Insurance Coverage Tug-of-War:
Contractual Indemnity vs. Additional Insured Coverage

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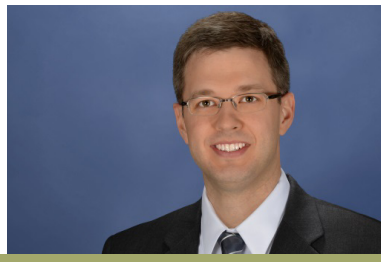

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Current Scope of Practice

Alex Shilliday represents the interests of insurers in matters involving the litigation of insurance coverage disputes and extra-contractual claims. Mr. Shilliday counsels insurers on policy interpretation, claims handling, bad faith avoidance, apportionment, and priority of coverage issues. He has over ten years of experience prosecuting and defending against declaratory judgment actions regarding the duty to defend and duty to indemnify.

In addition, Mr. Shilliday has drafted numerous coverage opinions on many aspects of general liability policies, auto policies, trucking policies, and nonsubscriber ERISA plans. He has also represented insurance agents on issues involving failure to procure coverage, negligence, misrepresentation and fraud claims.

A representative listing of cases Mr. Shilliday has been involved in include the following:

- *Bituminous Cas. Corp. v. Travelers Indem. Co.*, __ F.Supp.2d __, 2013 WL 1722447 (N.D.Tex. Apr. 22, 2013)
- *CSA Nutraceuti cals GP, L.L.C. v. Chubb Custom Ins. Co.*, No. 12–10317, 2013 WL 28399 (5th Cir. Jan. 2, 2013)
- *Nautilus Ins. Co. v. Concierge Care Nursing Centers, Inc.*, 804 F.Supp.2d 557 (S.D.Tex. 2011)
- *Trammell Crow Residential Co. v. Virginia Sur. Co., Inc.*, Civil Action No. 3:08–CV–0685–B, 2009 WL 3353035 (N.D.Tex. Oct. 16, 2009)
- *Arrowood Indem. Co. v. Gulf Underwriters Ins. Co.*, Civil Action No. EP–08–CV–285–DB, 2008 WL 5686082 (W.D.Tex. Dec. 19, 2008)
- *National Athletic Trainers' Ass'n, Inc. v. American Physical Therapy Ass'n*, Civil Action No. 3:08-CV-0158-G, 2008 WL 4146022 (N.D.Tex. Sep. 9, 2008)

Affiliations, Activities and Accomplishments

Mr. Shilliday is a member of the Insurance Law Section of the Texas State Bar and the Torts and Insurance Practice Section of the Dallas Bar Association. While in law school, he served as an articles editor for the International Law Review.

Presentations and Presentations

- Author: “Lights Out for Policyholders Seeking Business Interruption Coverage Due to Loss of Electricity,” Sedgwick *Insurance Law Blog* , May 19, 2014
- Author: “The Mathematics of Insurance Coverage,” JOURNAL OF TEXAS INSURANCE LAW, Vol. 12, No. 1 at pp. 1-7 (Summer 2012)
- Author: “Patience is Not Only a Virtue – For Insurers in Texas, It May Be a Necessity,” HSB e-Newsletter, February 26, 2010
- Author & Presenter: “Duties and Obligations in Handling Third Party Liability Claims,” June 11, 2009
- Author and Presenter: “Insurance Coverage – A Recent Battleground Issue in Texas Law,” Plano Bar Association, October 3, 2008
- Author and Presenter: “The Importance of Handling First-Party Claims Properly – And What Could Happen If You Don’t,” June 16, 2008
- Co-author: “Basic Coverage Issues Involving the Personal Auto Policy – What Adjusters Need to Look Out For,” February 5, 2007

Admissions

Texas; U.S. District Court (E.D. Tex.); U.S. District Court (N.D. Tex.); U.S. District Court (S.D. Tex.); U.S. District Court (W.D. Tex.); 5th U.S. Circuit Court of Appeals

Education

Mr. Shilliday obtained his J.D. from Southern Methodist University Dedman School of Law where he was articles editor for the International Law Review. He completed his B.B.A in Finance and Business Economics from the University of Notre Dame.

