

Policyholder Legal Update: Issues and Trends in the Law on Insurance and Indemnity

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Overview

- Introduction
- Attorney's-Eye View
- Policy Interpretation as Coverage Counsel
- Additional Insurance Post-*Deepwater*
- Changes to Texas's Claims-Handling Rules
- Takeaways

Attorney's-Eye View



The Insurance Lawyer

Attorney's-Eye View

“Insurance is different.”

-- *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 447 (Del. 1996).

The Bermuda Shorts Form

The Bermuda Shorts Form

THE BERMUDA SHORTS FORM

INSURING AGREEMENTS:

1. COVERAGE -

The Company (as stated in Item 9 of the Declarations) hereby agrees, subject to the limitations, terms and conditions contained herein, to pay those sums which the Insured shall be obligated to pay as damages by reason of the liability arising out of the hazards covered by and as more fully defined in the Followed Policy (as stated in Item 4. a) of the Declarations and hereinafter referred to as "Followed Policy"); provided always however, that this Policy shall not apply until the Underlying Policy(ies) (as set forth in Section I of Endorsement No. 1 'Schedule of Underlying Policy(ies)' to this Policy and hereinafter referred to as "Underlying Policy(ies)") have paid, have been held liable to pay, or the Insured has actually paid, the full amount of their respective Limit(s) of Liability in accordance with Insuring Agreement 2 for any loss(es) covered by this Policy.

The Bermuda Shorts Form



Attorney's-Eye View

A Common Market View

Attorney's-Eye View

A Common Market View

- Focus on Categories of Insurance Coverage.

Attorney's-Eye View

A Common Market View

- Focus on Categories of Insurance Coverage.
- Read Policy Provisions as They Are Understood in the Industry.

Attorney's-Eye View

A Common Market View

- Focus on Categories of Insurance Coverage.
- Read Policy Provisions as They Are Understood in the Industry.
- Evaluate Coverage in Terms of the Insured's Business.

Attorney's-Eye View

The Law's General View

Attorney's-Eye View

The Law's General View

- “[W]e must give the policy’s words their plain meaning, without inserting additional provisions into the contract.”
 - *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008).

Attorney's-Eye View

The Law's General View

- “[W]e must give the policy’s words their plain meaning, without inserting additional provisions into the contract.”
 - *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008).
- “[T]he language of this policy ultimately dictates how the policy operates, not the label the parties affix to it”
 - *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113 (Tex. 2015) (rejecting insurer’s arguments based on industry custom and the insured’s business).

Attorney's-Eye View

In short, . . .

The Words Matter.

Attorney's-Eye View

In short, . . .

The Words Matter.

“Most of the disputes in the world arise from words.”

- ▣ *Morgan v. Jones* [1773] Lofft 160, 176; 98 All E.R. 587, 596.

Policy Interpretation As Coverage Counsel

Policy Interpretation As Coverage Counsel



Policy Interpretation as Coverage Counsel

- “The objective of an insurance policy is to insure; courts should not construe policies otherwise unless the language clearly requires it.”
 - *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex. App.—Corpus Christi 1989, writ denied).

- “The purpose of an insurance company is to indemnify its insureds.”
 - *Am. Home Assurance Co. v. Unauthorized Practice of Law Comm.*, 121 S.W.3d 831, 839 (Tex. App.—Eastland 2003, pet. filed), *aff’d in part as modified, rev’d in part*, 261 S.W.3d 24 (Tex. 2008).

Policy Interpretation As Coverage Counsel

B. This Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss:

Problem

. . .

Policy

4) lack of the following services:

Language

a) incoming electricity, fuel, water, gas, steam or refrigerant;

b) outgoing sewerage;

c) incoming or outgoing voice, data or video,

all when caused by an event off the insured location, except as provided in the SERVICE INTERRUPTION coverages of this Policy. But, if the lack of such a service directly causes insured physical damage on the insured location, then only that resulting damage is insured.

Policy Interpretation As Coverage Counsel

Why?

B. This Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss:

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4) lack of the following services:

a) incoming electricity, fuel, water, gas, steam or refrigerant;

b) outgoing sewerage;

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Policy Interpretation As Coverage Counsel

Why?

**Insured is
a phone
company.**

B. This Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss:

. . .

