Indemnification and Insurance :: Contractual Risk Transfer Provisions

ORIGINALLY PRESENTED AT THE

41st Annual Corporate Counsel Institute
The University of Texas School of Law Continuing Legal Education
May 16-17, 2019
Houston, TX

AMY ELIZABETH STEWART
AMY STEWART LAW
5307 E. Mockingbird Lane, Suite 425
Dallas, Texas 75206
214-233-7076
amy@amystewartlaw.com

Contractual indemnity provisions and insurance requirements play a central role in corporate risk management. Designed to shift responsibility from one potentially liable party to another, indemnity agreements are commonplace in contracts with vendors, suppliers, service providers, and other third parties. Many contractual indemnity agreements are coupled with insurance provisions. The imposition of minimum insurance requirements and the frequent insistence that indemnitees be named as additional insureds on the required policies reinforce the transfer of risk by circumventing uncertainty regarding the enforceability of the indemnity provision or the solvency of the indemnitor.

When tailored to the parties' relationship, these risk-shifting provisions can provide substantial protection to the company as a means of transferring risk to a third party and its insurers. As a practical matter, however, inconsistences in drafting both the contract provisions and the insurance policies maintained by the indemnitor spawn significant challenges. Enforceability aside,[1] the indemnity provisions in many corporate contracts are boilerplate inserts, copied and pasted from predecessor agreements with minimal customization. Indemnity clauses that were carefully crafted at the outset may be amended mid-term to address specific risks without attention to the associated insurance provisions, leading to disappointing results in the event of a substantial claim that exceeds the indemnitor's available resources. Other complications arise when an indemnitee learns after a loss that the indemnitor did not maintain insurance as agreed, leaving both parties exposed for liability that should have been transferred to an insurer.

> TAKEAWAY. To reinforce the transfer of risk, indemnity provisions are often accompanied by requirements that the indemnitor maintain insurance at specified limits. These insurance provisions protect the indemnitee from uncertainty regarding (1) the enforceability of the indemnity provisions and (2) the solvency of the indemnitor.

This article focuses on the interplay between indemnity and insurance provisions in third-party contracts as a mechanism for transferring risk and the impact these provisions have on the insurance policies maintained by both the indemnitor and the indemnitee.

Indemnity Agreements

Contractual indemnity provisions seek to allocate or re-allocate risk between and among parties to an agreement. In Texas, indemnity provisions that purport to transfer to another the transferring party's own negligence are subject to strict fair notice requirements because they effectuate "an extraordinary shifting of risk." [2] These fair notice requirements consist of compliance with the express-negligence doctrine and conspicuousness.[3] Under the express-negligence doctrine, a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract.[4] To

[1] Michael A. Golemi & William W. Pugh, *Hoping for the Best, Preparing for the Worst: "Don't Worry, We Have Indemnity*," 78 THE ADVOC. 47, 48-50 (2017), *available at* https://www.liskow.com/portalresource/HopingfortheBest_PreparingfortheWorst (discussing legal obstacles to indemnity provision enforceability); William W. Pugh, *Maximizing Insurance Protection*, 2018 TXCLE-AOGERL 4-IV ("Generally, the insurance requirements should dovetail with the indemnity provisions, both for the purpose of insuring solvency and for the purpose of maximizing enforceability of the agreed risk allocation."); Lisa Cappelluti & David Roper, *Looking for the Trap Doors in Your* Contract, 12 NO. 4 IN-HOUSE DEF. Q. 60 (2017).

[2] *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993) ("Although we recognize that most contractual provisions operate to transfer risk, these particular agreements are used to exculpate a party from the consequences of its own negligence. Because indemnification of a party for its own negligence is an extraordinary shifting of risk, this Court has developed fair notice requirements which apply to these types of agreements.").

[3] *Id*.