I. INTRODUCTION

Believe it or not, the interplay between additional insurance coverage and contractual indemnity can be a fascinating topic. These issues come up most often in commercial service transactions, such as those between project or property owners and general contractors, general contractors and subcontractors, lessors and lessees and so on. This article will focus on the relationship between contractual indemnity provisions and coverage created by additional insured endorsements as well as the impact both may have on the duties to defend and indemnify, the scope of such coverages, priority of coverage, and limits of insurance.

II. THE BASICS

A. Additional insured coverage

Under the typical insuring agreement in the standard commercial general liability policy, the insurer is required to pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" caused by an "occurrence" during the policy period, and the insurer has the right and duty to defend any suit seeking such damages. In addition to providing coverage to a named insured, the policy may contain an endorsement extending additional insured coverage to any entity as required by written contract, subject to certain restrictions and limitations. For example, the additional insured endorsement might extend coverage to any party required to be added as an additional insured by written contract entered with the named insured, but only with respect to liability caused, in whole or in part, by the named insured's acts in the performance of the named insured's ongoing operations.

In *Mid-Continent Cas. Co. v. Swift Energy Co*., 206 F.3d 487, 499-500 (5th Cir. 2000) (applying Texas law), an employee of the named insured was injured while performing duties under a contract between the named insured and the additional insured. The employee filed suit against the additional insured, contending that its negligence caused his injuries. The policy in Swift limited coverage for an additional insured "to liability arising out of [the named insured's] ongoing operations performed for [the additional insured]." Swift, 206 F.3d at 491-92. The insurer claimed that the additional insured was not covered under the policy because the injuries were allegedly caused by the additional insured's negligence and not by the negligence of the named insured. The Fifth Circuit determined that the additional insured was covered under the policy even though the named insured was not alleged to be negligent. *Id*. at 500. The court noted that the insurer "could have expressly stated in the Policy that liability not resulting from [the named insured's] sole negligence was not covered by the additional insured endorsement," but "[i]t did not do so." *Id*., at 499.

In *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), the Court held that the property owner was an "additional insured" under the contractor's general liability insurance policy without regard to whether the additional insured's negligence was the sole cause of the injury. In reaching this conclusion, the court interpreted the following language from the policy's additional insured endorsement:

> A person or organization for whom you have agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you.

Id. at 664.

Distinguishing *Swift* and *ATOFINA*, the court in *Gilbane Building Co. v. Admiral Insurance Co.*, 664 F.3d 589 (5th Cir. 2011) held that the insurer owed no duty to defend the general contractor under the additional insured provision, which provided for coverage "only with respect to liability for 'bodily injury,' 'property damage' or 'personal & advertising injury' caused, in whole or in part" by the named insured subcontractor's acts or omissions or the acts or omissions of those acting on the named insured's behalf. The underlying plaintiff in Gilbane was an employee of the subcontractor and sustained a workplace injury while on the jobsite for the general contractor. The plaintiff brought suit against the general contractor, alleging that his injuries were caused only by the general contractor. While the allegations did not implicate either the employee's or subcontractor's fault, the general contractor argued that the pleadings did not conclusively rule out any contributory negligence by the employee. In rejecting this argument, the court determined that this would improperly shift the burden of proof and require the insurer to establish that the pleadings did not potentially

support a covered claim; instead, a court should only consider whether the facts actually pleaded affirmatively implicated employee's or subcontractor's negligence.