4) lack of the following services:

- a) incoming electricity, fuel, water, gas, steam or refrigerant;
- b) outgoing sewerage;
- c) incoming or outgoing voice, data or video,

all when caused by an event off the insured location, except as provided in the SERVICE INTERRUPTION coverages of this Policy. But, if the lack of such a service directly causes insured physical damage on the insured location, then only that resulting damage is insured.

Policy Interpretation As Coverage Counsel

- This policy language:

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Appeared in a CGL policy for an airport

Policy Interpretation As Coverage Counsel

- This policy language:

“This insurance does not apply to [b]odily injury or property damage arising out of the conduct of or participation in, or preparation for, any parachuting activities.”

Appeared in a CGL policy for an airport
... that operated a skydiving business.

- *U.S. Specialty Ins. Co. v. Sussex Airport, Inc.*, No. 15-5494 (D.N.J. May 9, 2016).

Policy Interpretation As Coverage Counsel

- This policy language:

“This insurance does not apply to any claim arising from practicing for or participating in any event of a sporting or athletic nature.”

appeared in a CGL Policy --

Policy Interpretation As Coverage Counsel

- This policy language:

“This insurance does not apply to any claim arising from practicing for or participating in any event of a sporting or athletic nature.”

appeared in a CGL Policy --
for the organizers of a rodeo.

- *Volusia County Cattlemen’s Association, Inc. v. Western World Ins. Co.*, Case No. 6:15-cv-1239 (M.D. Fla. Oct. 27, 2016).

Policy Interpretation As Coverage Counsel

CORPORATE KIDNAP AND RANSOM/EXTORTION INSURANCE DECLARATIONS

Item II. Limits of Insurance

**Anywhere
in the
Policy**

A. Covered Loss A: \$ 3,000,000 each loss;	Ransom Monies: \$ Not applicable each annual aggregate
B. Covered Loss B: \$ 3,000,000 each loss;	In-transit/Delivery: \$ Not applicable each annual aggregate
C. Covered Loss C: \$ 3,000,000 each loss;	Expenses: \$ Not applicable each annual aggregate
D. Covered Loss D: \$ Unlimited each loss;	Consultant Expenses: \$ Not applicable each annual aggregate
E. Covered Loss E: \$ 3,000,000 each loss;	Judgements, Settlements, and Defense Costs: \$ Not applicable each annual aggregate
F. Covered Loss F: \$ 100,000 each person;	Death or Dismemberment: \$ 1,000,000 each incident

Terms with Bad Incentives for the Insurer

23. Products - completed operations hazard:

■ ■ ■

b. Does not include bodily injury or property damage arising out of:

Definitions

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the loading or unloading of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification in this Coverage Part or in our manual of rules includes products or completed operations.

Terms with Bad Incentives for the Insurer

23. Products - completed operations hazard:

■ ■ ■

b. Does not include bodily injury or property damage arising out of:

Why?

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the loading or unloading of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification in this Coverage Part or in our manual of rules includes products or completed operations.

Policy Interpretation As Coverage Counsel

D. Exclusions

The insurance under this "PART TWO" does not cover:

4. Injury, damages, claim or suit for any consequence, whether direct or indirect, proximately or remotely, occasioned by or contributed to by Terrorism.

■ ■ ■

13. Terrorism means the use or threatened use of force or violence against persons or property, or commission of an act dangerous to human life or property, or commission of an act that interferes with or disrupts an electronic or communication system, undertaken by any person or group, whether or not acting on behalf of or in connection with any organization, government, power, authority or military force, when the effect is to intimidate or coerce a government, the civilian population or any segment thereof, or to disrupt any segment of the economy.

Policy Interpretation As Coverage Counsel

“Use or threatened use of force or violence against persons or property . . . when the effect is to intimidate or coerce . . . the civilian population or any segment thereof, or to disrupt any segment of the economy.”

Terrorism?



Policy Interpretation As Coverage Counsel

“Use or threatened use of force or violence against persons or property . . . when the effect is to intimidate or coerce . . . the civilian population or any segment thereof, or to disrupt any segment of the economy.”

Terrorism?




