CONTRACTUAL LIABILITIES

Contracts

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Insuring Contracts

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Hold Harmless, Indemnity and Additional Insured Issues

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First Step of the Inquiry– Are the Indemnity and Insurance Provisions in the Contract Valid?

Indemnity Clauses in Contracts

- Indemnity agreements are essentially a promise by which one party (the indemnitor) agrees to defend, indemnify, or hold harmless another party (the indemnitee) for acts or omissions relating to the subject matter of the contract
- Sometimes the indemnitee calls on the indemnitor to promise indemnity even for the indemnitee's own negligence.
- Indemnitors typically complain about being asked to indemnify beyond their own fault, and the common law tends to narrowly construe the scope of indemnity agreements that are not based on fault.
- **Most state legislatures have also declared that certain types of indemnities not based on fault are against public policy and invalid.**

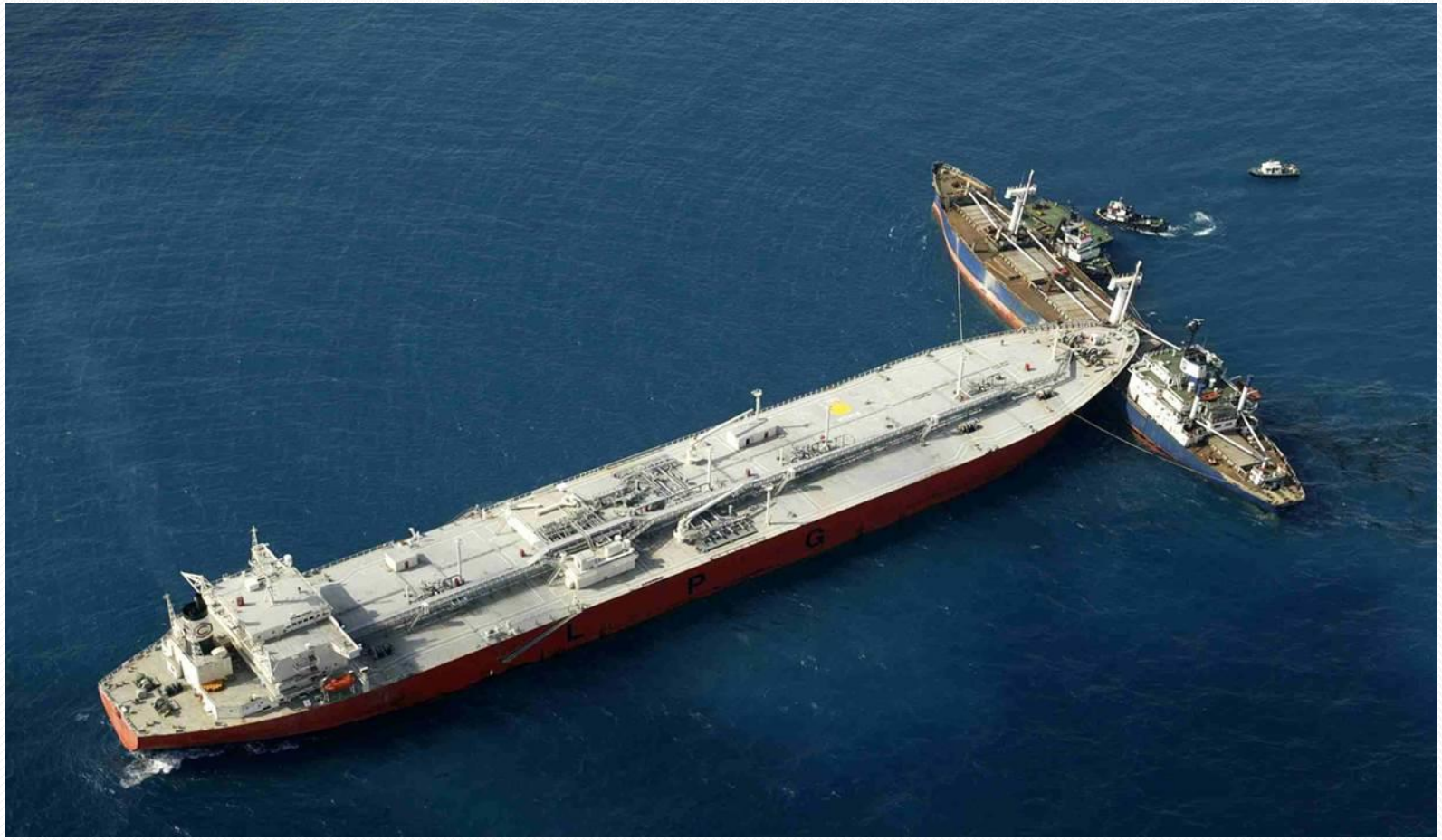
Additional Insured Status

- The battle not only concerns indemnity agreements; it also extends to the allowable scope of requiring one party to insure against the fault of another.
- Many **indemnitees also contractually require that they be named as an additional insured** on the indemnitor's CGL policy.

Indemnity Distinguished From Insurance

- Many of the same states that legislatively invalidate clauses purporting to indemnify another party for its own fault nevertheless allow agreements to procure insurance that effectively provide the same kind of protection.
- However, several state legislatures prohibit not only indemnity agreements covering an indemnitee's fault, but also agreements to provide insurance coverage for another party's fault.
- *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States, 8 No. 2 Journal of the American College of Construction Lawyers*

Anti-Indemnity Statutes



States with No Anti-Indemnity Statute

- **Eight states** that have no such statute, or have a provision that only applies in limited circumstances: Alabama, Maine, Nevada, North Dakota, Pennsylvania, Vermont, Wisconsin, and Wyoming
- However, courts will strictly interpret provisions which purport to indemnify an indemnitee for its own negligence.
- Therefore, the intent must be clearly and unambiguously expressed in a written agreement.

States with Sole Negligence Prohibitions

- **15 states** prohibit broad form indemnity agreements: Alaska, Arizona, Arkansas, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, New Jersey, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia all prohibit an indemnitee from requiring others to indemnify the indemnitee for its own *sole* negligence.
- However, such an indemnification agreement is valid so long as the indemnitor is at fault to any degree, even 1%.

