


**Have You Read Your Insurance Policy?
Lessons From The BP/Transocean Dispute**



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2015 AIA CONFERENCE
The Insurance Plan 13 Annual Conference

Deepwater Horizon—The Disaster

- 11 Deaths and 17 Others Injured
- Oil Well Went Uncapped for 87 Days
- 3.19 Million Barrels Leaked into Gulf. 2:10-md-02179, Docket Item No. 14021 (E.D. La. Jan. 15, 2015)





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Deepwater Horizon—Cleanup, Claims And Costs

➤ **“Let me be clear: BP is responsible for this leak. BP will be paying the bill.”**

President Barack Obama, May 2, 2010




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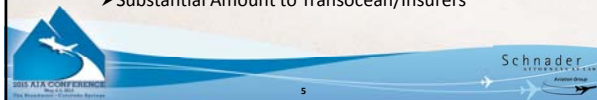
Deepwater Horizon—Cleanup, Claims And Costs

- BP Has Paid
 - Nearly \$30 Billion for Cleanup and Claims To Date
 - Likely Will Pay Billions More
 - Penalty Could Total as Much as Nearly \$14 Billion



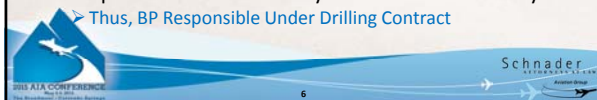
Deepwater Horizon—The Insurance Dispute

- Why the President Spoke too Soon—Or Did He?
 - BP Commenced Litigation Seeking as Much as \$750 Million of Insurance Coverage Procured by Transocean
 - Small Percentage of Total Cleanup/Claims
 - Substantial Amount to Transocean/Insurers




Deepwater Horizon—Indemnity Provisions

- Transocean Responsible for Above-Surface Liabilities
 - Must Indemnify BP
- BP Responsible for Liabilities Not Assumed by Transocean
 - Includes Sub-Surface Liabilities
 - Must Indemnify Transocean
- Deepwater Horizon Liability is Sub-Surface Liability
 - Thus, BP Responsible Under Drilling Contract




Deepwater Horizon—Additional Insured Provision

- BP to Be Named Additional Insured
 - “for liabilities assumed by [Transocean] under the terms of this Contract”
- Intention of Parties Relatively Clear
 - No Coverage for BP for Sub-Surface Liabilities
 - Comma Issue—Proofread Your Contracts!!!!
 - “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”




Deepwater Horizon—Insurance Policy Language

- Two Key Provisions
 - Definition of Insured
 - “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”
 - General Condition—Additional Insured/Waiver of Subrogation
 - “Underwriters agree where required by written contract ... additional insureds are automatically included hereunder ...”




Deepwater Horizon—The Underlying Decisions

- District Court Held BP Not Entitled to Coverage
 - Insurance Policy Not Ambiguous
 - Drilling Contract Language Relevant to Scope of Coverage
 - 2011 U.S. Dist. LEXIS 131693 (E.D. La. Nov. 15, 2011)




Deepwater Horizon—The Underlying Decisions

- Fifth Circuit Reversed (Initially)
 - Contractual Additional Insured Provision Separate from, and Additional to, Indemnity Provision
 - So Only Insurance Policy Language Relevant
 - Insurance Policy Did Not Place Limit on Extent of Additional Insured Coverage – 710 F.3d 338 (5th Cir. 2013)




Deepwater Horizon—The Underlying Decisions

- Fifth Circuit Withdrew Opinion and Certified Two Questions to Texas Supreme Court. 728 F.3d 491 (5th Cir. 2013)
 - “1. Whether *Evanston Ins. 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?’”



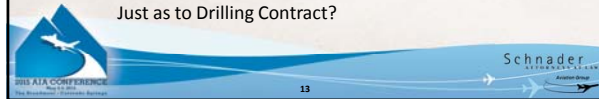
Deepwater Horizon—The Underlying Decisions

- Fifth Circuit Withdrew Opinion and Certified Two Questions to Texas Supreme Court. 728 F.3d 491 (5th Cir. 2013)—Cont’d
 - “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?”




