to determine BP's status as an additional insured." The Court found such "required reference" to the contract in two terms used in the policies: (1) that Transocean is "obliged" by the Drilling Contract to obtain insurance; and (2) that the additional insureds are included "where required by written contract."

**Lesson:** The Texas Supreme Court holding restored balance to an area of the law that had become out of sync with the reasonable expectations of contracting parties. The insurance provisions were intended to complement and support the agreed-upon contractual allocation of risk and required

insurance to support that allocation. By ignoring the underlying contract upon which the additional insured coverage was based, the very purpose for purchasing the insurance policy was thwarted.

*Ironshore Specialty Insurance Co. v. Aspen Underwriting, Ltd.*, 788 F.3d 456 (5th Cir. 2015)

**Key Issue:** What policy language is sufficient to reference underlying indemnity contracts?

**Facts:** Well owner Endeavor Energy Resources entered into a Master Services Agreement with Basic Energy Services in which both parties agreed to indemnify the other for liability resulting from claims brought by their own employees and to obtain at least \$5,000,000 of insurance that would cover claims by their own employees against the other party. After an oil well fire killed two Basic Energy employees, their families sued Endeavor seeking well over \$5,000,000.

Endeavor's excess insurer brought a declaratory judgment action against Basic's excess insurers arguing that Basic's insurers were obligated to cover Endeavor up to their full policy limits because the policies did not limit the amount of coverage available to an additional insured. In response, Basic's insurers argued that the policies incorporated the MSA's \$5,000,000 limit.

The only reference to the MSA in Basic's policies was in the definition of "Insured" as follows:

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