Contractual Limitations on Umbrella Coverage and the Texas Supreme Court: Umbrella Policy Coverage Extended Beyond Service Contract Requirements

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While not often in the limelight, standard business practice relies on service contracts and, in turn, risk transfer through those contracts. Critical issues can arise regarding whether a party seeking additional insured coverage is actually an additional insured, and if so, the amount of policy limits available. As extreme jury awards, or "nuclear verdicts," become more common[1], the limits of insurance available become increasingly significant in addressing catastrophic claims.

Service contracts and insurance policies often specifically address additional insured coverage and policy limits, as in *ExxonMobil Corporation v. National Union Fire Insurance Company of Pittsburgh, PA*, No. 21-0936, 2023 WL 2939596 (Tex. Apr. 14, 2023). The additional insured's coverage is often limited to (1) the policy limits or (2) the amount required by contract, whichever is less. In *ExxonMobil*, however, the Texas Supreme Court held that the umbrella policies did not incorporate the policy limits set forth in the underlying service contract and, therefore, the additional insured (Exxon) was entitled to the full policy limits under the umbrella policies.[2]

Background

In January 2013, two employees of Savage Refinery Services, LLC ("Savage") were working at an Exxon refinery in Baytown, Texas under the terms of "Standard Procurement Agreement No. 2088773" ("Contract"). The employees were injured and filed suit against Exxon. The Contract required, among other things, that Savage obtain certain insurance coverage for Exxon as an additional insured. The "Insurance" provision obligated Savage to "carry and maintain in force at least … its normal and customary Commercial General Liability insurance coverage and policy limits or at least $2,000,000, whichever is greater…."

Savage's primary insurers accepted Exxon's additional insured tender and agreed to provide defense and indemnity coverage for Exxon up to their policy limits. Those limits ($5 million), which Savage's primary insurers contributed to the settlement, were insufficient to satisfy Exxon's roughly $24 million settlement. Exxon, however, sought coverage as an additional insured under policies issued by "all of Savage's liability insurance carriers," or for the roughly $20 million[3] Exxon contributed to the settlement. Savage's umbrella insurers denied coverage and Exxon filed a breach of contract and declaratory judgment action against the umbrella insurers.

In response, the umbrella insurers argued, in part, that Savage's two policies affording the first $5 million in coverage satisfied any contractual obligations owed by Savage to Exxon, and that the umbrella policies provided no further coverage. Thus, the critical issues were whether (1) Exxon

[1] National Law Journal's 2015 and 2019 editions of the Top 100 Verdicts show that the average verdict in the United States more than tripled between 2015 and 2019, going from US$64 million to US$214 million.

[2] *Id.*, at *1.

[3] We are unaware as to why the Court's opinion said roughly $20 million instead of roughly $19 million here.

was as an additional insured under the umbrella policies, and (2) the umbrella policies incorporated by reference the lower insurance limits required by the Contract.

The trial court ruled in Exxon's favor. On appeal to the First Court of Appeal (Houston), the court reversed, holding the umbrella policies incorporated the primary policy's limits language[4] which in turn incorporated the Contract.[5] Because the Contract required only commercial general liability insurance for a specified minimum amount, the appellate court held Exxon's additional insured status was limited to that amount of coverage and did not extend to the umbrella policies. Disagreeing, Exxon appealed.

Opinion

On appeal, the Court began with the general principle of law that "'[t]he policy is the contract; and if outside papers are to be imported into it, this must be done in so clear a manner as to leave no doubt of the intention of the parties.'"[6] The Court cited its more recent decision in *In re Deepwater Horizon*, which reiterated the Court's reliance on "'the policy's language in determining the extent to which, if any, we must look to an underlying service contract to ascertain the existence and scope of additional-insured coverage.'"[7]

The Court next turned to the operative policy language, which provided as follows:

> Insured means: ... any person or organization, other than the Named Insured, included as an additional insured under Scheduled Underlying Insurance, but not for broader coverage than would be afforded by such Scheduled Underlying Insurance.

In response to the insurers' argument that the "broader coverage" language incorporated the limits from the Contract, the Court held the language did not mention incorporation of such limits and opined that the Contract "provides for a *minimum* amount of insurance, not a maximum."[8] As such, "[w]hether Savage had to buy as much insurance as it did is beside the point. What matters is that it did obtain that insurance." In addition, the court held that "[i]nterpreting 'broader coverage' to refer to payout limits … would give the umbrella policy a self-defeating meaning, as an umbrella policy springs into action only when the primary policy is exhausted." Ultimately, the Court held that Exxon was an additional insured, despite the Contract's requirement of "at least $2,000,000"

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[4] The primary policy additional insured endorsement provided coverage to "[a]ny person or organization" to which Savage is obligated by "any contract or agreement" to provide insurance.

[5] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Exxon Mobil Corp*., 658 S.W.3d 305 (Tex. App.—Houston [1st] 2021), *review granted* (Jan. 27, 2023), *rev'd and remanded sub nom.*, 2023 WL 2939596 (Tex. Apr. 14, 2023).

[6] 2023 WL 2939596, at *2 (Tex. Apr. 14, 2023) (quoting *Goddard v. E. Tex. Fire Ins. Co.*, 67 Tex. 69, 1 S.W. 906, 907 (1886)).

[7] *Id.* (quoting 470 S.W.3d 452, 462 (Tex. 2015)).

[8] *Id.*, at *4 (emphasis in original).

in coverage, and that the umbrella insurers must reimburse Exxon for its roughly $20 million settlement contribution.

Conclusion

The Court's holding provides no analysis as to what language meets the incorporation standards reiterated in *In re Deepwater Horizon* and again (though with a different outcome) in *ExxonMobil*. Practically, it is not feasible for insurers to police all of their insureds' service contracts. Additional guidance may be required as to how an insured may purchase a higher limit of insurance for itself than an additional insured (which, is a common, commercially reasonable scenario). Insurers may consider changes to policy language while insureds consider revisions to their service contracts.