Deepwater Horizon—Texas Supreme Court

- What Were the Real Issues?
 - Does Insurance Policy Language Incorporate Drilling Contract to Limit Scope of Additional Insured Coverage?
 - “Separate and Independent”—A Red Herring?
 - If Insurance Policy/Drilling Contract Language Is Ambiguous, Should Doctrine of *Contra Proferentem* Apply?
 - Would Supreme Court Look at Doctrine Generally, or Just as to Drilling Contract?



Deepwater Horizon—Texas Supreme Court

- Issue 1—Does Drilling Contract Language Limit Coverage
 - All Parties Argued Insurance Policy Not Ambiguous
 - All Parties Started Analysis with Language of Insurance Policy
- BP’s Position
 - Policy Language Clear that Insured Contract = Insured for All Operations
- Transocean and Insurers’ Position
 - Additional Insured Only “where required by written contract”




Deepwater Horizon—Texas Supreme Court

- Issue 2—*Contra Proferentem*
 - Ambiguity Interpreted Against Drafter/Insurer
 - Certified Question Refers to Drilling Contract, Not Policy
- BP’s Position
 - Doctrine Applies Against Transocean/Insurers
- Transocean and Insurers’ Position
 - Policies Underlying Doctrine Inapplicable
 - Sophisticated Entity Exception



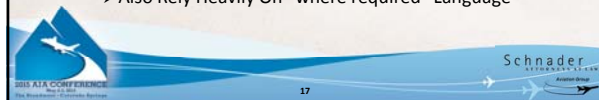
Deepwater Horizon—Texas Supreme Court

- The Decision—BP Not Entitled to Coverage
 - Analysis Begins With Four Corners of Policy
 - Long Held that Policy Can Incorporate Extrinsic Documents
 - No Magic Words—Intent to Incorporate Must Be Clearly Manifested
 - Court Held That “where required by written contract” Language Was Sufficient to Incorporate Drilling Contract
 - An Expansion of Policy Language Sufficient to Incorporate Outside Contract?



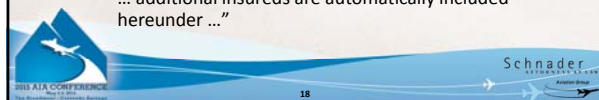
Deepwater Horizon—Texas Supreme Court

- Incorporation By Reference
 - BP Not Expressly Included as Additional Insured In Endorsement or Certificate of Insurance
 - Rely on Definition of Insured
 - “any person or entity to whom the ‘Insured’ is obliged by any oral or written ‘Insured Contract’”
 - Also Rely Heavily On “where required” Language



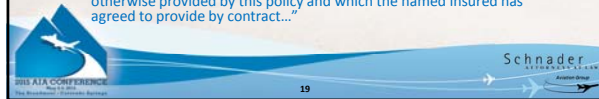
Deepwater Horizon—Insurance Policy Language

- Two Key Provisions
 - Definition of Insured
 - “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”
 - General Condition—Additional Insured/Waiver of Subrogation
 - “Underwriters agree where required by written contract ... additional insureds are automatically included hereunder ...”




Deepwater Horizon—Texas Supreme Court

- Cf.
 - *Evanston Ins. Co. v. ATOFINA Petrochem.* (256 S.W.3d 660)- Policy defined insured as “[a] person or organization for whom you have agreed to provide insurance coverage as is afforded by this policy”
 - *Aubris Resources L.P. v. St. Paul Fire & Marine Ins. Co.* (566 F.3d 483)-policy provided coverage “if that written contract ... specifically requires such coverages for that person.”
 - *Pasadena Refining Sys., Inc. v. McCraven* (2012 WL 1693697)—defining additional insured as “organization ... for whom the named insured ... has specifically agreed by written contract to procure ... insurance, provided that ... [t]his insurance applies only to the type of coverage which is otherwise provided by this policy and which the named insured has agreed to provide by contract...”




