

## TEXAS INSURANCE LAW NEWSBRIEF

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## COVERAGE FOR ADDITIONAL INSURED IS DETERMINED BY POLICY TERMS, NOT INDEMNITY AGREEMENT IN SERVICE CONTRACT

Applying Texas law, the Fifth Circuit recently concluded that when a service provider agrees to secure insurance for an additional insured and, to indemnify them for certain claims, the terms of the insurance policy determine the insurer's obligations which may not be limited to those stated in the indemnity provision. In *In re Deepwater Horizon v. Transocean Offshore Deepwater Drilling, Inc.* 2013 WL 776354 (5<sup>th</sup> Cir. La. March 1, 2013), the drilling unit owner, Transocean, agreed to name the oil company, BP, as an additional insured under their insurance policies providing a combined \$750,000,000 in coverage. In the service contract, Transocean also agreed to indemnify BP for certain liabilities, which did not include pollution related liabilities for below surface oil spills. After the Deepwater Horizon oil spill in the Gulf of Mexico, BP sought insurance coverage from Transocean's insurers. The district court concluded that the insurers had no obligation to provide coverage to BP with respect to the pollution claims and this appeal followed.

The Fifth Circuit reviewed Texas law interpreting insurance contracts and cases addressing additional insured status and the impact of indemnity provisions. The court observed that "BP is not seeking indemnity from Transocean, but is seeking coverage from the insurers." The court also noted 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 clause." After finding that the insurance provisions and the indemnity clauses were separate and independent, the court held that BP was entitled to coverage as an additional insured under the Transocean policies, and that coverage was not limited by the indemnity provision in the contract between BP and Transocean. The district court's decision was reversed and the case remanded for entry of judgment.

FACT ISSUE PRECLUDES SUMMARY JUDGMENT ON *STOWERS* CLAIM DESPITE ABSENCE OF REQUIRED EXPERT REPORT AT TIME OF DEMAND

Last Tuesday, a federal district court rejected an insurer's motion for summary judgment on a *Stowers* claim against a liability insurer after the insurer rejected settlement offers within policy limits and an excess judgment was entered against their insured. In *Bramlett v. Medical Protective Co. of Fort Wayne, Indiana*, 2013 WL 796725 (N.D. Tex. March 5, 2013), following surgery, the treating physician suspected internal bleeding and ordered related tests, but then left the hospital before checking the results to work out with his personal trainer. By the time he returned and checked the test results, it was too late and the patient later died from post-operative bleeding. Almost one year later, after the death but before presenting a required expert's report indicating the doctor was negligent, the decedent's family presented a demand for the \$200,000 policy limit but the offer was rejected. A second offer was made and the expert's report was provided, but that offer was allowed to expire. The trial court entered judgment in excess of \$12,000,000 and the decedent's family pursued the insurer for the excess judgment.

There was no dispute that the first two *Stowers* elements; a claim within the scope of the liability coverage and, a demand within policy limits, were met. But the insurer moved for summary judgment asserting that the third element of *Stowers* – that the offer was such that a reasonable and prudent insurer would accept it considering the insured's potential exposure – was not met as a matter of law. As to the first demand, the insurer asserted that plaintiffs failed to provide the statutorily-required expert report expressing a medical opinion that the treating physician was negligent. The court rejected this argument observing that a jury could find based solely the facts as known to the insurer at the time of the demand, that a reasonably prudent insurer should have accepted it. As to the second demand, the insurer argued that its actions were reasonable because the 17 day time period allowed to accept the offer was insufficient. The court noted that there are some instances that the time allowed to accept the offer can be unreasonable, but under the facts of this case, the question is one of fact and the jury should be allowed to apply the "reasonably prudent insurer standard." Accordingly, summary judgment was denied.