[4] *Id.*; *see Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707-08 (Tex.1987).

be conspicuous, "something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it."[5]

Distinguished from Insurance Policies

Importantly, indemnity agreements are ***not*** insurance policies. While indemnity agreements and insurance policies both transfer specified risks to another party and impose "indemnity" obligations, the similarities end there. As a starting point, compare any insurance policy with the standard indemnity clause in a company contract. The insurance policy is likely far more detailed, setting forth a complex assortment of terms, definitions, conditions, and exclusions. Even a well-drafted indemnity provision that meets the legal criteria for enforceability will typically be shorter and less detailed. Many insurance policies are written on standard, industry-promulgated, state-approved forms, and the insurance companies that issue these policies are often regulated by state insurance departments or commissioners of insurance that are in turn governed by state statutes—*e.g.*, the Texas Insurance Code.

While some rules of contract construction apply generally to both indemnity agreements and insurance policies, the presumptions and burdens are different:

> The strict construction of indemnity agreements against indemnity stands in contrast to the liberal interpretation of insurance policies in favor of coverage. In insurance, ties go to the insured; in indemnity, ties go to the indemnitor. Therefore, even if the indemnity agreement obligates the indemnitor to "defend" claims, the indemnitee should not expect the same kind of protection the indemnitee would enjoy as an additional insured under an insurance policy that provides defense of the "suit" even when most of the claims are not covered under the policy.[6]

Finally, and perhaps most importantly, for an indemnity agreement to be effective as a risk-transfer mechanism, the indemnitor must be solvent and financially capable of honoring its indemnity obligations.[7] Quite unlike the average indemnitor, insurance companies are subject to financial regulation designed to minimize insolvency and its impacts on policyholders and claimants.[8]

TAKEAWAY. While most readers will appreciate the distinctions between indemnity provisions in the company's third-party contracts and the company's insurance policies, business clients may conflate these risk-transfer tools, equating indemnity protection with insurance and treating capped contractual indemnity as another form of "insurance."

[5] *Dresser*, 853 S.W.2d at 508 (citation and internal quotation marks omitted).

[6] *See* Eric S. Peabody, *Indemnity: Don't get harmed by your "hold harmless" agreement!*, HANNA & PLAUT LLP (May 23, 2017), https://www.hannaplaut.com/indemnity-dont-get-harmed-hold-harmless-agreement/

[7] *See* Mark Bell, *Indemnity and Additional Insured Requirements: Why Am I Demanding Them, Why Do Others Want Them, and What Does It All Mean?*, INTERNATIONAL RISK MANAGEMENT INSTITUTE (May 2013), https://www.irmi.com/articles/expert-commentary/indemnity-and-additional-insured-requirements ("Because an indemnity agreement is only as good as the indemnitor's financial ability to pay for a loss, a financially defunct indemnitor provides no meaningful protection to the indemnitee.").

[8] *See generally State Insurance Regulation*, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 4-5 (2011), https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf

Insurance Requirements

Because the indemnitor's ability to pay is critical to an effective transfer of risk, indemnity agreements are often accompanied by provisions requiring indemnitors to obtain insurance coverage with specified minimum limits applicable to the indemnity obligation. Assuming the indemnitor's insurance policies are structured to provide coverage for "insured contracts" or otherwise contemplate coverage for indemnity obligations (an exception to exclusions for contractually-assumed liabilities), the policies should provide coverage subject to their terms for a claim by the indemnitee against the indemnitor pursuant to the indemnity obligation.

Well-drafted contracts commonly contain enhanced insurance requirements, which impose upon the indemnitor the obligation to maintain specified insurance coupled with an obligation to name the indemnitee as an additional insured on the required policies. This type of insurance provision better protects the indemnitee, providing two avenues for access to the indemnitor's policies (subject to policy terms): (1) a claim against the indemnitor pursuant to the indemnity obligation; and (2) as an additional insured, a direct claim against the insurer for policy benefits.[9]

TAKEAWAY. An insurance clause that requires the indemnitor *to name the indemnitee as an additional insured* on the required policies provides greater protection to the indemnitee, including status as an additional insured vis-à-vis the indemnitor's insurer. The indemnitee should also request a certificate of insurance confirming its status as an additional insured.