Deepwater Horizon—Texas Supreme Court

- Cf.
 - *Urrutia v. Decker* (992 S.W.2d 440)- policy provided coverage “only to the extent and for the limits of liability agreed to under contractual agreement”
 - *Becker v. Tidewater, Inc.* (586 F.3d 358)-policy stated that “[i]n no event shall Insurance coverage be afforded hereunder to such other assureds to any greater extent that that which the Named Insured is expressly obligated by contract to provide”




Deepwater Horizon—Texas Supreme Court

- Separate and Independent
 - Does Not Mean Duties to Indemnify and Maintain Insurance Not Congruent
 - Contract May Limit Additional-Insured Status To Extent of Risk Insured Agreed to Assume
- Drilling Contract Clearly Limits Coverage
 - BP’s Comma Argument Rejected
- *Contra Proferentem*
 - No Ambiguity So No Need to Address




Deepwater Horizon—Texas Supreme Court

- Motion for Reconsideration—Argues the Opinion:
 - Misconstrues Operation of Additional Insured Provisions
 - Abandons Rule on Incorporation by Reference
 - Contradicts *ATOFINA*
 - Gives Certificates of Insurance Unfounded Significance
 - Exceeds Jurisdiction by Interpreting Drilling Contract
 - Governed by Federal Maritime Law
 - Reads Out Important Provision of Drilling Contract
- Motions for Rehearing Seldom Granted




**The Lessons of Deepwater Horizon:
Why Aviation Practitioners Should Take Note**

- Why Aviation Insurers Should Be Paying Attention!
 - Texas is Leader in Aerospace and Aviation
 - Substantial Operations for 17 of World's Top 20 Aerospace Manufacturers
 - Home to 6 of United States' 50 Busiest Airports
 - Aviation Industry Is Laden with Indemnity/Additional Insured Provisions




**The Lessons of Deepwater Horizon:
Why Aviation Practitioners Should Take Note**

- Contracts with Indemnity and Insurance Obligations
 - Aviation Context
 - Aircraft Charter and Lease Agreements
 - Premises Lease Agreements
 - Ground Handling Agreements
 - Construction
 - General Contractor—Subcontractor Agreements
 - Service Agreements in Any Industry



"If Woody Had Gone Right to the Police, This Would Never Have Happened"



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Contractual Indemnity—Generally

- Indemnity Provision Is Express Obligation Shifting a Loss from One Party to a Second
 - Relevant Elements
 - Indemnity
 - Duty to Defend/Reimbursement of Legal Costs
 - Associated Insurance Requirement
- May Be Oral
 - Party Seeking Indemnity Bears Burden to Establish Agreement
- May Arise from Unsigned or Expired Contract
- No Retroactive Effect Unless Clearly Stated or Implied

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Contractual Indemnity—Generally

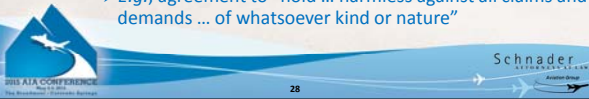
- Three General Types of Indemnity Provisions
 - Limited—Only for Loss Caused by Indemnitor's Negligence
 - Intermediate Form—All but Sole Negligence of Indemnitee
 - Broad Form—Includes Loss Caused by Sole Negligence of Indemnitee

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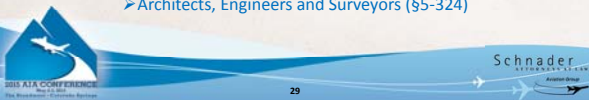
Indemnity—Enforceability

- Indemnity for Own Negligence Generally Permissible
 - Only Where Clearly Expressed in Language of Contract
 - Some States Stricter than Others
 - Generally Need Not Expressly Include Term Negligence
 - Language Must Evince “unmistakable intent to indemnify”; or
 - Intent Must “be implied from the purpose and language of the whole agreement”
 - All-Encompassing Language Usually Sufficient
 - E.g., agreement to “hold ... harmless against all claims and demands ... of whatsoever kind or nature”



Indemnity—Enforceability

- Indemnity For Own Negligence
 - At Least 28 States Prohibit Indemnity for Sole or Partial Negligence in Certain Contexts (e.g., construction)
 - Additional 17 States Prohibit Just for Sole Negligence
 - For example, N.Y. General Obligations Law prohibits it for:
 - Lessors (§5-321)
 - Caterers (§5-322)
 - Owners and Contractors (§5-322.1)
 - Building Service or Maintenance Contractors (§5-323)
 - Architects, Engineers and Surveyors (§5-324)




Indemnity—Enforceability

- Generally No Indemnity for Intentional Conduct
 - But Permitted for Gross Negligence or Recklessness
 - Indemnity for Intentional Conduct Against Public Policy
 - Compare Exculpatory Provisions—No Gross Negligence
- No Indemnity for Punitive Damages
 - Same as with Insurance Coverage



