AN UPDATE ON RECENT INSURANCE COVERAGE DECISIONS AND THEIR IMPACT ON THE CONSTRUCTION INDUSTRY:

THE POLICYHOLDERS' PERSPECTIVE

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I. *Liberty Surplus Insurance Corp. v. Exxon Mobil Corp.*, 483 S.W.3d 96 (Tex. App.—Houston [14th Dist.] 2015, pet. filed)

In late 2015, the Fourteenth Court of Appeals in Houston had the opportunity to apply the Supreme Court of Texas's recent decision in *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), in regard to the scope of additional insured coverage that existed for a party to a services contract. *See Liberty Surplus Ins. Corp. v. Exxon Mobil Corp.*, 483 S.W.3d 96 (Tex. App.—Houston [14th Dist.] 2015, pet. filed). Finding that the scope of additional insured coverage was not limited by the terms of the parties' services contract, the appellate court affirmed the district court's summary judgment verdict in favor of coverage.

A. Background Facts

Exxon Mobile Corporation ("Exxon") and Wyatt Field Service Company ("Wyatt") entered into a five-year contract under which Wyatt would perform "Services" as set forth in work orders from Exxon's affiliates. The contract required Wyatt to maintain $5 million of commercial general liability insurance covering Exxon and its affiliates "as additional insureds in connection with the performance of Services." Additionally, the contract required that the additional insured coverage had to be primary to all other policies, including deductibles or self-insured retentions. *See id*. at 98.

In 2008, Wyatt was assigned to work on a "flexicoker" unit at Exxon's Baytown refinery. Wyatt was assigned to reinstall dummy nozzles and chains after an intensive maintenance period called a "turnaround." Wyatt completed the services around the end of October 2008. Three years later, one of the dummy nozzles unexpectedly pulled all the way free from its packing, and the escaping steam and coke burned several employees of a contractor, LWL, Inc., who were working on the unit. It was subsequently discovered that the safety chain had been installed in the wrong location such that it did not properly secure the dummy nozzle. *See id*. at 98–99.

The injured workers sued Exxon in the 125th District Court in Harris County, and Exxon designated Wyatt as a responsible third party. The plaintiffs then added Wyatt as a defendant. Exxon and Wyatt asserted cross-claims against each other, which were severed from the injured workers' suit. Exxon demanded defense and indemnity from Wyatt's primary commercial general liability and excess umbrella insurers—Liberty Surplus Insurance Corporation ("Liberty") and Commerce & Industry Insurance Company ("Commerce"), respectively (collectively, the "Insurers"). The Insurers denied additional insured coverage to Exxon for the injured workers' claims, did not contribute to Exxon's costs of defense, and did not contribute the settlement with the injured workers. *See id*. at 99.

Exxon sued the Insurers and Wyatt in the 215th District Court of Harris County. Exxon filed a traditional motion for partial summary judgment concerning the Insurers' liability, arguing that the policies covered the injured workers' claims against Exxon as an additional insured. The trial court ruled in Exxon's favor. The parties entered into stipulations resolving all other matters, and the trial court rendered final judgment in accordance with its earlier order on the partial summary judgment and the stipulations. The Insurers appealed the final judgment. *See id*.

B. Scope of Additional Insured Coverage—Who and How Much?

Liberty's commercial general liability policy contained three endorsements potentially providing additional insured status to Exxon. Commerce's excess umbrella policy insured any entity or person qualifying as an additional insured under the Liberty policy, but it specified that it provided no broader coverage than afforded under the Liberty Policy. As such, the court's analysis regarding Exxon's additional insured coverage under the Liberty policy equally applied to the Commerce policy. *See id*. at 101.

The Insurers argued that Exxon only was an additional insured with respect to Wyatt's ongoing operations and not with respect to Wyatt's completed operations. In analyzing the arguments, the court started with Endorsement No. 3, because it was the first additional insured endorsement on which Exxon relied. The endorsement provided as follows:

> ENDORSEMENT NO. 3
>
> WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by you.

The parties agreed that Wyatt and Exxon entered into a contract requiring Wyatt to provide additional insured coverage to Exxon; therefore, the only issue was the scope of the coverage provided to Exxon. *See id*.

In determining the scope of additional insured coverage, the court had to determine whether the endorsement should be read by itself or whether the endorsement incorporated any coverage restrictions that may be found in the contract between Wyatt and Exxon. The Insurers argued that, because the endorsement required reference to the underlying contract for purposes of determining additional insured status, it also required reference to the underlying contract for purposes of determining the *scope* of that additional insured coverage. The court rejected this argument. In doing so, the court acknowledged that a policy generally may limit the scope of additional insured coverage to the coverage required in an underlying contract, but it disagreed that the policy necessarily incorporated the entire contract and all of its terms merely by referencing the underlying contract for a single purpose. In support of its findings, the court looked to *In re Deepwater Horizon*, in which the Supreme Court of Texas stated, "we determine the scope of coverage from the language employed in the insurance policy, and if the policy directs us elsewhere, we will refer to an incorporated document *to the extent required by the policy.*" *Id.* at 101 (quoting *In re Deepwater Horizon*, 470 S.W.3d at 460 (emphasis added)). The court determined that the endorsement only required the court to reference the underlying contract to determine whether the parties agreed to add a party as an additional insured, "but it does not direct us to the contract to determine the scope of coverage." *Id.* at 101–02. "Thus, it refers the reader to the written contract when identifying who is an insured, but not when limiting the circumstances under which such a person or organization is considered to be an insured." *Id.* at 103. Notably, in a lengthy footnote, the court stated that even if the endorsement required it to refer to the underlying contract to determine the scope of coverage, the underlying

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