Policy Interpretation As Coverage Counsel

- Insurer argued terrorism exclusion applied to claim by oil rig workers who were kidnapped for ransom, and injured by shooting in the process because the kidnappers:
 - (i) intimidated all of the vessel workers, who were a “segment of the population,” and
 - (ii) interrupted oil rig operations for several days, which was a “segment of the economy.”
- *Johnson v. PPI Tech. Services, L.P.*, CIV.A. 11-2773, 2013 WL 6665996, at *1 (E.D. La. Dec. 17, 2013) (rejecting insurer’s argument and holding insurer had a duty to defend)

Policy Interpretation As Coverage Counsel

Even a Margin Note

Policy Interpretation As Coverage Counsel


COMMONWEALTH
COMMONWEALTH INSURANCE COMPANY
(hereafter called the Company)
PO Box 49115 Bentall Tower Three, 595 Burrard Street, Suite 1500, Vancouver, BC, Canada V7X 1G4

DECLARATIONS

Policy Number: **US8747**

NAMED INSURED:

MAILING ADDRESS:

PERIOD OF INSURANCE: From: 2 January 2011
To: 2 July 2012

PREMIUM: \$ 119,448
TRIPRA: \$ 5,935
\$ 125,383

MINIMUM PREMIUM:

In consideration of the premium charged and subject to the terms, exclusions, limits and conditions of this Policy, not in conflict herewith, the minimum earned premium due to the Company is twenty-five percent (25%) of the total invoiced annual Policy premium, including any applicable taxes and surcharges, regardless of the actual term of this Policy.

However, if this Policy is cancelled by the Company prior to the expiration date, the earned premium shall be computed pro-rata and the terms and conditions of this minimum earned premium provision shall be null and void.

NOTIFICATION OF LOSS TO: Risk Placement Service, Dallas, TX

LOSS, IF ANY, IS PAYABLE TO: Insured or Order

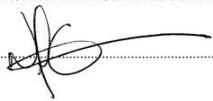
In consideration of the premium specified above (or specified in the form or endorsement(s) attached hereto) and of the conditions and other terms of this Policy and of the form or endorsement(s) attached hereto, the Company does insure the above Named Insured (hereafter called the "Insured") from inception date shown above to expiration date shown above, both dates at 12:01 A.M. Standard Time at the Location of the Insured property, to an amount not exceeding the limit(s) of liability or specified in the form or endorsement(s) attached hereto. To the extent that coverage in this Policy replaces coverage in other policies terminating Noon Standard Time at the inception date of this Policy, coverage under this Policy will not become effective until such other coverage has terminated.

THE CONDITIONS ATTACHED FORM PART OF THIS POLICY

This Policy is made and accepted subject to the foregoing provisions, and to such other provisions, stipulations, agreements or conditions as may be endorsed hereon or added hereto. No term or condition of this Policy shall be deemed to be waived by the Company in whole or in part unless the waiver is clearly expressed in writing signed by the person(s) authorized for that purpose by the Company. Neither the Company nor the Insured shall be deemed to have waived any term or condition of this Policy by any act relating to the appraisal of the amount of loss or to the delivery and completion of Proofs, or to the investigation or adjustment of any claim under the Policy.

IN WITNESS WHEREOF the Company through its representative(s) duly authorized by it for this purpose have executed and signed this Policy.

COMMONWEALTH INSURANCE COMPANY

Per 

(Rev. 06 March 2007) 17022

1

THIS POLICY CONTAINS A CLAUSE WHICH MAY LIMIT THE AMOUNT PAYABLE.

COMMONWEALTH INSURANCE COMPANY

Policy Interpretation As Coverage Counsel

Can Work Both Ways

This Sale and Purchase Agreement for Golden Eagle Refining and Marketing Assets (this “Agreement”) is entered into as of February 4, 2002 (the “Effective Date”) between Ultramar Inc., a Nevada corporation having a principal place of business in San Antonio, Texas (“Seller”), and **Tesoro Refining and Marketing Company**, a Delaware corporation having a principal place of business in San Antonio, Texas (“Purchaser”).