States with Sole and Partial Negligence Prohibitions

- **Twenty-eight states** prohibit both broad and intermediate form indemnity agreements: Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Utah, and Washington all prohibit indemnity for both sole and partial negligence of the indemnitee.
- An indemnitor can be required to indemnify the indemnitee only to the extent of the indemnitor's own negligence.

Insurance Provisions

Additional Insured Coverage

- Another way parties can transfer risk is by agreeing that one party will name the other as an additional insured on its CGL policy.
- While indemnity agreements and agreements to procure insurance contain separate and distinct requirements, many states' anti-indemnity statutes also address insurance agreements.

Indemnity Distinguished from Insurance

- **States with Sole Negligence Prohibitions**
- Of the 15 states that prohibit broad form indemnity agreements for sole negligence, one (Arkansas) expressly provides that an agreement to name a party as an additional insured does not violate the statute.
- In addition, eight of these states include an insurance "savings" clause which clarifies that the statute does not affect the validity of an agreement to procure insurance (or in some states, certain specified types of insurance contracts).

- **States with Sole and Partial Negligence Prohibitions**
- Of the 28 states that prohibit indemnity for sole and partial negligence, eighteen of them include an insurance "savings" clause, establishing which types of insurance contracts are saved or not affected
- Of these 18, 10 states have express restrictions in their anti-indemnity statutes on clauses requiring a party to provide additional insured coverage for the AI's negligence.

Contractual Liability Insurance

- Another potential way to get around an anti-indemnity prohibition is to obtain **contractual liability coverage for an "insured contract," by which one party typically assumes another party's tort liability through a contractual indemnity provision.**
- Among the states that have anti-indemnity statutes, many include a **savings clause that allows an agreement to procure insurance such as contractual liability coverage.**
- Among the eight states that prohibit broad form but allow intermediate form indemnity provisions, these statutes also expressly allow agreements to procure insurance

Insurance and Public Policy

- Some courts have pointed out that anti-indemnity statutes are typically enacted because a state determines that requiring indemnity for a party's own negligence is against public policy.
- However, if an insurance company is the one paying for the resulting injuries or damage, the public policy argument is less compelling because both the insurer and the insureds have agreed to this risk transfer mechanism in return for a premium payment.

