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# Insurance in the Oil-Patch

*Recent Insurance Decisions from  
the Supreme Court Affecting Oil &  
Gas Operations*

# Supreme Court Trends

- Business versus Insurance Business
- Strict four corners approach
- Consistency with other jurisdictions?
- Avoiding protracted litigation and re-litigation

# Lessons to Learn

- Every piece of litigation should be reviewed to determine if there may be coverage
- Timely notice to all carriers should be undertaken from the outset
- Carefully analyze and respond to reservations of rights
- Be prepared for two front war—underlying suit and coverage suit
- Try to prevent the two-front war if possible
- Use independent counsel for protection
- Coverage will be an issue in mediation of the underlying suit—be prepared
- Push to settle early—unlikely to happen.

# Coverage for Exemplary Damages

*Fairfield Ins. Co. v. Stephens*

# Coverage Not Contrary to Public Policy

- Exemplary damages were covered under terms of employers liability policy
- Legislature has spoken
- Public policy as stated by legislature supports allowing coverage for exemplary damages

# Open Issues

- Other types of policies
- Whether such damages are even covered under other policies
  - Whether under a CGL punitive damages are a form of damage because of bodily injury?
  - Whether the standard for malice is an “occurrence”/accident?
- *Admiral v. Westchester*

# Additional Insureds

*Evanston Ins. Co. v. Atofina*

# Additional Insureds--*Atofina*

- Atofina hired Triple S to work on refinery
- Contract required:
  - Indemnity for all *except sole negligence of Atofina*
  - Procure additional insured coverage for Atofina on Triple S's policy
- Claim made for wrongful death of Triple S employee

# Additional Insureds--*Atofina*

- Rule #1:
  - Insurance coverage is determined by the policy, not by reference to a collateral contractual agreement or indemnity clause
- Rule #2:
  - Typical additional insured coverage is not limited to situations where the named insured would be vicariously liable

# Additional Insured—Direct Liability

- Policy language covered the additional insured “only with respect to operations performed by” the named insured or on its behalf, or facilities owned or used by the named insured.
- Presence of Triple S employee at site of work was enough.

# The Rub

- The excess policy followed the form of the underlying policy
  - The underlying policy excluded coverage for the sole negligence of an additional insured
- The Court found there were two avenues for coverage as an additional insured
  - The “following form” language could not be superimposed on a separate route.

# Hints Re Sole Negligence

- Not sole if any other party was negligent
- Contributory negligence prevents sole negligence

# Anti-Indemnity Statute—No Impact

- Reaffirmed anti-indemnity act has no application to additional insured coverage or contractual agreements to procure insurance
- Contract said Atofina should be an additional insured.
  - Direct coverage even though the indemnity provisions stated intent not to indemnify for Atofina's own negligence

# Settlement

- Insured settles after wrongful denial
  - Need not prove reasonableness of settlement
  - Carrier is *estopped or has waived* the right to contest
- *Gandy* protections inapplicable because no assignment as part of settlement
- Carrier may still contest coverage

# Pending Cases

- *DR Horton v. Markel Intern. Ins. Co.*
  - Underlying allegations silent as to whether liability of additional insured arose out of the work of the named insured.
- *Transportation International Pool, Inc. v. Continental Cas. Co.*
  - Additional insured not entitled to coverage if solely negligent
  - AI only one sued because of workers comp bar
  - Refusal to consider extrinsic evidence of evidence of other negligent parties

# Defective Work

*Lamar Homes v. Mid-Continent*

# Defective Work

- Allegations of a negligent breach of contract equal an “occurrence”/accident
- Defective construction is “property damage”

# Rationale

- Policy does not distinguish between coverage for breach of contract and tort
- The work performed exclusion assumes coverage for defective work
  - Exception clearly contemplates coverage

# Late Notice

*PAJ v. Hanover Ins. Co.*

# Prejudice Must Be Shown

- Carrier must show *actual prejudice* from the delay in giving notice
- Only a *material breach* will result in loss of coverage
- Open issues:
  - Claims-made policies
  - Policies with *Cutaia* language

# Right of Reimbursement

*Excess Underwriters v. Frank's  
Casing Crew*

# *Frank's Casing*

- Frank's Casing installed the drilling platform for ARCO.
- Collapse of off-shore drilling rig several months after installation
- ARCO offered to settle within limits (\$7.5m)
- Carrier settled reserving a right to seek reimbursement

# *Matagorda*

- No right of reimbursement unless a new agreement that is clear and unequivocal
- No implied right
- Carriers can seek declaratory actions as a relief
- Carriers can rewrite the contract to include reimbursement provision

# *Frank's Casing I*

- Right of Reimbursement Available in Two Situations:
  - when an insured has demanded that its insurer accept a settlement offer that is within policy limits, or
  - when an insured expressly agrees that the settlement offer should be accepted.
- Insured estopped to challenge reasonableness by urging acceptance of *Stowers* demand.

## *Frank's Casing II*

- No right of reimbursement
  - Potential of unreasonable settlement
  - Declaratory actions are available
  - Coverage as defense to *Stowers*?
- Risk of inability to determine coverage before *Stowers* demand falls on carrier
  - Better able to assess coverage

# *Frank's / Aftermath*

- Increase in declaratory actions
- Increased involvement of plaintiffs in same
- Danger of declaratory actions on indemnity where there are overlapping facts
- Use of coverage as defense to a *Stowers* action

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