Extra-Contractual Limitations on Insurance Coverage

The insurance coverage available to an additional insured under an indemnitor's policy may be subject to limitations not expressed in the policy itself if the policy clearly manifests an intent to incorporate the extrinsic provisions. As illustrated by the cases discussed below, however, judicial application of the rule has generated significant uncertainty for additional insureds.

Evanston v. ATOFINA

In *Evanston v. ATOFINA*, the Texas Supreme Court "examine[d] the interplay between a contractual indemnity provision and a service contract's requirement to name an additional insured."[10] ATOFINA Petrochemicals, Inc. ("ATOFINA") entered into a service contract with Triple S Industrial Corporation ("Triple S") to perform maintenance and construction work at ATOFINA's Port Arthur refinery.[11] In the service agreement, Triple S agreed to indemnify ATOFINA against personal injuries and property losses sustained during the performance of the contract unless ATOFINA's own negligence caused or contributed to the injury or loss.[12] Triple S agreed to maintain primary and excess (or umbrella) general liability insurance, each with at least $500,000 in limits, and to provide certificates of insurance to confirm that the required policies showed ATOFINA as an additional insured.[13] In compliance with these provisions, Triple S maintained a $1 million primary general liability policy

[9] *See* Mark Bell, *Indemnity and Additional Insured Requirements: Why Am I Demanding Them, Why Do Others Want Them, and What Does It All Mean?*, INTERNATIONAL RISK MANAGEMENT INSTITUTE (May 2013), https://www.irmi.com/articles/expert-commentary/indemnity-and-additional-insured-requirements (noting that insurance policies can secure the indemnitor's obligations using either of "two complementary and non-mutually exclusive policy mechanisms"—contractual liability insurance and additional insured coverage)..

[10] *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 662 (Tex. 2008).

[11] *Id.*

[12] *See id.*

[13] *See id.* at 662-63.

and a $9 million umbrella policy issued by Evanston Insurance Company ("Evanston").[14]

A Triple S employee working at the ATOFINA refinery fell through the corroded roof of a storage tank containing fuel oil and drowned.[15] His survivors sued both Triple S and ATOFINA for wrongful death.[16] ATOFINA sought coverage as an additional insured on the Triple S policies. After the primary insurer tendered its limits, Evanston denied coverage for the claim under its umbrella policy and coverage litigation ensued.

At the outset of its analysis, the court noted that its decision regarding Evanston's obligations was based on the terms of the umbrella policy, not the scope of the indemnity clause in the service agreement.[17] Evanston argued that it had no obligation to provide coverage to ATOFINA because the underlying service agreement did not require Triple S to indemnify ATOFINA for claims alleging that ATOFINA was negligent.[18] The court recognized that this argument conflated Triple S's indemnity obligation to ATOFINA with the insurer's direct obligations to ATOFINA as an (additional) insured under the policy.[19]

The court first examined ATOFINA's insured status, focusing on a provision that included as an insured:

> 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.[20]

Based on this provision, the court determined that ATOFINA had additional-insured status under the policy without regard to whether its negligence was the sole cause of the injury.[21] The injury respected operations performed by Triple S because the decedent was employed by Triple S and at the ATOFINA facility for purposes of Triple S's operations.[22] Based on the policy language, therefore, the Evanston policy provided direct coverage to ATOFINA even if the injury was caused by ATOFINA's sole negligence.[23]

In re Deepwater Horizon

In 2015, the Texas Supreme Court issued its opinion in the *Deepwater Horizon* coverage litigation in response to questions certified by the Fifth Circuit in 2013.[24] In an 8-1 opinion, the Texas high court limited the scope of additional-insured coverage to liability assumed by the named insured in a third-party contract based on the provisions of the extrinsic contract.[25]

Transocean Holdings, Inc. ("Transocean") owned the Deepwater Horizon, a semi-submersible, mobile offshore drilling unit.[26] Transocean contracted with oil-field developer BP PLC ("BP") to operate the rig for the purpose of

