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CONTENTS

FEATURE ARTICLES

Reconsidering the Fraud Exception to the Parol Evidence Rule and Its Impact on Insurance: *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit* 101

By John K. DiMugno

In Re: Deepwater Horizon Insurance Litigation – Fifth Circuit Reverses in Favor of BP’s Additional Insured Claim 108

By Charles Platto, Joseph G. Grasso, and Michael Menapace

CASES

Agents & Brokers

O&G Industries, Inc. v. Aon Risk Services Northeast, Inc. (D. Conn.) 111
Failure to read insurance policy is not a complete bar to malpractice suit against broker

Automobile Insurance/Allocation

GuideOne Mutual Insurance Company v. Utica National Insurance Co. (Cal. App.) 112
Policy covering employer’s vicarious liability for employee’s negligent driving is excess of policies covering employee directly

Bad Faith/Discovery

Cedell v. Farmers Ins. Co. of Washington (Wash.) 113
Washington Supreme Court restricts attorney-client privilege in first-party insurance bad faith litigation

Duty to Defend/Conflict of Interest

University of Miami v. Great American Assurance Company (Fla. App.) 114
Florida appellate court requires insurer to pay for separate independent counsel for additional insured and named insured where complaint alleged both were directly liable for plaintiff’s injuries

Liability Insurance/Advertising Injury

Basic Research LLC v. Admiral Ins. Co. (Utah) 116
False advertising suit alleged no advertising injury

Liability Insurance/Allocation

Boston Gas Co. v. Century Indemnity Co. (1st Cir.) 117
Policyholder bound by position on timing of environmental contamination before Massachusetts Supreme Judicial Court adopted “pro rata” method of allocating coverage among multiple triggered policies

Liability Insurance/Assignments

Water Applications and Systems Corp. v. Bituminous Casualty Corp. (Ill. App.) 119
Insurer had no duty to defend successor owner absent signed consent by insurer

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(Continued on Inside Page)

In Re: Deepwater Horizon Insurance Litigation – Fifth Circuit Reverses in Favor of BP’s Additional Insured Claim

By Charles Platto*, Joseph G. Grasso**, and Michael Menapace***

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During the very same week in which the trial of the multibillion dollar claims by the U.S. Government and private parties against BP and the other parties involved with the Deepwater Horizon drilling rig was just getting under way in Federal Court in New Orleans, the Fifth Circuit Court of Appeals was putting the finishing touches on its decision in the declaratory judgment case brought by Transocean’s primary and excess insurers against BP, involving BP’s claim for coverage as an additional insured under Transocean’s policies. In a decision issued on Friday, March 1, 2013, the Fifth Circuit unanimously reversed the decision of the E.D.La., which had previously granted judgment in the insurers’ favor denying coverage to BP. In a major victory for BP, the Fifth Circuit ruled that BP was entitled to coverage as an additional insured under the Transocean policies. *In Re: Deepwater Horizon, Ranger Ins., Ltd., Transocean Offshore Deepwater Drilling, Inc., et al. and Certain Underwriters at Lloyd’s London, v. BP P.L.C. et al.*, No. 12-30230, 2013 WL 776354.

We have been following and reporting on this case since its inception. (Insurance Litigation Reporter, Vol. 32, No. 9, Vol. 32, No. 14, Vol 33, No. 1, Vol 33, No. 20). As previously reported, Transocean maintained primary and excess liability coverage in the amount of \$750 million covering the period during which the explosion of the Deepwater Horizon drilling rig took

place. Transocean was a contractor to BP, and BP and its affiliated entities were named as additional insureds under the policies. The dispute with the insurers arose because under the Drilling Contract between BP and Transocean, Transocean was only obligated to indemnify BP and to name BP as an additional insured for surface pollution, and the major pollution claims resulted from subsurface pollution resulting from the well blowout. However, there was a question as to whether the insurance policies were similarly limited.

In its decision issued on November 15, 2011, the District Court, applying Texas Law, held that the additional insured coverage was only as broad as the indemnity requirements in the underlying contract and, therefore, denied coverage to BP and issued judgment on the pleadings in favor of the insurers. 2011 WL 5547259 at 75.

