In re Deepwater Horizon: A Year and a Half Later

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When the Supreme Court of Texas delivered its opinion in *In re Deepwater Horizon*[1] on February 13, 2015, commentators across the country pondered the impact of the opinion in the insurance industry. Many wondered whether the case would cause a sea change in the manner courts – at least Texas courts – interpret insurance policies. This article examines the impact *In re Deepwater Horizon* has had on insurance law in Texas. At the present time, results are mixed on *Deepwater Horizon's* impact.

As a reminder, *In re Deepwater Horizon* raised the issue of what language is required to incorporate the limitations in an underlying contract referenced in an insurance policy.[2] The insurance policy at issue named BP as an additional insured under the policy; however, the parties disputed whether BP's coverage under the policy was determined strictly by the policy or whether it incorporated limitations in the underlying drilling contract.[3] The insurance policies did not contain any explicit language limiting BP's coverage as an additional insured.[4] The Texas Supreme Court held that BP's coverage under the policy was, in fact, defined by the drilling contract.[5] The Court reasoned that there is no need for "magic words to incorporate a restriction from another contract into an insurance policy."[6] Since the drilling contract simply required BP to be named an additional insured "for liabilities assumed" under the contract, the Court reasoned that BP's coverage under the insurance policy was also limited to the items listed in the drilling contract.[7] There was a concern by many commentators that the Court's ruling in *In re Deepwater Horizon* would lead to the overinclusion of limitations in outside contracts in insurance disputes.

Liberty Surplus Insurance Corporation v. Exxon Mobil Corporation suggests that courts have not interpreted *In re Deepwater Horizon* as requiring the wholesale adoption of limitations in underlying contracts.[8] In *Liberty Surplus Ins. Corp.*, the court rejected the insurers' argument that the additional insured's insurance coverage was limited by the underlying contract.[9] In the underlying contract, the parties agreed that the additional insures would be insured "in connection with [the insured's] performance of Services."[10] The court reasoned that there was explicit language in the insurance policy stating that the coverage extended "only with respect to liability arising out of [the insured's] operations."[11] The court emphasized that mentioning an underlying contract is insufficient to incorporate the entirety of the underlying contract.[12] Rather, "[t]he policy instead must clearly manifest the intent to include the extrinsic document as part of the policy."[13]

AS OF YET, THE LONG-TERM IMPACT OF DEEPWATER HORIZON STILL REMAINS TO BE SEEN

Yet, some courts have extended the reach of *In re Deepwater Horizon*. For example, in *Ironshore Specialty Insurance Company v. Aspen Underwriting, Limited.*, the Fifth Circuit was confronted with a coverage dispute similar to *In re Deepwater Horizon*. In *Ironshore Specialty Insurance Company*, two companies—Endeavor and Basic— agreed to a master services agreement (MSA) whereby each agreed to be responsible for liability arising from claims brought by their respective employees and to obtain insurance coverage for at least $5 million.[14] The excess insurer for Endeavor sued the excess insurer for Basic, alleging that Basic's policy was not limited to $5 million.[15] The insurance policy merely defined an insured as follows: "any person or entity to whom [the party] 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. . . ."[16] Although the Court expressed doubts as to whether the policy's brief reference to the MSA was sufficient to incorporate the limitations in the MSA, the Court ultimately held that *In re Deepwater Horizon* compelled it to hold that the limitations in the MSA were incorporated into the policy.[17]

Certainly, all courts have not interpreted the decision as making a significant change in the interpretation of insurance law. For instance, in *Tetra Technologies, Inc. v. Vertex Services., LLC*, a party argued that the court should reconsider its prior interpretation of

insurance coverage in light of *In re Deepwater Horizon*.[18] The Court held that it did "not read the *Deepwater Horizon* opinion as modifying or somehow rendering incorrect the methodology employed by this Court in its previous Order."[19]

As for those cases mirroring the facts of *In re Deepwater Horizon*, courts have thus far strictly adhered to the guidelines of the Supreme Court's decision.[20] In *Miramar Petroleum, Inc. v. First Liberty Insurance Corporation*, the court was faced with the question of whether an underlying drilling contract limited a party's insurance obligations. [21] Miramar contracted with Nicklos, and in the contract, Nicklos agreed to maintain insurance coverage for its liabilities under the contract. [22] Similar to *In re Deepwater Horizon*, the insurance policy granted the party additional insured status "*only to the extent required by a written agreement*." [23] The court therefore held that the coverage under the policies was limited to the obligations the parties agreed to cover in the underlying contract. [24]

As the above cases demonstrate, *In re Deepwater Horizon* has had an impact, albeit perhaps not the sea change some members of the legal field worried it may have (at least not yet). However, a few principles are clear from *In re Deepwater Horizon* and its progeny. When incorporating an underlying contract into an insurance policy, parties should include explicit language directing the court the extent to which the underlying contract should be incorporated. Absent such explicit language, parties lose control over the extent of coverage under the policy.

1 470 S.W.3d 452 (Tex. 2015).
2 *Id.* at 458.
3 *Id.* at 458–59.
4 *Id.* at 460.
5 *Id.* at 464–65.
6 *Id.* at 460.
7 *Id.* at 465.
8 483 S.W. 3d 96 (Tex. App.[14th Dist.] 2015)
9 *Id.* at 101–02.
10 *Id.* at 101.
11 *Id.* at 102.
12 *Id.*
13 *Id.* at 102.
14 788 F.3d 456, 457 (5th Cir. 2015)
15 *Id.*
16 *Id.*
17 *Id.*
18 2015 WL 1810453, 5 (E.D. La. April 20, 2015).
19 *Id.*
20 *Miramar Petroleum, Inc. v. First Liberty Ins. Co.*, 2015 WL 7301096 (S.D. Tex. Nov. 18, 2015).
21 *Id.* at 3.
22 *Id.* at 1.
23 *Id.*
24 *Id.*