[14] *Id.* at 663.
[15] *Id.*
[16] *Id.*
[17] *See id.* at 664 ("Instead of looking, as the court of appeals did, to the indemnity agreement in the service contract to determine the scope of any coverage, we base our decision on the terms of the umbrella insurance policy itself.").
[18] *See id.* at 663.
[19] *See id.* at 662-66.
[20] *Id.* at 664.
[21] *See id.* at 667.
[22] *See id.*
[23] *See id.*
[24] *In re Deepwater Horizon*, 470 S.W.3d 452, 455 (Tex. 2015).
[25] *Id.* at 455-56.
[26] *See id.* at 456.

conducting exploratory drilling activities in the Gulf of Mexico. After an onboard explosion in April 2010, the rig caught fire, burned for more than a day, then fully submerged, killing eleven crew members and spewing millions of gallons of oil into the Gulf of Mexico.[27]

Pursuant to the drilling contract, Transocean assumed responsibility for and indemnified BP against all liability "for pollution or contamination, including control and removal thereof, *originating on or above the surface* of the land or water, from spills, leaks, or discharges of" various pollutants.[28] BP assumed responsibility for and indemnified Transocean against all other pollution risk.[29] The contract required Transocean to maintain specified minimum insurance coverages for the benefit of BP.[30] As a supermajor oil company, BP self-insured its risks, since liability insurance for an operation of such magnitude would be cost prohibitive.[31] The extent to which Transocean's policies, with combined limits of $750M, covered BP's pollution-related liabilities arising from the Deepwater Horizon explosion was the issue before the court.[32]

When BP sought coverage under Transocean's policies for claims arising from the catastrophe, the insurers disputed that BP was entitled to additional-insured coverage for subsurface pollution-related liabilities it assumed in the drilling contract and litigation ensued.[33] In an effort to safeguard the limited insurance proceeds for its own exposures, Transocean intervened and aligned with its insurers. Responding to certified questions from the Fifth Circuit, the Texas Supreme Court answered two questions:

> 1. Whether [*ATOFINA*] 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 [d]rilling [c]ontract are "separate and independent"?
>
> 2. Whether the doctrine of contra proferentem applies to the interpretation of the insurance coverage provision of the [d]rilling [c]ontract under [*ATOFINA*] given the facts of [the] case?[34]

In its opinion, the court focused on "the interplay between the subject insurance policies and provisions in [the] drilling contract giving rise to Transocean's obligation to name BP as an additional insured," ruling Transocean's policies effectively limited the scope of additional insured coverage afforded BP to only those liabilities assumed by Transocean in the drilling contract.[35] The court explained:

> We do not require "magic" words to incorporate a restriction from another contract into an insurance policy; rather, it is enough that the policy clearly manifests and intent to include the contract as part of the policy.[36]

The court began its analysis with the policies, citing *ATOFINA* for the proposition that "insurance policies can

[27] *Id.*
[28] *In re Deepwater Horizon*, 728 F.3d 491, 496 n.6 (5th Cir. 2013).
[29] *In re Deepwater Horizon*, 470 S.W.3d at 456.
[30] *See id.* at 465.
[31] *Id.* at 457 n.8.
[32] *See id.* at 455-56.
[33] *See id.* at 458-59.
[34] *Id.* at 455 (citations omitted).
[35] *Id.* at 455-56.
[36] *Id.* at 460.

incorporate limitations on coverage encompassed in extrinsic documents by reference to those documents."[37] Noting that BP was not named in any of the policies and the absence of any certificate of insurance identifying BP as an additional insured, the court concluded that BP would have no coverage at all "if the coverage inquiry were constrained to the language in the insurance policy[.]"[38] Rather, the policies conferred additional-insured coverage based on "(1) the existence of an oral or written contract, (2) pertaining to the business of an 'Insured', and (3) under which an 'Insured' assumes the tort-liability of another party and is 'obliged' to provide insurance to such other party."[39]