Moreover, a federal district court in Texas, applying Texas law, interpreted a "caused in whole or in part" additional insured provision and determined that the focus of coverage under such an endorsement should be on whether the allegations in the underlying petition present a theory under which the additional insured could be held liable for conduct by the named insured that "caused" injury to a third party in any way, but the district court noted that the endorsement did not address the conduct of the other wrongdoer or wrongdoers, whether they be the additional insured or not. *See American Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins*., 2006 WL 1441854 (S.D. Tex. 2006) (not designated for publication). The insurer argued that the policy provided coverage for the additional insured only when it is found vicariously or derivatively liable for the acts of the named insured. The district court disagreed, stating:

Contrary to [the insurer's] argument, nothing in the "whole or in part" sentence of the Endorsement (or any other section cited by [the insurer]) expressly limits Finger's additional insured coverage to derivative or vicarious claims based on Multi's acts, as Crum asserts. The words "derivative" and "vicarious" are conspicuously absent from the Endorsement. Crum was free to draft an endorsement that specifically limited additional insured coverage to situations which the additional insured was liable on only a vicarious liability theory. However, Crum did not do so. Thus, Crum may not read into the clause an unstated limitation that Finger's negligent conduct in combination with Multi's [negligence] disqualifies Finger as an additional insured.

Id. at *7 (citations omitted). The district court therefore held that the additional insured was entitled to a defense under the policy if the allegations in the underlying lawsuit potentially assert a claim against the additional insured based on some conduct by the named insured, despite allegations of some wrongful act or omission by the additional insured. *Id*.

B. Contractual indemnity

Because indemnity provisions seek to shift the risk of one party's future negligence to the other party, Texas imposes a fair notice requirement before enforcing such agreements. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508-09 (Tex. 1993). For an indemnity clause to be valid, fair notice demands that the clause satisfy (1) the express negligence test and (2) the conspicuousness requirement. An indemnity clause that fails to satisfy either of the fair notice requirements is unenforceable as a matter of law. *See Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004); *see also Dresser Indus., Inc. v. Page Petroleum, Inc*., 853 S.W.2d 505, 509-10 (Tex. 1993). The following paragraphs discuss these requirements of the fair notice doctrine.

1. Express Negligence

The express negligence rule requires that a party seeking indemnity from the consequences of its own negligence must express that intent and clearly state that it is seeking indemnity for its own negligence, within the four corners of the contract. *Ethyl v. Daniel Const. Co.,* 725 S.W.2d 705, 707-08 (Tex. 1987). Indemnity provisions that do not unequivocally state the intent of the parties within the four corners of the instrument are unenforceable as a matter of law. *Fisk Elec. Co. v. Constructors & Associates, Inc*., 888 S.W.2d 813 (Tex. 1994) (holding that indemnification agreement did not comply with express negligence test, and subcontractor had no obligation to indemnify contractor for costs or expenses resulting from claim against it for its own negligence, even though contractor was not found to be negligent).

The Texas Supreme Court opinion of *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990) found the following provision sufficient to meet the express negligence rule:

Indemnitor "further agrees to indemnify and hold harmless [indemnitee] . . . in respect to any such matters . . .assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by [Christie], its agents and employees, and its subcontractors, their agents and employees regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [indemnitee], [indemnitee's] representative, or the employees, agents, invitees, or licensees thereof."

Id. at 8 (emphasis added). Initially, the language in Enserch appears only to require indemnification for the indemnitor's negligence, but then continues to require indemnification regardless of whether the claim is based on the alleged negligence of the indemnitee. *Id*.

In Glendale Const. Services, Inc. Accurate Air Systems, Inc., 902 S.W.2d 536 (Tex. App.—Houston [1st Dist.] 1995, writ denied), the Houston Court of Appeals analyzed a similar, but slightly distinguishable, indemnification clause and held that it did not meet the express negligence test. The clause in Glendale stated as follows:

[T]he Subcontractor shall indemnify and hold harmless ••• the Contractor ••• from and against all claims ••• arising out of or resulting from the performance of the Subcontractor's work under this Subcontract provided that any such claim ••• to the extent caused in whole or in part by a negligent act or omission of the Subcontractor ••• regardless of whether it is caused in part by a party indemnified hereunder.