Duty to Defend Insurance Coverage

The Duty to Defend Coverage is Broader than the Duty to Indemnify

- Another issue that can arise when interpreting anti-indemnity statues is how they affect a party's contractual duty to defend.
- A few statutes specifically provide that an agreement to indemnify *or defend* another for its own negligence will be declared unenforceable as against public policy.
- However, most statutes do not specifically address the obligation to defend as part of an agreement to indemnify.
- Most courts seem to recognize that the duty to defend is separate and distinct from the duty to indemnify, with the duty to defend being broader.

- The duty to defend is broader than the duty to indemnify in three ways:
- (1) the duty to defend extends to every claim that “arguably” falls within the scope of coverage;
- (2) the duty to defend one claim may effectively create a duty to defend all claims; and
- (3) the duty to defend can exist regardless of the merits of the underlying claims.

- Because the duty to defend is distinct from an indemnification obligation, **it is possible that the duty to defend can survive even when an indemnity agreement is struck down as violating an anti-indemnity statute.**
- Courts in Massachusetts, for example, have explicitly made this determination
- Other courts have ruled to the contrary
- *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States, 8 No. 2 Journal of the American College of Construction Lawyers*

Examples of State Anti-Indemnity Statutes

Louisiana's Anti–Indemnity Act

- Louisiana's **Anti–Indemnity** Act arose out of a concern about the unequal bargaining power of oil companies and contractors and was an attempt to avoid adhesionary contracts under which contractors would have no choice but to agree to indemnify the oil company, lest they risk losing the contract.

- Subsection B of La. RS 9:2780 provides:
- **Any provision** contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, **is void and unenforceable** to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, **which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee**

- Such agreements are voided only to the extent that they purport to require indemnification and/or defense where there is negligence or fault on the part of the indemnitee; otherwise, they are enforceable just as any other legal covenant.
- **Fontenot v. Chevron U.S.A. Inc., 676 So.2d 557 (1996)**

- Louisiana's **Anti–Indemnity** Act Subsection G specifically addresses waiver of subrogation and additional named insured endorsements:
- G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

New Jersey Law

- The guiding principles in construing indemnification agreements are well-settled.
- Although such agreements are interpreted in accordance with the rules governing construction of contracts generally, **ambiguous clauses should be strictly construed against the indemnitee.**
- A contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is **expressed in unequivocal terms.**
- This general rule is fortified by **N.J.S.A. 2A:40A-1 and 2** which specifies that **an indemnification agreement in a construction contract purporting to hold harmless the indemnitee for losses or damages resulting from its "sole negligence" is a violation of public policy.**
- ***Leitao v. Damon G. Douglas Co., 301 N.J.Super. 187 (1997)***

New Jersey Law

- Even in the context of an indemnity agreement in a construction **contract**, it is not against public policy for the indemnitor to promise to hold harmless the indemnitee for the indemnitee's own negligence as long as the indemnitee is not solely at fault

- The majority of courts hold that the "sole negligence" prohibition does not operate to bar indemnification for injuries found to have been partially caused by the employee's own negligence, even where the indemnitor, the plaintiff's employer, was found not to be at fault

New York Law

- Concerning indemnity agreements in construction contracts between contractors and subcontractors, **General Obligations Law Section 5-322.1** voids the indemnity provision insofar as it purports to indemnify the indemnitee for its own negligence, in whole or in part.
- The statute clearly does not prohibit a indemnitor from contractually assuming liability for its own negligence or for the negligent acts of others for which the indemnitor may be held liable.
- **Magrath v. J. Migliore Const. Co., Inc., 139 A.D.2d 893 (1988)**

The Marine Towage Contract

The U.S. Supreme Court Case of Bisso

- The court's analysis of a marine towage contract is a classic illustration of the manner in which admiralty law applies to exculpatory provisions in a contract
- ***Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955)***
- In ***Bisso***, an unmanned oil barge collided with a bridge pier on the Mississippi river due to the tug's negligence.
- When sued by the barge owners, the defendants sought to invoke two clauses in their **towage** agreement.
- The first provided that the towing was to be performed at the sole risk of the towed vessel. The second provided that the employees of the tug would become servants of the barge.