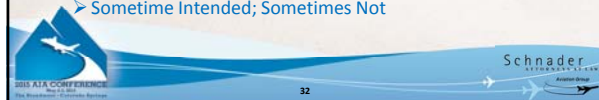
Indemnity—Practice Tips

- Insureds and Counsel Should Carefully Review Indemnity Provisions Before Contracting
- Upon Claim, Evaluate Whether There Is Applicable Indemnity Provision
- Review Language of Indemnity Provision Closely
- Determine and Analyze Applicable State Law
 - Local Counsel Can Be Essential
- Separately Analyze Duty to Defend
- Carefully Review Additional Insured Provisions




Contractual Additional Insured Provisions

- Provision Requiring Party to Be Named as Additional Insured
- Distinct from Provision Requiring Insurance for Indemnity Obligation
- Problem May Arise When Contractual Additional Insured Provision Broader Than Indemnity Provision
 - Sometime Intended; Sometimes Not




Contractual Additional Insured Provisions

- Contractual Additional Insured Provision Broader or Narrower than Indemnity
 - *Shell Oil Co. v. Nat'l Union Fire Ins. Co.*, 44 Cal. App. 4th 1633 (Cal. Ct. App. 1996)
 - No Indemnity for Shell's Sole Negligence
 - S.I.P. Engineering to Obtain Coverage Naming Shell as Additional Insured "to the fullest extent permitted by law"
 - Policy Covered Shell as Additional Insured "to the extent required by said contract"
 - Despite Indemnity Provision, Coverage Owed to Shell for Sole Negligence



Interplay Between Contract and Insurance Policy

- Relevant Contract Provisions
 - Insuring Indemnitor for Indemnity Obligation
 - Additional Insured Provisions
- Relevant Policy Provisions/Concerns
 - Additional Insured Endorsement
 - Was Insurance Procured for Indemnitee if/as Required by Contract?




Interplay Between Contract and Insurance Policy

- Resolution Depends On:
 - Applicable State Law
 - Policy Language
- General Rule
 - Insurance Policy Language Governs Regardless of Underlying Contract Language; but
 - States Differ in their Approaches to Interpretation



Interplay Between Contract and Insurance Policy

- Insurer's Duties Generally Defined by Policy Language
 - New York—*Bovis Lend Lease LMB, Inc. v. Great American Ins. Co.*, 855 N.Y.S.2d 459 (1st Dep't 2008)
 - Texas — *In re Deepwater Horizon*, 2015 Tex. LEXIS 141 (Tx. 2015)
 - California—*Great Western Drywall, Inc. v. Interstate Fire & Cas. Ins.*, 161 Cal. App. 4th 1033 (Cal. Ct. App. 2008)
 - Oklahoma—*Travelers Ins. Cos. v. Dickey*, 799 P.2d 625 (Ok. 1990)




Interplay Between Contract and Insurance Policy

- Contract Terms Sometimes Relevant If Policy Is Ambiguous
 - Different than Where Contract Is Incorporated By Reference
 - Modified Approach Utilized by Number of Courts
 - *New Jersey—Marshall v. Raritan Valley Disposal, 2012 N.J. Super. Unpub. LEXIS 544 (N.J. App. Div., Mar. 13, 2012)*



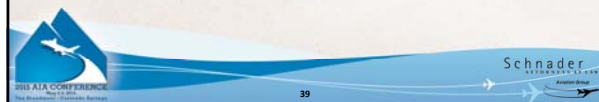
Interplay Between Contract and Insurance Policy

- In Limited Circumstances, Contract Terms May Prevail over Policy
 - **Minority (Rare) Approach**
 - Fourth Circuit—*St. Paul Fire & Marine Ins. Co. v. Am. Int'l. Spec. Lines Ins. Co.*, 365 F.3d 263 (4th Cir. 2004)
 - Eighth Circuit—*Wal-Mart Stores, Inc. v. Nat'l. Union Fire Ins. Co. of Pittsburgh, Pa.*, 292 F.3d 583 (8th Cir. 2002)



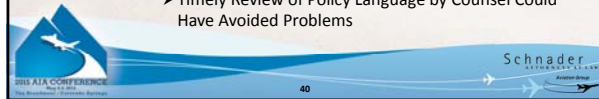
Interplay Between Contract and Insurance Policy