Id. at 538-39. Notably, the word "negligence" is not used in the above provision when describing the actions of the indemnified party, and thus the requirement that the indemnitee be indemnified for its own negligence can only be implied, which causes it to fail the express negligence test. On the other hand, the provision in Enserch, supra, does use the word "negligence" when stating that the indemnity obligation applies "regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [indemnitee]." The indemnity provision in Enserch therefore more expressly stated that the indemnitee shall be indemnified for its own negligence and thus satisfied the express negligence test.

2. Conspicuousness

The conspicuousness requirement demands that significant terms must appear on the face of the agreement in such a way as to attract the attention of a reasonable person. Dresser, 853 S.W.2d at 508; *see also Powerhouse Services, Inc. v. Bechtel Corp.*, 108 S.W.3d 322 (Tex. App.–Amarillo 2002, pet. denied) (indemnity provision held to satisfy "fair notice" requirements where provision recited that the duty to indemnify applied even in the event of the fault or negligence of contractor, provision was readily apparent, appearing in larger type than preceding paragraphs, and the title "Indemnity" was capitalized in bold print). Language that is larger than other type contained in a form or has otherwise contrasting type or color is conspicuous, for purposes of determining whether an indemnity clause is conspicuous and therefore enforceable. *Littlefield v. Schaefer,* 955 S.W.2d 272, 274-75 (Tex. 1997).

In *Douglas Cablevision v. Southwestern Electric Power Co*., 992 S.W.2d 503 (Tex. App.—Texarkana 1999, writ denied), the court found that the provision at issue did not meet the conspicuousness test because all of the paragraphs, including the indemnity provision, were printed in the same size and font type, and none of the paragraphs were preceded with a descriptive heading. Accordingly, the indemnity provision was no more visible than any other provision of the agreement. *Id*.; *see also U.S. Rentals, Inc. v. Mundy Service Corp.*, 901 S.W.2d 789, 792 (Tex. App.—Houston [14 Dist.] 1995, writ denied) (indemnity agreement regarding rental of forklift did not meet conspicuousness requirement because the provision was the seventh of 15 unrelated provisions spanning the back of the rental contract, and the headings and text of all 15 provisions were printed in same respective sizes and types).

3. Anti-indemnity statutes

In some instances, the written contract may be subject to an anti-indemnity statute that governs the enforceability of an indemnity provision. For example, the Texas Anti-Indemnity Act, which became effective on January 1, 2012, governs many construction contracts and agreements between certain general contractors and their subcontractors. Also, for a contract pertaining to a well for oil, gas, or water that purports to indemnify a person against loss or liability for damage that is caused by the sole or concurrent negligence of the indemnitee, such a contract is subject to the Texas Oilfield Anti-Indemnity Act ("TOAIA").

C. Contractual liability exclusion and the "insured contract" exception

The contractual liability exclusion in the standard CGL policy provides that there shall be no coverage for liability assumed by the insured under any contract or agreement, but as an exception to the exclusion, states that the

exclusion does not apply to liability for damages assumed in an "insured contract" or liability the insured would have in the absence of a contract or agreement. "Insured contract" is typically defined in the policy in relevant part as follows:

That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

In other words, the contractual liability exclusion precludes coverage for any liability the insured is obligated to pay under the terms of a contract or agreement, but will not apply to any damages for which the indemnitee is liable in tort that have been assumed by the insured pursuant to a written contract. Texas courts construing the contractual liability exclusion and the "insured contract" exception look to the "fair notice rule" articulated above and the Ethyl/Dresser line of cases to determine whether there has been an effective assumption of another's tort liability. *See Tri-State Insurance Co. v. Rogers-O'Brien Construction Co.*, 1997 W.L. 211534 (Tex. App.—Dallas 1997, writ denied) ("We conclude that the indemnity provision in the Rogers-O'Brien/Ellsworth subcontract does not meet the express negligence doctrine. Consequently, the subcontract is not an 'insured contract' within the meaning of the Tri-State policy.").