The Fifth Circuit ruled to the contrary:

“Applying Texas law, especially as clarified since the district court’s decision, we find that the umbrella insurance policy [and the primary insurance policy as well]—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 the 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.” ___ F.3d ___, 2013 WL 776354, at *1.

The Fifth Circuit reached this conclusion for the following reasons.

Initially, the Court of Appeals noted that the \$50 million primary policy issued by Ranger Insurance Ltd., and the \$700 million excess policies had materially identical provisions, so it treated all insurers as one for purposes of its decision. *Id.* The Drilling Contract between Transocean and BP required that Transocean maintain insurance covering its operations, and that BP be named as an additional insured under Transocean’s policies. *Id.* at *2. The parties agreed that the Drilling Contract was an “insured contract” under the policies. The issue in contention was the scope of BP’s insurance coverage. *Id.* at *2.

Under Article 24 of the Drilling Contract, Transocean was responsible for, and indemnified BP with respect to, pollution or contamination originating on or above the surface of the water, whereas BP was responsible for, and indemnified Transocean with respect to, pollution or contamination not assumed by Transocean, i.e. originating from sub surface conditions (such as the well blow out). *Id.* at *2. The District Court had found that the Drilling Contract only required Transocean to carry insurance and name BP as an additional insured for above surface pollution, and that the policies that were obtained by Transocean only provided coverage to the extent of Transocean’s contractual liabilities. The Court of Appeals disagreed.

The Court of Appeals conducted a de novo review of the District Court’s decision granting judgment on the pleadings to the insurers and of the contract and the policies. *Id.* at *3 It applied standard principles under Texas law, holding that if there are ambiguities in or more than one reasonable interpretation of a policy, coverage will be interpreted in favor of the insured. *Id.* at *3. As applied to this case, the Court was guided by the following principle:

“Under Texas law, to discern whether a commercial umbrella insurance policy [or the primary 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 policy itself, instead of looking to the

indemnity agreement in the underlying contract. We apply this analysis so long as the indemnity agreement and the insurance coverage provision are separate and independent.” *Id.* at *4 (internal citations omitted).

Applying this analysis, the Court of Appeals looked first to the policy language, and applied Texas law as set forth in *Evanston Ins. Co. v. ATOFINA Petrochems, Inc.*, 256 S.W.3d 660 (Tex. 2008) and *Aubris Resources LP v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483 (5th Cir. 2009), which the District Court had distinguished, and *Pasadena Refining System, Inc. v. MCraven*, Nos. 14-10-00837-CV, 14-10-00860-CV, 2012 WL 1693697 (Tex. App. May 15, 2012), which came down after the District Court’s opinion, in concluding that even if the indemnity obligations of Transocean were limited under the Drilling Contract, only the policy itself may establish limits upon the extent to which an additional insured is covered. *Id.* at *6. The Court found that, as in *ATOFINA*, *Aubris* and *Pasadena Refining*, the fact that the policy referred to the underlying contract in the definition of additional insured was not sufficient, without more, to impose any limitations of liability in the underlying contract, on the policy obligations. *Id.* at *7. The Court of Appeals concluded 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.” *Id.* (internal citations omitted). The Court of Appeals then went on to hold that it is “unmistakable” that the provision in the Drilling Contract extending direct insured status to BP was separate and independent from BP’s agreement to forego contractual indemnity in various circumstances. *Id.* at *8 (internal citations omitted).

The Court of Appeals’ final conclusion was as follows:

Because we find that the umbrella policies [and the underlying policy] 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. *Id.* at *9.

Thus, the bottom line is quite simple. Even if the obligations of an additional insured are limited in an underlying contract, if the insurance policy is broader than those obligations, unless the policy provides specific limitations on coverage to the additional insured—by specific reference to the limitations in the underlying contract, or otherwise, at least under Texas law, the policy will provide the full extent of coverage to the additional insured.

This case represents an important development

in additional insureds law, and carriers will undoubtedly in the future more carefully tailor their policies to limit coverage to additional insureds if there are limits in the underlying contracts. The decision also represents a major win for BP, to the tune of \$750 million. (Of course, compared to the billions BP has already spent as a result of the Gulf Oil spill, and the billions at issue in the current trial, \$750 million may not seem like so much, but as they say, every little bit helps.)