

## Haynes and Boone's Newsroom

### Determining the Scope of "Additional Insured" Coverage: Fifth Circuit Issues New Decision in Deepwater Horizon Coverage Litigation

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Only the terms of the insurance policy itself - and not the provisions of an underlying indemnity contract - determine the scope of coverage afforded to an additional insured, provided that the insurance and indemnity provisions in the underlying indemnity contract are separate and independent from one another. For additional insured and indemnity provisions to be deemed "separate and independent," "Texas law only requires the additional insured provision to be a discrete requirement."

This was the ruling from a unanimous three-judge panel of the Fifth Circuit Court of Appeals on Friday, March 1, 2013 in the ongoing coverage litigation over the Deepwater Horizon incident in April 2010. The decision reverses a prior opinion from U.S. District Court Judge Carl Barbier finding that BP American Production Company ("BP") was not insured under \$750 million of primary and excess policies issued to Transocean Holdings, Inc. ("Transocean").

According to Judge Barbier, the insurance requirements in a "drilling contract" between predecessors of BP and Transocean only required Transocean to name BP as an additional insured in its policies with respect to the liabilities assumed by Transocean under the drilling contract. Those liabilities, the district court determined, did not include BP's potential liability for the underwater pollution arising out of the Deepwater Horizon Incident.

In contrast, Circuit Judge E. Grady Jolly, writing for the Circuit Court panel, ruled that Transocean's umbrella policy "imposes no relevant limitations upon the extent to which BP is covered." Relying on prior decisions from courts applying Texas law and involving similar contracts,<sup>1</sup> the Fifth Circuit confirmed that "only the umbrella policy itself may establish the limits upon the extent to which an additional insured is covered in situations such as the one now before us," "so long as the indemnity agreement and the insurance coverage provision are separate and independent."

For insurance and indemnity provisions to be "separate and independent," Judge Jolly explained "it need not be an entirely separate provision of the contract, and its independent status is not altered merely by the fact that the contract also includes a provision requiring the relevant party to obtain insurance to cover its liabilities under the contract." Here, the drilling contract includes "one clause . . . [that] requires Transocean to obtain coverage for its contractual liabilities, while another provision simply requires Transocean to name BP as an additional insured." Thus, "the provision in the Drilling Contract extending direct insured status to BP is separate and independent from BP's agreement to forego contractual indemnity in various other circumstances."

As a result of the Circuit Court's opinion, the case will be returned to Judge Barbier for further adjudication of the declaratory judgment claims filed by Transocean's insurers.

This opinion, and those upon which the Fifth Circuit relied for its decision, provide important guidance to "additional insureds" and those contractually responsible for obtaining this coverage.

If you have any questions about "additional insured" coverage or the effect of the Circuit Court's opinion in the Deepwater Horizon matter, please contact one of the Haynes and Boone **Insurance Coverage Practice Group** partners listed below.