Public Policy Considerations

- The Supreme Court refused to enforce the provisions seeking "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.'
- Thus, ***Bisso*** prohibits exculpatory provisions that relieve a tug from *all* liability for negligent **towage**.

- Subsequent court decisions have held that ***Bisso*** does not invalidate all limitations on liability.
- ***Bisso*** states that a towing company may not exempt itself from ***all*** liability for negligent towage.
- Limitations on damages, unlike an complete exemption, do not induce or encourage negligence.
- ***Gaida Shipping Corp. v. Tug S/R MARE ISLAND, 2002 AMC (ND Cal 2002)***

Knock for Knock Clauses

- Similarly, reciprocal indemnity provisions, known as "**knock for knock**" clauses, in towage contracts have been held valid
- Generally, these types of clauses provide that the tug owner/operator is liable for acts occurring on the tug and the barge owner/operator is liable for acts occurring on the barge.
- ***In re Boskalis, 975 F.Supp. 2d 1238 (SD Fla 2012); Marquestte Transp. V. Claimants, 106 F.Supp. 3rd 844 (SD Tex. 2015)***

- **Also, cross-insurance provisions have been upheld by the Fifth Circuit.**
- In *Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir. 1974),* the court concluded:
- "that the provision in the towing agreement requiring each party to fully insure its vessel to effect a waiver of subrogation, and to name the other party as an additional insured is not an exculpatory clause of the type invalidated in *Bisso*
- *Caveat, there is a split in the Circuits on this issue*

Assisting tugs

- Unlike towage of a “dead tow”, assisting a “live ship” has received different treatment in the courts.\
- In ***United States v. Nelson, 349 U.S. 129 (1955)***, the towing vessel provided a docking pilot to assist a vessel into the docks.
- The contract contained a pilotage clause which provided that the docking pilot became the servant of the ship owners.
- The court held that pilotage clause differs from a towing contract in that a pilotage clause exempts for the negligence of the pilot only, not for the negligence of all of the tower’s employees.

Step Two of the Inquiry: What is the Scope of the Indemnity Contract and Insurance Coverage?

Deepwater Horizon

- Transocean Holdings, Inc. ("Transocean") owned the *Deepwater Horizon*, a semi-submersible, mobile offshore drilling unit.
- In April 2010, the *Deepwater Horizon* sank into the Gulf of Mexico after burning for two days following an onboard explosion
- At the time of the Incident, the *Deepwater Horizon* was engaged in exploratory drilling activities at the Macondo Well **under a Drilling Contract between BP** America Production Company's Predecessor **and Transocean**'s predecessor

Deepwater Horizon - Federal District Court

- **In re Oil Spill by the Oil Rig "Deepwater Horizon" , 2012 AMC 533 (ED La. 2011)**
- **A. The Insurer Complaints**
- The Insurance Actions are two declaratory judgment actions.
- One was filed by Ranger, a primary liability carrier, and the other was filed by various excess liability carriers led by London market syndicates ("Excess Insurers," and together with Ranger, "Insurers").
- **The Insurers issued liability insurance policies to Transocean**
- The Insurance Actions concern the **scope of BP's "additional insured" coverage under the Insurance Policies issued to Transocean.**

- The Insurers seek a judicial declaration of their rights and duties as to **BP**, if any, under the Policies in connection with **BP's** pollution-related liabilities for the oil emanating from **BP's** well' as a result of the sinking of **Transocean's *Deepwater Horizon***

- **B. The Drilling Contract**
- The Drilling Contract defines BP's and Transocean's obligations
- It contains **cross-indemnities** between Transocean as "Contractor" in the Drilling Contract and BP as "Company" in the Drilling Contract
- Each party committed itself to hold the other harmless for certain specified liabilities.