- Scenarios That Arise:
 1. Insurance Does Not Match Contractual Requirements
 - Broader or Narrower Coverage than Anticipated
 2. Insurer Contends Insurance Is Excess (or Co-Primary) to "Other Insurance"




Interplay Between Contract and Insurance Policy

- Scenario 1:
 - Policy Language Broader or Narrower than Parties Intended
 - *Ranger Ins., Ltd. v. Transocean Offshore Deepwater Drilling, Inc.*, 728 F.3d 491 (5th Cir. 2013)
 - Insurance Questions Certified to Texas Supreme Court
 - BP Seeking \$750 Million In Additional Insured Coverage
 - Not Intended by Parties—Underlying Contract Clearly Makes BP Responsible
 - Policy Language Could Have Been Clearer
 - Timely Review of Policy Language by Counsel Could Have Avoided Problems



Interplay Between Contract and Insurance Policy

- Scenario 2:
 - Insurer Argues Coverage Is Excess to “Other Insurance”
 - *Bovis Lend Lease LMB, Inc. v. Great American Ins. Co.*, 855 N.Y.S.2d 459 (1st Dep’t 2008) (reversing trial court’s ruling that priority of coverage is dictated by the terms of the underlying trade contracts, and instead relying on “other insurance” provisions of policies)



Interplay Between Contract and Insurance Policy

- General Rules of Construction for Insurance Policy
 - Applicable Law—Choice of Law Provision or Analysis
 - Effectuate Intent of Parties at Time of Contract
 - Intent as Reflected in Language of Policy
 - Undisclosed Intent of One Party Irrelevant
 - The Policy Is Read as Whole to Give Effect to All Provisions
 - Courts Will Not Rewrite or Add Terms
 - Plain Meaning of Terms



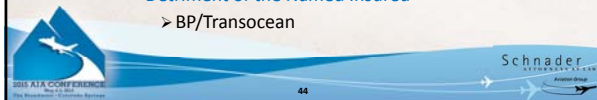
Interplay Between Contract and Insurance Policy

- Interpretative Tools Utilized by Courts
 - Parol Evidence Permissible to Resolve Ambiguity
 - Not to Create Ambiguity
 - Mere Disagreement Not Enough to Find Ambiguity
 - Several Types of Parol Evidence
 - Evidence of Custom and Practice
 - Circumstances Surrounding Making of Agreement
 - Communications at Time of Contracting




Interplay Between Contract and Insurance Policy

- Interpretative Tools Utilized by Courts
 - Other Rules May Apply Where Parol Evidence Not Enough
 - *Contra Proferentem*—Ambiguous Terms Construed against Insurer (Drafter)
 - Potential Exception Where Policy Negotiated by Sophisticated Insured
 - Applies in Favor of Additional Insured Even If to the Detriment of the Named Insured
 - BP/Transocean




Interplay Between Contract and Insurance Policy

- Looking to Other than Policy
 - Binders and Cover Notes Generally Superseded by Policy
 - In Event of Conflict, Policy Prevails
 - Where No Formal Policy—Courts Will Apply Terms of Binder, but May Look to Form Policy to Fill in Gaps
 - Certificate of Insurance Typically Not Proof of Coverage
 - Can Be Binding on Insurer under Limited Circumstances



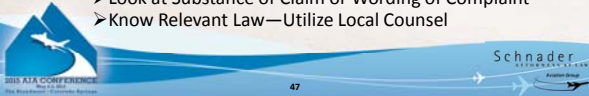
Practice Tips

- Generally
 - Don't Just Copy Language!
- When Procuring Insurance
 - Understand Insured's Contractual Obligations
 - Ensure Language Clear and of Proper Scope
 - Counsel Can Be Invaluable
 - Indemnitee Will Seek Coverage Even Where Contract Does Not Apply
 - May Have Same Indemnitee Repeatedly



Practice Tips

- For Insured after Contract but before Claim
 - Get Copies of Certificates of Insurance (Not Enforceable)
 - Get Copy of Policy and Review to Ensure Proper Coverage
- Once Claim Arises
 - Careful Review of Insured and Other Party's Policy Language
 - Does Policy Language Match Contract
 - "Other Insurance" Provisions
 - Look at Substance of Claim or Wording of Complaint
 - Know Relevant Law—Utilize Local Counsel



THANK YOU

