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Gulf Oil Catastrophe Insurance Claims - Round 1

Transocean Insurers vs. BP Additional Insured Claim

By Joseph G. Grasso¹ and Charles Platto²

There will undoubtedly be monumental insurance claims (and coverage litigation) arising out of the tragic and catastrophic blowout of the Transocean Deepwater Horizon drilling rig in the Gulf of Mexico and the resulting prolonged oil leak from the BP Deepwater Horizon well, which has resulted in enormous damage to the region. These will include claims for property damage, personal injury, business interruption, pollution, and potential coverage disputes among the various policyholders and insurers involved.

BP has repeatedly stated publicly that it is self insured, and also that it will assume responsibility for clean up and damage claims. Therefore, it was somewhat surprising when it was reported that on May 21, 2010 Transocean's excess liability insurers filed a declaratory judgment action in the United States District Court for the Southern District of Texas challenging a notice of claim by the BP entities as additional insureds under the Transocean policies, sent on May 14, 2010.

The Complaint is captioned Certain Underwriters at Lloyd's, London and Various Insurance Companies vs. BP plc [and other BP entities], Civil Action No. 10-01823 (SD Tex). The plaintiffs are listed as excess insurers who issued \$700 million excess of \$50 million of coverage under marine liability policies to Transocean covering the period May 1, 2009 to May 1, 2010. The explosion and fire took place on April 20, 2010, within the policy period.

There would seem to be little doubt, and it is acknowledged in the Complaint, that BP and affiliated entities are additional insureds under the Transocean

excess policies, but the question raised by the Complaint is what is the scope of the Transocean coverage and in turn the additional insured coverage. According to the Complaint, this turns on the issue of which party has responsibility for various aspects of loss and damage from operations under the underlying drilling contract between Transocean and BP. The Complaint alleges that under the drilling contract, Transocean was responsible for loss or damage for pollution originating above the surface of the land or water from spills, leaks, or discharges of fuels, ...liquids or solids in the possession or control of Transocean, and that the excess policy covered BP as an additional insured for liabilities or damage for which Transocean was responsible in this regard. However, the Complaint goes on to assert that BP was responsible for liability for any pollution or contamination claims for operations and responsibilities not assumed by Transocean.

Ultimately, the Complaint asserts that under the language of the policies and the underlying drilling contract, Transocean is not responsible for any liabilities or damage relating to pollution from BP's well and, therefore, BP is not an additional insured under the Transocean policies for purposes of the claims resulting from this disaster.

According to the Docket, a status conference in this case is set for early September. There will perhaps be motions filed in the interim, which may provide some insight into BP's position. But this Complaint portends a classic "additional Insured" policy dispute. In addition to the issue of allocation of coverage and responsibility under the policies and

1. Mr. Grasso is the current Co-Chair of the Insurance Practice Group of Wiggin and Dana LLP. He is counsel to the American Institute of Marine Underwriters and wrote the Association's amicus brief to the United States Supreme Court in the Exxon Valdez case. Mr. Platto and Mr. Grasso have just been appointed as editors of the Additional Insured Handbook, to be published by the American Bar Association in 2011.

2. Mr. Platto is Adjunct Professor of Insurance Law and Litigation at Fordham Law School, a Vice Chair of the ABA Insurance Coverage Litigation Committee and a Member of the Editorial Board of the Insurance Litigation Reporter. He was formerly Chair of the Insurance Practice Group at Wiggin and Dana LLP, and is now an independent arbitrator and mediator in domestic and international commercial and insurance matters.

the underlying drilling contract highlighted in the Complaint, complex questions ranging from fault and causation to the nature and scope of pollution and marine liability coverages will be presented. Additional insured coverage is designed to avoid disputes between parties, typically owners and contractors, and to allow them to jointly share in applicable insurance coverage. But in a case of this magnitude, complexity and visibility, with the filing of this Complaint, it is already obvious that additional insured coverage will be subject to a multitude of challenges.

At this early stage, and with limited information, it would be presumptuous of us to offer an analysis of the issues relating to coverage for additional insureds, pollution, or other marine risks and other issues – but

as with the 9/11 number of occurrence cases and the Katrina wind/water cases, we can observe that these catastrophic events invariably raise complex insurance issues, and in this case, the additional insured question is now highlighted. Furthermore, as with claims arising out of the events of 9/11, the enormity of the damages may in any event eclipse coverage disputes and the dispute may play out in the context of defense obligations and costs in the first instance, depending on the defense provisions of any applicable policies. We will in any event continue to follow and report on the additional insured and other issues as they develop.