- Thus, as to pollution-related liabilities:
- (1) **Transocean** assumes full responsibility for **above-surface oil pollution** discharges without regard to the negligence of any party
- (2) **BP** assumes full responsibility for specified oil pollution damage without regard to any party's negligence, *except* for liability assumed by Transocean

- **The Drilling Contract also imposes an insurance requirement on Transocean:**
- Without limiting the **indemnity** obligation or liabilities of CONTRACTOR [Transocean] or its insurer, at all times during the term of this CONTRACT, CONTRACTOR shall maintain **insurance** covering the operations to be performed under this CONTRACT.

- The Contract sets forth the types and minimum amounts of insurance coverage that Transocean is required to purchase and maintain.
- **Included is the requirement that BP be named as additional insured in each of Transocean's policies for liabilities assumed by Transocean under the terms of this Contract."**
- The Insurers are not parties to the Drilling Contract

- **C. The Insurance Policies**
- The Insurance Policies include the Ranger policy and the Excess Policies providing general liability coverage.
- The Ranger and Excess Policies have materially identical terms.
- **The key terms at issue are "Insured" and "Insured Contract."**
- "Insured" is defined as including the Named Insured, and other parties.
- **"Insured" includes:** (c) ***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…***

- **"Insured Contract" shall mean 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", "Property Damage", . . . to a "Third Party" or organization.**

- Other parts of the Policies address **additional insureds.**
- **Additional insureds are automatically included where required by written contract.**
- However, there is a **limitation**: Transocean has the privilege to **name additional insureds only to the extent as is required under contract or agreement.**

- **BP argued that the insurance and indemnity provisions are separate.**
- The insurance provision of the Drilling Contract required that BP and its affiliates be named as additional insureds in each of Transocean's policies
- BP argued that where the services agreement provided for the owner to be an additional insured, **there was no substantive limit on the "additional insurance" coverage.**
- BP argues that it is entitled to **full coverage** under the Ranger and Excess Policies.

- **Judge Barbier did not accept BP's arguments and held, in a 2011 decision, as follows:**
- **Because Transocean did not assume the oil pollution risks under the indemnity provisions of the drilling contract pertaining to the *Deepwater Horizon* catastrophe, Transocean was not required to name BP as "additional insured" as to those risks.**
- BP assumed the risk as there was no insurance obligation as to these risks.
- BP was not an "insured" or an "additional insured" for them.

Moving to the Court of Appeals

First Court of Appeals Decision – March 2013

- **In re Deepwater Horizon, 710 F.3d 338 (5th 2013)**

- **In the first decision, a three judge panel accepted BP's arguments, and while applying Texas law, reversed the district judge's decision.**
- Judge Jolly stated that Texas law compels us to interpret insurance coverage provisions in favor of the insured, so long as that interpretation is reasonable—and even if the insurer's proffered interpretation denying coverage is more reasonable.
- Texas law further establishes that " 'where an additional insured provision is separate from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity claims.' "

- The Court of Appeals concluded that the umbrella policies do not impose any relevant limitation upon the extent to which BP is an additional insured
- And the additional insured provision in the Drilling Contract is separate from and additional to the indemnity provisions therein,
- The Court held that BP was entitled to coverage under each of Transocean's policies as an additional insured as a matter of law.

Second Court of Appeals Decision on Rehearing – August 2013

- On Rehearing, Judge Jolly stated that because this case involves important and determinative questions of Texas law as to which there is no controlling Texas Supreme Court precedent
- The panel withdrew the previous opinion and substituted the following certified questions to the Supreme Court of Texas:

- whether the umbrella policies alone determined scope of oil company's coverage as additional insured, and

