

# Client Alert

Insurance Coverage &amp; Recovery Practice Group

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## The Intersection of Contractual Indemnity Clauses and Additional Insured Status: You May Have Less Coverage Than You Think

Parties to sophisticated construction projects, real estate transactions, and services agreements routinely allocate risks by contract through the use of indemnity provisions. Parties often reinforce that risk allocation by providing the indemnified party with “additional insured” status under the indemnitor’s insurance program, effectively granting the additional insured direct coverage rights under the indemnitor’s insurance program. In other cases, parties seek certificates of insurance from the indemnitor’s insurers, or other assurances that an indemnity obligation is an “insured contract.”

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Because indemnity agreements and insurance policies are separate contracts, courts generally treat the scope of an indemnity provision in an underlying contract separately from the scope of an additional insured’s insurance coverage under the indemnitor’s insurance policy because the insurer is not a party to the underlying contract. However, companies must take care not to inadvertently limit their rights to insurance in indemnity agreements. As discussed below, companies must pay careful attention to the intersection between indemnity provisions and additional insured endorsements when negotiating risk allocation arrangements to avoid gaps or potential loss of insurance coverage.

**An Eastern District Of Louisiana decision limited the scope of the additional insured’s coverage based on the parties’ indemnification provision in *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-02179-CJB-SS (E.D. La. Nov. 15, 2011).**

- Following the Deepwater Horizon oil spill, BP sought insurance coverage for oil spill related claims under Transocean’s \$750 million coverage program, arguing that it was an “additional insured” under Transocean’s insurance policies.
- Transocean’s insurance policies did not specifically name BP as an “additional insured” pursuant to an additional insured endorsement. Instead, the policies provided that any person with an “Insured Contract” was covered as an “Insured” under the terms of the policy. The policies defined “Insured Contract” as an agreement entered into by the Insured in which the Insured “assumes the tort liability of another party.”
- In denying BP’s claim for coverage, the insurers argued that an indemnification provision in BP’s separate contract with Transocean, whereby BP assumed the risk of certain tort liabilities, limited the scope of coverage provided to BP as an additional insured. In response, BP argued that the court should find that BP’s coverage rights were

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controlled by the terms of the policies, and not the scope of the separate contract between BP and Transocean to which the insurers were not parties.

- In its order, the court declined to interpret the insurance policies and the indemnity obligation separately, as BP had urged, but agreed with BP that the underlying contract was an “Insured Contract” at least for some purposes, because BP and Transocean had each assumed certain tort liabilities of the other under their contract. However, the court also determined that indemnity provisions in the underlying contract limited BP’s coverage for the oil spill related claims at issue. Citing the definition of “Insured Contract” in the policies, the court found that BP should be considered an additional insured *except* for tort liabilities BP had assumed under the terms of its contract with Transocean. The court concluded that because BP had, through indemnification provisions, assumed the risk of liability for the risks for which it was seeking coverage, Transocean was not required to name BP as an additional insured as to those risks. Thus, BP had no right to coverage under Transocean’s insurance policies.

While the dispute over liability for the Deepwater Horizon oil spill will continue for years, the court’s recent decision confirms that the scope of and language in an indemnity agreement may limit an additional insured’s right to seek insurance coverage for its own actions. In order to maximize potential coverage, parties seeking additional insured status under a contracting party’s insurance program should carefully consider the following issues when negotiating indemnity provisions and additional insured/insured contract provisions:

- Seek an additional insured endorsement from the contracting party’s insurer that specifically names the additional insured entity, rather than having to argue only that the underlying contract is an “insured contract.”
- If the insurance carrier or insured is unwilling to specifically name your entity in the additional insured endorsement, carefully review the indemnification clause in the underlying agreement to determine whether it limits the coverage to the additional insured in any manner.
- When specifying that a minimum amount of insurance needs to be maintained by the named insured, an additional insured should ensure that neither the underlying contract nor the insurance policy can be read by the insurer to limit the scope of coverage to the additional insured.
- Be wary of “your work” exclusions to additional insured endorsements, which may be used by insurers to attempt to limit coverage.
- When seeking additional insured status, consider requesting that the named insured’s policy be applied as primary before the additional insured’s program in the event of loss.
- Seek certificate holder status under the contracting party’s insurance program, but do not rely upon a broker’s certificate of insurance as proof of coverage.
- Consult with experienced insurance coverage counsel when seeking to allocate risks through indemnity and additional insured/insured contract provisions.

*We work closely with our clients and their risk managers to ensure their insurance and contractual indemnity provisions afford adequate protection in the event of catastrophic claims. We also have advised many businesses on the negotiation of appropriate indemnity and additional insured provisions in their contracts, and recovery under these provisions when faced with losses.*

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