Since Transocean had no liability for subsurface pollution, the court concluded, it had no obligation to name BP as an additional insured for purposes of those exposures.[40] In the absence of such an obligation, the policies did not extend additional insured coverage to BP for its liability in connection with the Deepwater Horizon explosion.[41]

Notably, the court distinguished *ATOFINA* on two primary grounds:

1. ATOFINA had a certificate of insurance confirming its status as an additional insured, while BP did not—"there was no need to look at the underlying service contract to ascertain ATOFINA's status as '[a] person or organization for whom you have agreed to provide insurance as is afforded by this policy'";[42] and

2. unlike the Evanston policy analyzed in *ATOFINA*, the Transocean policies tied the additional-insured coverage to the existence of a contract imposing on Transocean specific indemnity and insurance obligations, thereby requiring the court to analyze the contract to determine BP's additional-insured status.[43]

In response to *Deepwater Horizon,* standardized additional-insured endorsements may now contain the following language:

> If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you [the insured] are required by the contract or agreement to provide...
>
> If coverage provided to the additional insured is required by a contract or agreement, the most [the insurer] will pay on behalf of the additional insured is the amount of insurance:
>
> 1. Required by the contract or agreement; or
>
> 2. Available under the applicable Limits of Insurance shown in the Declarations; whichever is less.[44]

[37] *Id.* (citing *ATOFINA*, 256 S.W.3d at 667).
[38] *Id.* at 464.
[39] *Id.* at 458.
[40] *See id.* at 467.
[41] *See id.* at 467-68.
[42] *Id.* at 462. (quoting *ATOFINA*, 256 S.W.3d at 663).
[43] *See id.*
[44] *See* Scott P. Pence & Wm. Cary Wright, *Not All Additional Insured Endorsements Are Created Equal: Brief History of ISO's Additional Insured Endorsements and 2013 Changes*, UNDER CONSTRUCTION, Aug. 2013 (citing ISO Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization Form CG 20 10 04 13).

Ironshore Specialty Ins. Co. v. Aspen Underwriting

In the first substantive application of *In re Deepwater Horizon*, the Fifth Circuit decided a similar dispute regarding the scope of coverage available to an additional insured, holding in *Ironshore Specialty v. Aspen Underwriting* that the provisions of a drilling contract could be considered to sublimit the coverage available to an additional insured based on the drilling contract's minimum insurance requirements.[45]
Endeavor Energy Resources ("Endeavor") owned and operated an oil well in Martin, Texas, contracting with Basic Energy Services ("Basic") to perform various services in connection with operation of the well.[46] The master services agreement ("MSA") between Endeavor and Basic contained mutual indemnity provisions, according to which each entity undertook responsibility for claims brought by their own employees regardless of fault.[47] Both parties also agreed to obtain at least $5 million of insurance to cover indemnified claims.[48]

In 2010, a fire at the well killed two Basic employees and litigation ensued, triggering Basic's indemnity and insurance obligations.[49] Although the MSA only required $5 million in limits, Basic's general liability policies provided considerably more coverage—$51 million in total limits.[50] The policies contained no provisions limiting the coverage provided to additional insureds.[51] The policies defined "Insured" to include:

> any person or entity to whom [Basic] is obliged by a written "Insured Contract" entered into before any relevant "Occurrence" and/or "Claim" to provide insurance such as is afforded by this Policy but only with respect to . . . liability arising out of operations conducted by [Basic] or on its behalf[.][52]

Because the potential exposure for two fatalities was expected to exceed $5 million, Endeavor's excess insurer sued for a declaratory judgment that Basic's excess insurers were obligated to provide coverage up to the full limits of their policies absent an express provision in the policies that limited coverage for additional insureds to $5 million.[53] Basic's insurers argued that the policies "must be read 'in conjunction' with the MSA, including its insurance provision, and therefore that Endeavor's coverage is limited to $5 million."[54]

The Fifth Circuit began its *Erie* analysis by examining Basic's policies, noting that:

> Texas courts will not hesitate to award coverage beyond that contemplated by a service contract when the "terms of the . . . policy itself" do not impose the same limits as the service contract.[55]

