

# TEXAS INSURANCE LAW NEWSBRIEF

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## DERRICK WORKER FOUND TO BE "LEASED-IN WORKER" NOT COVERED UNDER CGL POLICY - PLAINTIFF'S STOWERS ACTION RENDERED VOID

In *Roy Seger, Et Al. v. Yorkshire Insurance Co., Ltd., and Ocean Marine Insurance Co., Ltd* NO. 13-0673T (June 17, 2016) the Texas Supreme Court determined a deceased derrick worker was a leased-in worker when he died on the job, and his estate's wrongful death action was therefore excluded under the drilling company's CGL policy. Consequently, Plaintiff's *Stowers* action also failed as a matter of law.

After a tragic accident, a deceased derrick hand's parents ("Plaintiff") sued the company that owned the drilling rig upon which the fatal accident occurred. The drilling company demanded that its commercial general liability (CGL) insurers defend it in the litigation. The insurers refused based on lack of coverage. The parents obtained a judgment against the drilling company, the company assigned its rights against the insurers to the parents, and the parents brought a *Stowers* action against the insurers. See *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547-48 (Tex. Comm'n App. 1929, holding approved). At trial, the jury returned a verdict in the deceased worker's parents' favor. The court of appeals reversed the decision of the trial court, and the Texas Supreme Court decided the case on different grounds. The Texas Supreme Court held that the Plaintiff's parents failed to establish coverage, an essential element of any *Stowers* action, and the evidence is legally insufficient to support the jury's finding that the deceased worker was not a leased-in worker; in fact, the evidence is conclusive that he was a leased-in worker.

Prior to the underlying trial, Plaintiff demanded settlement on several occasions—all of which the CGL carrier refused to settle on behalf of the drilling company. Each time, the insurer determined no coverage existed. The drilling company's counsel withdrew from the case due to its failure to pay, and at trial the company appeared through its general partner, who was not a lawyer and had been subpoenaed to appear as a witness. After a full day of hearing evidence, the trial court found the drilling company liable for the derrick hand's death and awarded plaintiff \$15 million, plus interest.

Following judgment, the drilling company assigned plaintiff "any and all claims and causes of action" against the CGL insurer in exchange for a release.

The *Stowers* case went to trial, and the jury returned a verdict in favor of the Plaintiff as to the *Stowers* Insurers' negligence and causation, and the trial court issued a directed verdict as to damages based on the underlying judgment against drilling company. The trial court entered a \$37,213,592.01 final judgment in favor of Plaintiff. The court of appeals reversed the trial court's judgment. The court, however, only determined the issue of the construction of the leased-in worker exclusion and rendered judgment declaring that the CGL policy "excluded liability for injury or death to leased-in employees/workers," and remanded to the case back to the trial court.

On remand, the *Stowers* case was tried, and the jury found that: (1) the *Stowers* Insurers negligently failed to settle the Plaintiff's wrongful death claim against the drilling company, proximately causing the underlying judgment against the drilling company; (2) the plaintiff's son was not an employee or leased-in worker of the drilling company; and (3) the *Stowers* Insurers' wrongful refusal to provide the drilling company with a defense in the underlying action waived their right to control Diatom's defense. The trial court entered a judgment, and awarded damages in the amount of \$71,696,547. The *Stowers* Insurers appealed.

The Supreme Court determined that under the policy, the drilling companies' liabilities for bodily injuries to third parties, including independent contractors, were covered. Accordingly, to prevail under a *Stowers* cause of action, the Plaintiff had the burden to prove that the derrick hand was an independent contractor or other third party.

In its analysis, the Supreme Court noted the drilling company could not afford workers' compensation insurance for all of its employees, as an alternative the drilling company established an arrangement under which its general partner created another company (leasing company) to employ the drilling workers and provide the workers as independent contractors to the drilling company. Consequently, neither company provided worker's compensation. The drilling company purchased a CGL policy which provided a maximum of \$500,000 coverage for any one bodily injury accident or occurrence. The CGL policy expressly covered independent contractors, and it excluded leased-in workers.

