

# The BP/Transocean Decision

Lloyd's Library Presentation  
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# The Dispute

As a result of notice from BP in May 2010, Underwriters sought a declaration from the Court that BP was not insured under Transocean's liability insurance program for Macondo-related liabilities that BP expressly assumed under the Drilling Contract with Transocean.

# Judge Barbier's Ruling

Applying Texas law and specifically relying on the mutual indemnities contained in the Drilling Contract, Judge Barbier entered a partial final judgment “declaring that all claims by [BP] for additional insured coverage under the Policies for the sub-surface pollution liabilities [BP has] or will incur with respect to the Macondo well oil release are dismissed with prejudice.”

# The Drilling Contract

The 1999 contract had been amended thirty-eight times.

It contained traditional mutual indemnities between the parties, with the operator accepting responsibility for subsurface pollution.

The insurance obligation in the contract was challenged by BP due to a missing comma. “[BP]...shall be named as additional insured(s) in each of [Transocean’s] policies, except Workers’ Compensation for liabilities assumed by [Transocean] under the terms of this Contract.”

# The Fifth Circuit Ruling

On March 1, 2013, the Fifth Circuit rendered its opinion in the appeal of Judge Barbier's additional assured ruling. Unfortunately, the decision simply accepts BP's theory that the Texas Supreme Court opinion in *Evanston v Atofina* (2008) does not permit reference to the Drilling Contract to determine the contextual limitations of the grant of additional assured status. The Fifth Circuit reversed Judge Barbier's decision in favor of Transocean and its insurers and remanded the case to Judge Barbier for entry of an appropriate judgment in accordance with the Court's opinion.

# The Fifth Circuit Ruling

The Court approached the appeal by answering two principal questions:

- (1) whether the umbrella policy between the insurers and Transocean itself limits coverage for any additional insureds, including BP, and
- (2) whether the Drilling Contract's additional insured provision is separate from and additional to the Drilling Contract's indemnity provisions.

# Current Status

On March 15, petitions for rehearing en banc were filed on behalf of Underwriters, Transocean and Ranger.

On March 26, the Court directed BP to respond to the petitions.

On April 4, BP filed an opposition to the petitions. The petitions are still under consideration.

# The Legal Issue

Underwriters argue that the Texas Supreme Court in *National Union Fire Ins. Co. v. CBI Indus.*, (1995) established clear guidance on the fundamental rules of contract construction and interpretation under Texas law.

- The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument.
- If, however, the language of a policy or contract is subject to two or more reasonable interpretations, it is ambiguous.
- Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered.

# The Legal Issue

This rule for interpretation of insurance contracts was affirmed by the Texas Supreme Court in the 2011 decision of *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*

# BP's Argument

The Fifth Circuit accepted BP's reliance on *Evanston v Atofina* to hold, “If an insurance coverage provision is susceptible to more than one reasonable interpretation, the court must interpret that provision in favor of the insured, so long as that interpretation is reasonable. The court must do so even if the insurer's interpretation is more reasonable than the insured's—“[i]n particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured.”

# Policy Provisions

There were two sections of coverage in the Excess Liability Policies, each with slightly different Additional Assured constructs.

In the Umbrella section, under which BP sought coverage, additional insureds were automatically added “where required by written contract.”

The definition of Insured includes “any person or entity to whom the ‘Insured’ is obliged by any oral or written ‘Insured Contract’...to provide insurance such as is afforded by this policy.”

# The Effect in Texas

The rule of interpretation suggested by the Panel opinion jeopardizes Insurers on issues well beyond additional assured status. The opinion creates an imbalance on any issue that potentially limits coverage, even if, under traditional rules of interpretation, the Insured has the burden to prove coverage.

# Law and Jurisdiction

The obvious reaction to this decision is to choose some other state law in any new placements. One reasonable option is New York law. The New York courts have a long history of considering and resolving commercial disputes.

- The standard under New York law for interpretation of insurance contracts is to give effect to the intent of the parties as expressed in the clear language of the contract.
- An ambiguity exists only where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

# Law and Jurisdiction

There is no certainty every New York court will apply that rule on a consistent basis or that the rule will not be adversely affected by legislation or regulation in the post-Hurricane Sandy context.

It is also reasonable to assume Texas will ultimately remedy the damage done by the Panel opinion as it is clear even Texas insureds are prejudiced by the uncertainties established by the rule enunciated by the Court.

# Law and Jurisdiction

Another option with which we have familiarity is Louisiana, which interprets insurance contracts as follows:

- In analyzing insurance contracts, courts must remain mindful that insurance contracts should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or to restrict its provisions beyond what is reasonably contemplated by unambiguous terms or achieve an absurd conclusion.
- The rules of construction do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clearness the parties' intent.

# Avoiding Courts

One means of avoiding the vagaries of court interpretation of commercial insurance policies could be including arbitration as a dispute resolution mechanism.

Everyone should remember that not all states permit arbitration of insurance policies.

New York and Texas do permit arbitration of insurance policies.

# Focus on Wordings

The core of this problem is the lack of precision in policy wordings. In the last week, examples of additional assured provisions in U.S. form policies as well as other London market examples suggest this lack of clarity that any party seeking coverage can attack is not limited to this case or this wording.

# Focus on Wordings

Notwithstanding the fact that many of London's wordings are manuscript in nature and heavily negotiated, courts presume that commercial insureds, like personal lines insureds, are "required" to accept the wordings proposed by insurers.

One possible means of avoiding rules of interpretation appropriate for contracts of adhesion is to make plain in negotiated wordings that the insured has relied on the broker community to negotiate a manuscript wording and is sophisticated.

# Questions

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