Citing *Deepwater Horizon*, the court noted that an insurance policy can incorporate limitations on coverage set forth in extrinsic documents by reference to those documents—if the policy clearly manifests an intent to

---

[45] *Ironshore Specialty Ins. Co. v. Aspen Underwriting, Ltd.*, 788 F.3d 456, 457 (5th Cir. 2015).
[46] *Id.*
[47] *Id.* at 457-58.
[48] *See id.* at 458.
[49] *See id.* at 458-59.
[50] *See id.*
[51] *Id.* at 457.
[52] *Id.* at 458.
[53] *Id.* at 457.
[54] *Id.* at 460.
[55] *Id.* (quoting *ATOFINA*, 256 S.W.3d at 664).

incorporate the restriction.[56] Endeavor's own policies, for example, explicitly limited the coverage to "the minimum Limits of Insurance [Endeavor] agreed to procure in [a] written Insured Contract."[57]

Although Basic's policies did not contain such clear language, Basic's insurers argued that the general reference to an "Insured Contract" in the definition of "Insured" was sufficient to incorporate into the policies the limitations set forth in the MSA's insurance provision.[58] Based on the Texas Supreme Court's analysis of similar policy language in *Deepwater Horizon*, the Fifth Circuit determined that the $5 million limitation on Basic's obligation to provide insurance capped the additional-insured coverage available to Endeavor at $5 million.[59]

Exxon Mobil v. The Insurance Company of the State of Pennsylvania

In February 2019, the Texas Supreme Court again considered whether an insurer's rights or obligations under an insurance policy can be limited by reference to extrinsic documents.[60] In *Exxon Mobil v. ICSOP*, the court analyzed an endorsement waiving the insurer's subrogation rights against a third party, deciding that the express terms of the endorsement permitted the court to consider the third-party contract "*only* to identify who may claim the waiver and at what operations[.]"[61] Because the policy did not explicitly refer to the extrinsic contract for limitations on the named insured's obligation to provide a waiver, the court declined to consider those limitations in the contract and enforced the waiver of subrogation.

TAKEAWAY. Standard waiver-of-subrogation clauses that do not clearly and expressly refer to limitations on the named insured's obligation to provide a waiver likely apply without limitation, precluding the insurer's ability to pursue subrogation claims against the third party.

Exxon Mobil Corporation ("Exxon") engaged Savage Refinery Services ("Savage") to perform work at Exxon's Baytown refinery pursuant to a standard procurement contract.[62] Two of Savage's employees were injured by an accidental discharge of hot water while they were working at the refinery.[63] Savage's workers compensation insurer, the Insurance Company of the State of Pennsylvania ("ICSOP"), paid compensation benefits to both workers, both of whom also sought tort damages from Exxon.[64] In the litigation that ensued, Exxon sought a declaration against ICSOP that the insurer had waived all subrogation rights against Exxon via an endorsement to the workers' compensation policy.[65]

The standard-form subrogation waiver in the policy specified three conditions for application of the waiver:

> We [the Carrier] have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization

[56] *See id.* at 460.
[57] *Id.* (citation and internal quotations marks omitted). Notably, the opinion does not make clear whether this limitation in the Endeavor policy applied to additional insured coverage, to coverage available to Endeavor for its own liability as an indemnitor under an "Insured Contract," or to both.
[58] *See id.* (noting that a "mere reference to an outside contract for the purpose of defining a term in an insurance policy is not necessarily sufficient to incorporate that contract's terms").
[59] *See id.* at 461-63.
[60] *See Exxon Mobil Corp. v. Insurance Co. of State of Pennsylvania*, 568 S.W.3d 650, 652 (Tex. 2019).
[61] *Id.* (emphasis added).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See id.*

> [1] named in the Schedule, but this waiver applies only with respect to [2] bodily injury [3] arising out of the operations described in the Schedule *where [Savage is] required by a written contract* to obtain this waiver from us.[66]