III. IMPACT ON POLICY LIMITS AND PRIORITY OF COVERAGE

In some situations, the carrier may have coverage for both the named insured and an additional insured in the same claim or lawsuit, and this could have a considerable impact on the policy limits and payment of defense costs. Under a typical general liability policy, costs and expenses incurred by the insurer in defending and investigating claims do not reduce the policy limits. As a result, the carrier will be responsible for providing a complete defense of both the named insured and additional insured. *See Tex. Prop. & Cas. Ins. Guar. Ass'n v. Sw. Aggregates, Inc.*, 982 S.W.2d 600, 605-06 (Tex. App.—Austin 1998, no pet.) (stating each insurer has a duty to fully defend its insured, not a duty to provide a pro-rata defense). Thus, costs incurred by the insurer in defending the additional insured are treated the same as those incurred in defending the named insured, and as such, defense costs incurred on behalf of both will be treated as supplementary payments that do not reduce the limits (unless it is an "eroding" or "wasting limits" policy).

With respect to contractual indemnity, however, there is only one policy limit that the named insured and its indemnitee must share. From the perspective of an indemnitee, if there is an enforceable indemnity agreement but no additional insured provision, the indemnitee's recovery is from the indemnitor. Under this scenario, the indemnitee has no right to recover indemnity under the indemnitor's policy. Likewise, the insurer would not have a duty to defend the indemnitee. As an exception to this general rule, the supplementary payment provision provides that the insurer must defend the insured together with its indemnitee provided the conditions stipulated therein are complied with, in which case the indemnitee is entitled to a defense, paid for outside the policy's limits of insurance, in much the same way as the insured. Of course, if the indemnitee has been named as an additional insured under the indemnitor's policy, the indemnitee would have two avenues of recovery. Otherwise, there is only one limit regardless of the number of parties.

The indemnity obligation may also impact the priority of coverage between two insurers. It has been held that when an indemnitee, with its own general liability insurance, becomes insured under its indemnitor's liability policy as the result of an indemnification agreement, the indemnitor's policy is primary despite the other insurance provisions. *See American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co*., 335 F.3d 429 (5th Cir. 2003) (applying Texas law, holding that an insurer of an indemnitor/subcontractor is liable for the full amount of a judgment where its insured had contractually agreed to indemnify the indemnitee, notwithstanding the "other insurance" language of the policy). In American Indemnity, the insurer of the indemnitor / subcontractor was seeking to recover half of the amounts it paid in settlement and defense of a lawsuit against an indemnitee / contractor that was an additional insured under its policy. The indemnitee / contractor was both the named insured under its own CGL policy as well as an additional insured under the subcontractor's policy. Each of the two policies at issue contained identical other insurance clauses. Initially, the court noted that neither the research by the parties or the court had produced any cases on point in Texas. However, in making an Erie guess as to what a Texas court might hold, the Court relied on authority from other jurisdictions where courts had found that an indemnity agreement between insureds could shift an entire loss to a particular insured notwithstanding the existence of an "other insurance" clause in the policy. *Id*. (citing *J. Walters Construction, Inc. v. Gilman Paper Co.*, 620 So.2d 219 (Fla. App. 1993*); Wal-Mart Stores, Inc. v. RLI Ins. Co*., 292 F.3d 583 (8th Cir. 2002)).

IV. IMPACT ON DEFENSE AND INDEMNITY OBLIGATIONS

Texas courts have long recognized an exception to the "four corners" rule that permits parties to look to an outside contract to evaluate the existence of coverage for an additional insured when the named insured is required by that outside contract to provide such coverage. Before the Texas Supreme Court issued its holding in Deepwater Horizon, the law in Texas was that a court should look to the terms of the policy itself instead of looking to the indemnity agreement in the underlying service contract when interpreting coverage for a putative additional insured. In *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), the Texas Supreme Court refused to import into the policy any of the restrictions on scope of coverage in the underlying contract.