Policy Interpretation As Coverage Counsel

ASSIGNMENT OF NAMED INSURED ENDORSEMENT

It is hereby agreed that Item 1, **NAMED INSURED** and **ADDRESS** of the Declarations is deleted in its entirety and replaced with the following:

Item 1.	NAMED INSURED:	Tesoro Petroleum Corporation
	ADDRESS:	300 Concord Plaza Drive San Antonio, TX 78216-6999

Policy Interpretation As Coverage Counsel

- “The Tesoro Parties have not directed this court to any evidence that they relied on Chartis to know that Tesoro Refining *actually owned* the refinery in question and to therefore draft the policy to include Tesoro Refining”
- “The Tesoro Parties were unable to point to any basis for concluding that the injury in this case—the alleged mistake over which entity was covered—is ‘inherently undiscoverable.’ Indeed, the mistake is evident from the face of the document.”
 - *AIG Specialty Ins. Co. v. Tesoro Corp.*, 2016 WL 6078247, at *5 (5th Cir. Oct. 17, 2016) (rejecting insured’s third-party beneficiary and reformation claims).

Additional Insurance Post-Deepwater



Additional Insurance Post-*Deepwater*

Deepwater Horizon Refresher: The Policy

- “Insured” included “[a]ny person or entity to whom the ‘Insured’ is obliged by oral or written ‘Insured Contract’ . . . to provide insurance such as afforded by [the] Policy.”
- “Insured Contract” was defined as “any written or oral contract or agreement entered into by the ‘Insured’ . . . and pertaining to business under which the ‘Insured’ assumes the tort liability of another party to pay for ‘Bodily Injury’ [or] ‘Property Damage . . . to a ‘Third Party’ or organization.”
- “[W]here required by written contract, bid or work order, additional insureds are automatically included hereunder.”

Additional Insurance Post-*Deepwater*

Deepwater Horizon Refresher: The Contract

- Drilling Contract required Transocean name BP “as additional insureds in each of [Transocean’s] policies, except Workers’ Compensation, for liabilities assumed by [Transocean] under the terms of [the Drilling] Contract.”
- Under the Drilling Contract, Transocean assumed liability for above surface, and not sub-surface, pollution.
 - *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015).

Additional Insurance Post-*Deepwater*

Post-*Deepwater* Horizon: Mixed Messages

<i>Ironshore Specialty Ins. Co. v. Aspen Underwriting, Ltd.</i> , 788 F.3d 456 (5 th Cir. 2015)	Additional insureds are those “to whom insured is obliged by a written ‘Insured Contract’ [assuming tort liability] . . . but only with respect to: i) liability arising out of operations conducted by the insured or on its behalf.”	
<i>Liberty Surplus Ins. Corp. v. Exxon Mobil</i> , 483 S.W.3d 96 (Tex. Ct. App. —Houston [14 th Dist.] 2015, pet. filed)	Additional insureds are those “whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by you.”	
<i>L-Con, Inc. v. CRC Ins. Servs, Inc.</i> , 122 F.Supp.3d 627 (S.D. Tex. 2015).	Additional insureds are those “that you have agreed to and/or are required to by contract name as an additional insured . . . but only with respect to liability arising out of “your work” for that insured by or for you.”	

Additional Insurance Post-*Deepwater*

Post-*Deepwater* Horizon: Mixed Messages

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<i>Liberty Surplus Ins. Corp. v. Exxon Mobil</i> , 483 S.W.3d 96 (Tex. Ct. App. —Houston [14 th Dist.] 2015, pet. filed)	Additional insureds are those “whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by you.”	
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<i>L-Con, Inc. v. CRC Ins. Servs, Inc.</i> , 122 F.Supp.3d 627 (S.D. Tex. 2015).	Additional insureds are those “that you have agreed to and/or are required to by contract name as an additional insured . . . but only with respect to liability arising out of “your work” for that insured by or for you.”	Policies “effectively direct” the court to consider the contract

Additional Insurance Post-*Deepwater*

Post-*Deepwater*. Example of Stronger Language

- Additional Insureds are: “any person or organization for whom you agreed in writing to provide liability insurance . . . only to coverage and minimum limits of insurance required by the written agreement.”
 - *Miramar Petroleum, Inc. v. The First Liberty Ins. Corp.*, 2015 WL 7301096 (S.D.Tex. 2015) (holding the policy did not provide additional insured coverage to Miramar for claim because breach of contract and negligence counterclaims by insured drilling company were not within liabilities assumed by drilling company under the contract).