In the "Schedule," the insurer agreed to a blanket waiver of subrogation applicable "when the insured has contractually agreed to provide it *to a particular party* . . . if the insured has agreed to provide the waiver *for Texas operations causally connected to the injuries*[.]"[67]

In the procurement contract, Exxon and Savage each agreed to indemnify the other for personal-injury claims resulting from their *own* negligence or misconduct; neither assumed liability for the *other's* tortious conduct.[68] In a separate provision, Savage agreed to provide certain types of insurance with specified minimum limits *and* to obtain waivers of the insurers' subrogation and contribution rights against Exxon *to the extent Savage assumed liabilities.*[69]

In the coverage litigation, Exxon and ICSOP agreed that if the injuries were caused by Exxon's negligence, Savage had no obligation to indemnify Exxon.[70] The issue in dispute was whether this limitation on Savage's indemnity obligation also limited its obligation to obtain a subrogation waiver.[71] According to ICSOP, the policy's reference to a written contract required the court to examine the contract for purposes of determining whether Savage is "required by a written contract" to obtain a waiver of ICSOP's subrogation rights against Exxon.[72] Because the agreement to provide a waiver applied only to the extent Savage assumed liability for the injuries, ICSOP argued, the waiver was limited to the scope of Savage's indemnity obligations in the service contract.[73] If Savage did not assume liability for the injuries, it did not agree to provide a waiver and the endorsement would not apply.[74] Exxon argued primarily that the policy permitted examination of the service contract only to determine "*who* [was] entitled to a subrogation waiver"—but that no contractual limitations on the obligation to provide the waiver could be considered.[75]

Ultimately, the court agreed with Exxon, concluding that the subrogation-waiver endorsement "[did] not refer to, and thus [did] not incorporate, any limits on coverage" that the extrinsic contract may have imposed on the waiver.[76] The court stated its holding as follows:

> [W]e hold that the standard subrogation-waiver endorsement directs us to consult the [extrinsic contract] to determine whether Savage was "required by a written contract" to obtain a subrogation waiver for Exxon and to determine whether that obligation applies to the operations described in the Schedule, but only to that extent.[77]

As such, the court held that ICSOP waived its subrogation rights against Exxon, protecting Exxon from claims

[66] *Id.* at 652-53.
[67] *Id.* at 653 (emphasis added).
[68] See *id.* at 653-54.
[69] *See id.*
[70] *See id.* at 654.
[71] *See id.*
[72] *See id.* at 659.
[73] *See id.* at 654.
[74] *See id.*
[75] *Id.*
[76] *See id.* at 657.
[77] *Id.*

by the insurer to recoup sums paid to the injured workers under Savage's workers' compensation policies.

Anti-Indemnity Statutes

In additional to contractual constraints on indemnity obligations and applicable insurance policies, the ability of contracting parties to shift their own liability to others may be curtailed by statute. Under the Texas Oilfield Anti-Indemnity Statute, indemnity provisions in agreements pertaining to wells and mines that purport to reallocate liability for the contracting party's own "sole or concurrent" negligence are void and unenforceable—unless the indemnity obligation is supported by liability insurance furnished by the indemnitor subject to the requirements of the statute.[78] The Texas Transportation Anti-Indemnity Act protects "motor carriers" from certain types of indemnity obligations.[79]

The Texas Anti-Indemnity Statute reaches further, addressing indemnity agreements, insurance requirements, and insurance policies. Chapter 151 of the Texas Insurance Code is an anti-indemnity statute pertaining to regulation of "Consolidated Insurance Programs,"[80] which prohibits indemnity for the negligence of the party receiving indemnification.[81] Applicable to construction projects that began on or after January 1, 2012, the statute applies broadly to any construction contract that requires a party to provide liability insurance[82] and limits the scope of enforceable indemnification clauses in construction contracts.[83]

The provision, set forth in Section 151.102, states:

> Except as provided by Section 151.103 [relating to claims for bodily injury or death to an employee of the party providing indemnification], a provision in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party, against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier.[84]