- whether the doctrine of *contra proferentem* was applicable

Texas Supreme Court has Final Say

Texas Supreme Court Decision – February 2015

- **In re Deepwater Horizon, 470 S.W.3d 452 (2015)**
- The Supreme Court explained that Texas law allows insurance policies to incorporate other documents by reference, and policy language dictates the extent to which another document is so incorporated.
- The policies here provide additional-insured coverage automatically where required and as obligated by written contract in which an insured has agreed to assume the tort liability of another party.
- **Because BP is not named as an insured in the Transocean policies**, the insurance policies direct us to the additional-insured provision in the Drilling Contract to determine the existence and scope of coverage.
- We conclude that **BP is an additional insured** under the Transocean policies **only to the extent of the liability Transocean assumed for above-surface pollution.**

Subsequent Fifth Circuit Decision

- ***Ironshore Specialty Ins. Co. v. Aspen Underwriting, Ltd., 788 F.3d 456 (2015)***

- In ***Ironshore***, the Fifth Circuit **followed the rationale of the BP case**, while applying Texas law.
- The Court stated that insurance policies can incorporate limitations on coverage encompassed in extrinsic documents by reference to those documents in order to incorporate a restriction from another contract into an insurance policy,
- However, the policy must clearly manifest an intent to do so

Service Contract - Indemnity

- **Endeavor** owned and operated an oil well in Martin County, Texas. **Basic** contracted with Endeavor to perform services, including pumping brine into the well.
- **The MSA between Endeavor and Basic contained mutual indemnity provisions** stating that each party would release the other from any liability for "all claims, demands, and causes of action of every kind and character, without limit," brought on behalf of each party's respective employees.
- In other words, regardless of which party is sued or at fault, Basic would be liable for claims brought by Basic employees and Endeavor would be liable for claims brought by Endeavor employees.

Service Contract - Insurance

- **Another section of the MSA specified that the parties were required to obtain insurance:**
- To support the indemnification provisions in this Contract but as a separate and independent obligation, each party shall … maintain, with an insurance company or companies …
- (b) Commercial General Liability Insurance, including contractual obligations covered in this Contract in the amount of $1,000,000
- (d) Excess Liability Insurance in the amount of $4,000,000, specifically including Contractual Liability.

Additional Insured Pursuant to “Insured Contract”

- Basic maintained insurance policies that provided this $5 million in coverage, but also a lot more. It had three policies providing total coverage of $51 million
- Besides naming Basic itself, Basic’s excess policies define additional “Insured” parties as follows:
- The word “Insured”, wherever used in this Policy, shall mean …
- (c) any person or entity to whom [Basic] is obliged by a written “Insured Contract” . . . to provide insurance such as is afforded by this Policy but only with respect to:
- i) liability arising out of operations conducted by [Basic] or on its behalf….

- The Court explained that Basic's policies make Endeavor an insured only by virtue of the existence of its obligations under the MSA.
- The policies state:
- The word "Insured", wherever used in this Policy, shall mean ...

(c) 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 ...

- The Court held that this reference was sufficient to limit the insurers' obligations to the $5 million Basic was "obliged" to provide under the service contract

The Law Varies from State to State

- ***EMJ Corporation v. Hudson Specialty Insurance Company, 833 F.3d 544 (2016)***
- **In this Fifth Circuit Decision, the court refused to follow the rationale of the BP and Ironshore cases**, because the law of Mississippi, not Texas applied.
- General Contractor was not listed on the Subcontractor's insurance policy by name.
- However, the insurance policy's "Additional Insured" provision covered the "[a]ny person or organization for whom you have agreed in writing … to provide insurance such as is afforded by this policy, *but only with respect to operations performed by you* [the Subcontractor] *or on your behalf*."
- Therefore, the General Contractor was an Additional Insured under the Subcontractor's policy and was an Insured under its own policy.

- The contract between the general contractor and subcontractor was an “insured contract” under the subcontractor’s policy and stated that the subcontractor’s policy was primary.
- The general contractor’s and the subcontractor’s policies, however, contained “other insurance clauses” which contradicted the subcontract

- The insurer agued that the terms of the subcontract should be incorporated by reference into the insurance policy
- **The Court explained that Mississippi’s traditional rule is that mere references to extrinsic documents in a contract do not incorporate the terms of that document into the contract.**

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