A. In re Deepwater Horizon

Last year, the Texas Supreme Court extended the exception to the "four corners" rule by expressly holding that the terms of the outside contract can determine both the existence and scope of coverage for the putative additional insured. In that case, Deepwater Horizon was a deep sea oil-drilling rig owned by Transocean Offshore Deepwater Drilling, Inc. It operated in the Gulf of Mexico under a contract (the "Drilling Contract") between Transocean and BP, an oil-field developer. On April 10, 2010, an explosion on the rig killed 11 crewmen. The resulting fire could not be extinguished, and the rig sank in the Gulf two days later, causing the largest oil spill ever to have occurred in U.S. waters. That spill generated massive claims against both BP and Transocean for environmental damage, including claims based on subsurface oil releases.

In their Drilling Contract, BP and Transocean agreed to a "knock-for-knock" allocation of risk: Transocean agreed to indemnify BP for losses caused by above-surface pollution, regardless of fault, and BP similarly agreed to indemnify Transocean for any pollution losses Transocean did not assume—i.e., losses caused by subsurface pollution.

The Drilling Contract also required Transocean to name BP, its subsidiaries and affiliated companies, co-owners and joint venturers:

> as additional insureds in each of [Transocean's] policies … for liabilities assumed by [Transocean] under the terms of this contract.

Transocean was insured under a $50 million general liability policy and four layers of excess insurance, which provided another $700 million in coverage. These policies provided coverage on behalf of an "Insured" for any loss that was either "imposed upon the 'Insured' by law" or "assumed by the 'Insured' under an 'Insured Contract.'" An "Insured Contract" is an agreement by Transocean, pertaining to its business, under which Transocean "assumes the tort liability of another party."

Although BP was not named as an additional insured in any of these policies, the policies defined the term "Insured" to include

> [a]ny person … to whom the 'Insured' is obligated by … [an] 'Insured Contract' … to provide insurance such as afforded by [the] Policy.

Thus, BP could be an additional insured only if several conditions were satisfied:

- BP's Drilling Contract with Transocean had to be an "Insured Contract," meaning it needed both (i) to "pertain[]" to Transocean's business and (ii) to require Transocean to "assume[]" BP's tort liability.

- If these conditions were met, the Drilling Contract also needed to "oblige[]" Transocean "to provide insurance" of the kind provided by Transocean's policies.

BP made a demand under Transocean's policies, and the insurers filed a declaratory judgment action in federal court, asserting that BP was not entitled to coverage for subsurface pollution claims. In that suit, it was undisputed that the Drilling Contract was an "Insured Contract" within the meaning of the policies, and so that BP was an additional insured for at least some purposes. It was also undisputed that none of the insurers was a party to the Drilling Contract.

Nevertheless, the insurers contested coverage on the ground that the Drilling Contract required Transocean to make BP an additional insured only "for liabilities assumed by [Transocean] under the terms of" that contract. BP countered that the insurers' actual policies contained no term that limited coverage in this way.

The question before the court, therefore, was whether the scope of coverage should be determined by the four corners of the policies, or if those policies should be interpreted by reference to the terms of the Drilling Contract. The district court resolved the issue against BP, holding that BP was not an "Insured" under the policies for purposes of subsurface pollution liabilities. The Fifth Circuit reversed and held, based *on Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc*., 256 S.W.3d 660 (Tex. 2008), that courts applying Texas law must resolve coverage disputes based solely on the four corners of the policies: because the policies themselves "imposed no relevant limitations upon the extent to which BP [was] covered," the company's subsurface claim had to be honored. *Id*. at 341.

On rehearing, however, the Fifth Circuit withdrew its opinion and certified two questions to the Texas Supreme Court:

> 1. *Whether Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.,* 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?
>
> 2. Whether the doctrine of contra proferentem applies to the interpretation of the insurance coverage provision of the Drilling Contract under the ATOFINA case, 256 S.W.3d at 668, given the facts of this case?
>
> In re Deepwater Horizon, 728 F.3d 491, 500 (5th Cir. 2013).