The statute also voids contractual insurance mandates *and* insurance policy provisions that purport to require or extend coverage for the indemnitee's own negligence.[85] Pursuant to Section 151.104, any provision requiring the purchase of additional insured coverage and any insurance policy provision or endorsement providing additional insured coverage is void and unenforceable to the extent it requires *or provides* coverage the scope

---

[78] Tex. Civ. Prac. & Rem. Code §§ 127.001-127.007.
[79] *See* Tex. Transp. Code § 623.0155.
[80] *See* Tex. Ins. Code §§ 151.101-*151.105.*
[81] Patrick J. Wielinski & Rene R. Pinson, *Texas Insurance Code Chapter 151 and 1811: New Restrictions on Indemnity, Additional Insured Coverage and Certificates of Insurance in Texas*, DALLAS BAR ASSOCIATION 4 (Jan. 5, 2012), http://dallasconstructionlaw.org/wp-content/uploads/2016/04/DBA-Anti-Indemnity-1-5-12.pdf.
[82] *See id.*
[83] *See* Tex. Ins. Code § 151.102; *Maxim Crane Works, L.P. v. Berkel & Co. Contractors, Inc.*, No. 14-15-00614-CV, 2016 WL 4198138, at *2 (Tex. App.—Houston [14th Dist.] Aug. 9, 2016, pet. denied) (mem. op.).
[84] Tex. Ins. Code § 151.102.
[85] Patrick J. Wielinski & Rene R. Pinson, *Texas Insurance Code Chapter 151 and 1811: New Restrictions on Indemnity, Additional Insured Coverage and Certificates of Insurance in Texas*, DALLAS BAR ASSOCIATION 7 (Jan. 5, 2012), http://dallasconstructionlaw.org/wp-content/uploads/2016/04/DBA-Anti-Indemnity-1-5-12.pdf.

of which is prohibited under Chapter 151 with respect to indemnification or hold-harmless agreements.[86]

Responding to this legislative mandate, additional insured endorsements now state that they provide coverage "to the extent permitted by law."[87] This update apparently seeks to incorporate the risk transfer limitations set forth in Chapter 151 and similar statutes without the necessity of state-specific endorsements.

Implications for Policyholders

The key takeaway from *Deepwater Horizon* and its progeny has not changed since the Fifth Circuit's original opinion in 2013.[88] If the named insured intends to limit additional-insured coverage to the scope of the indemnity or insurance obligations set forth in a third-party contract, the policy should provide clear direction to that effect. While *Deepwater Horizon* appeared to permit consideration of contracts extrinsic to the policy if the policy so much as mentions an outside contract and *Exxon Mobil* limited the reach of the extrinsic analysis, the line has not been clearly drawn. Relying on an analysis of extrinsic contracts opens the door to significant uncertainty. Imagine a situation in which the policy and the outside contract appear to be in conflict—what then?

> TAKEAWAY. A named insured seeking to limit the scope of coverage accessible to an additional insured should express that limitation with extraordinary clarity—in both the third-party contract and in the policies, especially the policies.

To eliminate the risk of an unintended outcome, named insureds should have no difficulty negotiating restrictive additional insured provisions with their insurers, since the interests of both the named insured and its insurers are served by clearly delineating the scope of additional insured coverage. Additional insureds must focus on the language of the service or vendor contract to avoid uncertainty, keeping in mind that limitations in the contract may be read into the insurance policies.

4823-6160-4503, v. 1

[86] *See* Tex. Ins. Code Ann. § 151.104.

[87] Scott P. Pence & Wm. Cary Wright, *Not All Additional Insured Endorsements are Created Equal: Brief History of ISO's Additional Insured Endorsements and 2013 Changes*, *UNDER CONSTRUCTION*, Aug. 2013 (citing ISO Additional Insured Endorsement Form CG 20 10 04 13).

[88] *See generally In re Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013), *opinion withdrawn on reh'g*, 728 F.3d 491 (5th Cir. 2013), *certified question answered*, 470 S.W.3d 452 (Tex. 2015).