The Supreme Court found that an agreement, titled “Contract for Personnel Services,” was signed by the General Partner of the drilling company twice, both as the general partner of drilling company and as the president of leasing company. The agreement was only for the *temporary use of personnel*. The agreement stated that leasing company would “provide [the drilling company] with all necessary personnel for the operation of one or more drilling rigs in accordance with the needs of [the drilling company].” Under these terms, leasing company would provide the drilling company with workers only “as needed” depending on the drilling company’s project. Not every worker was necessary for every stage of drilling company’s drilling business, so the use of each worker was only temporary.

The Supreme Court concluded, even if the derrick worker was an independent contractor to drilling company through his employment at the leasing company, he would still be considered a “leased-in worker” under the policy. Consequently the Supreme Court held the derrick worker was a leased-in worker as a matter of law. Therefore Plaintiff’s claim was excluded from coverage under the CGL policy and its *Stowers* action fails as a result.

## SOUTHERN DISTRICT OF TEXAS DENIES MOTION FOR RECONSIDERATION FINDS INSURER OWED DUTY TO DEFEND ADDITIONAL INSURED

On June 14, 2016, Judge Harmon of the United States District Court for the Southern District of Texas denied Ace American Insurance Company’s Motion for Reconsideration of its First-Amended Cross-Motion for Summary Judgment in *Lexington Ins. Co. v. ACE Am. Ins. Co.*, 4:12-CV-531, 2016 WL 3251748, at \*1 (S.D. Tex. June 14, 2016). On March 4, 2015, Ace filed a Motion for Reconsideration of the Court’s interlocutory order based on the Texas Supreme Court’s opinion in *In re Deepwater Horizon*, 470 S.W.3d 452, 2015 WL 674744 (Tex. Feb. 13, 2015) (“*Deepwater Horizon*”). The Court postponed consideration of Ace’s Motion for Reconsideration as premature until the Texas Supreme Court’s decision was released for publication and was no longer subject to revision, and the Court later denied Ace’s Motion without prejudice because of the continued pendency of the *In re Deepwater Horizon* decision. After *In Re Deepwater Horizon* became final, Ace filed a Renewed Motion for Reconsideration.

The insurance coverage lawsuit was brought by Lexington Insurance Company wherein it contended that Ace had a duty to defend Lexington’s additional insureds Midcontinent Express Pipeline, LLC and its affiliates (“MEP PARTIES”) in several Underlying Lawsuits arising out of a natural gas explosion that took place in Smith County, Mississippi on July 15, 2009. Ace denied that it owed a duty and has, therefore, filed a First Amended Cross-Motion for Summary Judgment against Lexington.

Ace’s Motion for Reconsideration asked the Court to revisit the relationship between the additional insured provision in the Ace Policy and the applicable provisions of a Professional Services Agreement (“PSA”), and conclude that Ace is entitled to summary judgment rather than Lexington. Ace argued that the Court’s previous order was “inconsistent with the Supreme Court’s holding in *Deepwater Horizon*” in its finding that the scope of the indemnity obligation set forth in the PSA did not operate to limit the additional insured coverage owed to the MEP Parties under the Ace Policy.

The Court determined that *Deepwater Horizon* did not present an intervening change in the controlling law and it did not expressly overrule any previous case law. Rather, the Court determined *Deepwater Horizon* specifically stated that “[o]ur application of these foundational principles in *Urrutia and ATOFINA* guides our analysis of the policies and Drilling Contract at issue here.” 470 S.W.3d at 460. For that reason alone, the limited application of the Supreme Court’s ruling, the Court concluded Ace’s Motion should be denied.

The Court also evaluated Ace’s indemnity provision regarding third party claims, and determined that third party claims do trigger the indemnity obligation under the PSA. The Court explained that the underlying plaintiffs in all eight suits are employees of contractors other than the MEP Parties, and therefore are third parties, and they have claimed that the MEP Parties are responsible for the bodily injuries or the deaths of the plaintiffs.”

Because the underlying plaintiffs’ claims fall under the indemnity obligation, the MEP Parties were entitled receive coverage as additional insureds under the Ace policy.