The Supreme Court began its analysis with the four corners of the policies. Although the policies contain no language explicitly limiting the scope of BP's coverage, the court explained, it has "long held [that] insurance policies can incorporate limitations on coverage encompassed in extrinsic documents by reference to those documents."

Moreover, no "magic words" are necessary to effect the incorporation: "it is enough that a policy clearly manifests an intent to include the contract as part of the policy." So, while the inquiry might start with the coverage grant in the insurance policy, it may not end there.

One way to "manifest" such intent is to establish a relationship between the existence of coverage and the terms of the underlying agreement:

> By tying additional-insured coverage to the terms of an underlying agreement, the parties procure only the coverage the insured is contractually obligated to provide, thereby minimizing the insurer's exposure under the policy and the named insured's premiums.

Alternatively, the named insured may gratuitously choose to provide more coverage than contractually required. This occurs when the coverage term does not reference the contract requiring the additional insured coverage.

The court explained that the insured had taken the latter approach in the case that was cited in the certified questions, and on which BP was relying for its claim. It is not obvious, however, that the policy in ATOFINA did not "t[ie] additional-insured coverage to the terms of an underlying agreement." In ATOFINA, the named insured's liability policy extended additional-insured coverage to "[a] person … for whom [the named insured has] agreed to provide insurance as is afforded by this policy … ." But the underlying contract also required the named insured to obtain a certificate of insurance, expressly identifying ATOFINA as an additional insured. In the Deepwater Horizon case, the Supreme Court reasoned that "[t]he existence of a certificate … meant … there was no need to look to the underlying service contract to ascertain ATOFINA's status as" an additional insured.

BP, on the other hand, did not receive a certificate of insurance, nor was it expressly identified as an additional insured by an endorsement to Transocean's policies. According to the Texas court, this meant that if the coverage inquiry were constrained to the language in the insurance policy, BP would have no coverage at all.

The coverage inquiry was not so "constrained," the court found, because "the policies confer coverage by reference to the Drilling Contract." Thus:

> The language in the insurance policies providing additional-insured coverage 'where required' and as 'obliged' requires us to consult the Drilling Contract's additional-insured clause to determine whether the stated conditions exist. … [W]hen we do so, it becomes apparent that the only reasonable interpretation of that clause is that the parties did not intend for BP to be named as an additional insured for the subsurface pollution liabilities BP expressly assumed in the Drilling Contract.

In re Deepwater Horizon, 470 S.W.3d 452, 460-62 (Tex. 2015).

B. Post-Deepwater Horizon decisions

In *Ironshore v. Aspen Underwriting*, the owner of an oil well contracted with another company to operate a drilling rig. The companies entered into a master services agreement (MSA) that contained a mutual indemnification clause and a provision requiring the rig operator to name the well owner as an additional insured on $5 million worth of insurance coverage. The rig operator, however, named the well owner as an additional insured on its entire $51 million tower of liability coverage—and nothing in the policies themselves (as opposed to the MSA) limited the insurance available to the well owner to less than the full policy limits. But the policies did include "insured contracts" language similar to the language in the policies at issue in Deepwater.

When two of the rig operator's workers were killed in an accident, pursuant to the MSA the well owner faced liabilities far in excess of $5 million. This, in turn, led to a fight among the two companies' liability insurers. Because the well owner was named an additional insured on all $51 million of the rig operator's policies, the well owner's insurer argued that the rig operator's insurers should be required to pay up to their full policy limits. The rig operator's insurers argued that a $5 million limit should be read into the policies, because that was all the MSA required, and the MSA's requirement should be incorporated into the policies by reference.

The Fifth Circuit ruled in favor of the rig operator's insurers, holding that the policy's reference to an "insured contract" was enough, standing alone, to incorporate the $5 million limit specified in a particular insured contract—the MSA—by reference. This holding is remarkable, considering that the well owner was named as an additional insured on $51 million worth of coverage, and that the "insured contract" language in the policy appeared in a pre-printed form without specific reference to a particular contract. In essence, courts applying Texas law are now citing agreements outside the four corners of the policy to overcome the language of the policy itself.