Additional Insurance Post-*Deepwater*

Practical Lessons Post-*Deepwater*

As the potential Additional Insured:

- Expect that contracting parties' policies may limit additional insurance to liability you assume in the contract.
- Consider negotiating to be named an additional insured by endorsement or certificate of insurance to maximize access to contracting parties' coverage.
- Consider negotiating provision in the contract that you will have the same coverage as the named insured under required insurance without regard to other provisions in the contract.

Additional Insurance Post-*Deepwater*

Practical Lessons Post-*Deepwater*

As the Named Insured:

- Carefully consider impact of proposed policy language on additional insurance when purchasing policies.
- Check subrogation waiver language in proposed policies and impact of potential claims by your insurer on business relationships.
- Think carefully before agreeing to name contracting party as an additional insured by endorsement or certificate of insurance.

Changes to Texas's Claims-Handling Rules

- Changes to the Texas Prompt Payment Act for first-party claims from hurricane/wind/rainstorm are effective 9/1/17
 - What did not change:
 - Insurers' claims-handling deadlines, including:
 - 15 calendar days to acknowledge claim and request required materials
 - 15 business days after receiving loss materials to accept or deny the claim, or to notify the insured that it needs additional time up to 45 days
 - 60 calendar days to pay the claim after receiving information reasonably requested and required
 - Hurricane Harvey is a “weather-related catastrophe or major natural disaster,” which extends each of these deadlines by an additional 15 days
 - Insurers' liability for other bad faith actions in handling claims, such as misrepresenting the insurance policy
-

Changes to Texas's Claims-Handling Rules

■ What did change:

- Requirement of an additional notice to the insurer at least 60 days before filing an action under the act with details about the claim and damages
 - The insurer has 30 days from notice to request an opportunity to inspect the property and abate a lawsuit by the insured until it is “completed”
 - Suits by insureds during the 60-day period are subject to abatement, while suits by the insurers are subject to dismissal
 - Failure to give notice could result in loss of attorneys’ fee claim
- Calculation of the annual interest rate an insurer must pay for violation of the act, from a set 18% to a variable, simple interest currently at 10%
- Award of attorneys’ fees changed from “reasonable” to “reasonable and necessary,” including specific requirements for proving such fees
- Procedure allowing insurers to accept liability of their agents to prevent insureds from bringing a claim against the agents

Takeways

Takeways

1. Read the Policy.

Takeways

1. Read the Policy.
2. Read the Policy. Again.

Takeways

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2. Read the Policy. Again.
3. Loss Prevention Is Best, But Loss Mitigation Is the Next Best Thing.

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4. It (Usually) Doesn't Hurt to Ask.

Takeways

1. Read the Policy.
2. Read the Policy. Again.
3. Loss Prevention Is Best, But Loss Mitigation Is the Next Best Thing.
4. It (Usually) Doesn't Hurt to Ask.
5. Review New Policies When They Arrive.

Takeways

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2. Read the Policy. Again.
3. Loss Prevention Is Best, But Loss Mitigation Is the Next Best Thing.
4. It (Usually) Doesn't Hurt to Ask.
5. Review New Policies When They Arrive.
6. Additional Insured Status – Contracting and Claims.

Takeways

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2. Read the Policy. Again.
3. Loss Prevention Is Best, But Loss Mitigation Is the Next Best Thing.
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5. Review New Policies When They Arrive.
6. Additional Insured Status – Contracting and Claims.
7. Be Careful in Presenting a Claim.

Takeways

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7. Be Careful in Presenting a Claim.
8. Comply with the Policy – Coverage May Depend on It.

Takeways

1. Read the Policy.
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6. Additional Insured Status – Contracting and Claims.
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8. Comply with the Policy – Coverage May Depend on It.
9. Never Assume There Is No Coverage.

Takeways

1. Read the Policy.
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5. Review New Policies When They Arrive.
6. Additional Insured Status – Contracting and Claims.
7. Be Careful in Presenting a Claim.
8. Comply with the Policy – Coverage May Depend on It.
9. Never Assume There Is No Coverage.
10. When You Think There Is No Coverage, Look for Another Route.

Our Contacts



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Policyholder Legal Update

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PILLSBURY WINTHROP SHAW PITTMAN LLP

September 20, 2017