Sui Generis

Providing Insight into the Contours of Emerging Insurance Coverage and Environmental Issues

White and Williams LLP

Steven Urgo, Esq.
urgos@whiteandwilliams.com

BP Can't Plug Gulf Leak Costs With Rig Owner's Insurance

Just when BP though it was safe to go back in the water, federal district judge Barbier ruled yesterday that BP cannot access $750 million in primary and excess insurance coverage under nine policies issued to Transocean Holdings LLC, the owner of the Deepwater Horizon that was the center of attention on April 20, 2010 when the rig exploded, killing several workers and turning the Gulf of Mexico into the world's largest deep fryer.

The action *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, is currently pending in the U.S. District Court for the District of Louisiana. BP argued in a Motion for Judgment on the Pleadings that it was an additional insured (AI) under policies issued to Transocean, and that the scope of its status as an AI was set forth in the policies themselves, rather than in the drilling contract between BP and Transocean. In other words, it argued that an "Insured Contract" is irrelevant to the scope of AI status, even where a policy specifically permitted the policyholder to name additional insureds only "to the extent required under contract." I can almost hear the Wizard of Oz exclaiming, "Ignore that man behind the curtain!" Like Toto, the court smelled a rat.

While the court issued a 42-page opinion, its reasoning can be boiled down to the fact that BP's argument was simply unreasonable. BP claimed that so long as it fell within the "insured" definition, the insurers were obligated to cover it for its liabilities arising from the massive spill as if the policies had been issued to BP rather than Transocean.

Applying Texas law, the court disagreed. In analyzing the indemnity provisions of the drilling contract, it was clear that the parties had succinctly allocated their liabilities: Transocean was responsible for pollution or contamination originating from on or *above* the surface of land or water; BP was responsible for pollution liabilities not assumed by Transocean, i.e., *below* surface spills. The court found it incongruous that the parties would have negotiated this type of allocation, only to ignore it for purposes of insurance.

The missing comma.

To determine the extent of BP's AI coverage, the court first looked to how the policies defined "insured." The relevant provision stated:

> (c) *any person or entity to whom the "Insured" is obliged by any oral or written "Insured Contract"* (including contracts which are in agreement but have not been formally concluded in writing) entered into before any relevant "Occurrence", *to provide insurance such as is afforded by this Policy* ….(emphasis original).

The court then looked at the drilling contract to determine the extent of Transocean's insurance obligations. That provision stated:

> [*BP*], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers and agents *shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this Contract.* (emphasis original).

BP argued that the above is meant to except from the coverage obligations workers' compensation liabilities that are assumed by Transocean, and had the intent been otherwise, a comma should have been inserted after the words "Workers' Compensation" in the provision. Thus, BP was an AI without any other limitation – period. The insurers, however, argued that Transocean's AI obligation was limited only to liabilities Transocean had assumed under the drilling contract. Here again, the court rejected BP's narrow reading of the AI provision as unreasonable. Moreover, it reasoned, "the mere absence of a coma does not create an ambiguity." And I paid so much for a proofreader!

In sum, the court held that since the policies specifically reference an "insured contract" in connection with how they defined "insured," the scope of AI status was limited to the risks specifically assumed in that portion of the drilling contract that fell within the "insured contract" definition. In other words, the scope of a party's insurance obligation in an "insured contract" determines the scope of AI coverage under the policies. Thus, at least in this instance, the yin of AI status was found to be inexorably linked to the yang of the "insured contract." As I always tell my underwriting friends, scope matters.

A copy of the opinion is available here.

White and Williams LLP

Steven D. Urgo | Member NY, NJ and PA Bars
1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395
Direct 215.864.7185 | Fax 215.789.7624
urgos@whiteandwilliams.com | whiteandwilliams.com