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***ExxonMobil Corp.*: How Indemnity Obligations May Limit Contractual Insurance Requirements**

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Most service contracts contain separate indemnity provisions and insurance procurement requirements, the latter of which often include an obligation that the contractor name its client as an additional insured on the contractor's CGL policy. As the U.S. Court of Appeals for the Fifth Circuit's decision in *ExxonMobil Corp. v. Electric Reliability Services*, 868 F.3d 408 (5th Cir. 2017), explains, in some instances a party's contractual obligation to procure

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insurance—including payment of deductibles—may be limited to claims that fall within the scope of the indemnity agreement. This is an important consideration.

Contractual Provisions and Additional Insured Endorsements Can Limit Scope of Additional Insured Coverage

Named insureds, such as contractors, may want to protect their policy limits (and not have to pay additional deductibles) by not providing additional insured coverage that is broader than the scope of indemnity required by the contract. And putative additional insureds, such as project owners, will want the broadest scope of additional insured coverage possible to protect and supplement their own insurance program policy limits, especially if the contract only provides limited indemnity. Along these lines, they will want to try to get the fullest benefit of additional insured coverage by having the named insured pay the full amounts of any deductibles in their own program as well as in the additional insured's program, regardless of whether the claim falls within the scope of indemnity.

The *ExxonMobil* decision outlines how contracting parties may attempt to accomplish both goals, albeit not in the same contract. Whether they will succeed will depend not only on the contract language, but also on the applicable law and the language of the specific additional insured endorsement at issue. Nevertheless, the starting point in attempting to limit the insurance requirements to the scope of indemnity—or ensuring that they are not so limited—will always be the insurance-related provisions in the contract.

Additional Insured Coverage May Not Be Limited to Contractual Indemnification Provisions

The dispute in *ExxonMobil* arose out of an underlying jobsite injury. ExxonMobil hired Electric Reliability Services (ERS) to perform electrical work at one of its chemical refineries. ERS's work was governed by a contract that required ERS to procure additional insured CGL coverage for ExxonMobil and pay deductibles underlying that insurance. The contract contained a separate, mutual indemnity provision that required ERS and ExxonMobil to indemnify each other for injuries "resulting from the [other's] negligence."

When an injured employee of ERS's subcontractor sued ExxonMobil, ExxonMobil sought additional insured coverage from ERS' CGL insurer and asked ERS to pay the policy's \$3 million deductible. ERS conceded that the insurance requirements, standing alone, required ERS to pay the deductible on ExxonMobil's behalf. However, ERS contended that it was not required to pay the deductible because the worker's injuries had been caused by

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ExxonMobil's sole negligence and the indemnity provision relieved ERS of any obligation to pay the deductible for claims that arose solely from ExxonMobil's negligence. In other words, ERS argued that its obligations to provide insurance, including payment of any deductibles, were no broader than its indemnity obligations. According to ERS, since its indemnity obligations would not have been triggered if ExxonMobil had brought a claim for indemnity, ERS's insurance obligations were not triggered.

In making this argument, ERS relied on the Texas Supreme Court's decision in *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015), in which the court found that BP was not entitled to additional insured coverage under liability policies procured by Transocean, BP's contractor, for liability arising out of the 2010 sinking of the offshore drilling platform Deepwater Horizon and based on language in the BP-Transocean contract requiring Transocean to provide additional insured coverage to BP "for liability assumed by Transocean under the terms of this contract." In the contract, BP agreed to indemnify Transocean for subsurface pollution and Transocean agreed to indemnify BP for above-surface pollution. Because the additional insured endorsement at issue only provided coverage "where required," the *Deepwater Horizon* court held that BP was not entitled to additional insured coverage for subsurface pollution because Transocean had not agreed to assume liability for subsurface pollution.

The Fifth Circuit in *ExxonMobil* held that *Deepwater Horizon* did not support ERS's position because, unlike the insurance requirement in the BP-Transocean contract, which was limited to additional insured coverage "for liability assumed by Transocean," the contractual obligation to procure additional insured insurance (including payment of the deductible) in the ERS-ExxonMobil contract had contained no language indicating that the parties intended the scope of the indemnity provision to govern the scope of the insurance provision. In explaining why ERS's argument was incorrect, the ExxonMobil court observed that contractual insurance requirements and contractual indemnification provisions impose separately enforceable, independent obligations—unless the contract contains language linking the two obligations and specifying that the scope of the indemnity obligation explicitly limits the scope of the duty to provide additional insured coverage.

The Fifth Circuit noted that the contract provided that ERS "shall" provide insurance coverage and "shall" pay the applicable deductible without reference to the scope of liability under the indemnity provision. Because there was no limiting language in the contract at issue in *ExxonMobil*, the court found ERS liable to pay the deductible.

Endorsements Limit Additional Insured Coverage to Contractually Required Coverage

While the *ExxonMobil* decision focused on ERS's liability to pay a deductible, the *Deepwater Horizon* decision had denied Transocean's CGL insurer's liability to provide additional insured coverage. Similar to the additional insured endorsement at issue in *Deepwater Horizon*, the additional insured endorsements issued in April 2013 by the Insurance Services Office (ISO) now specify that "[i]f coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured."

Although whether the *Deepwater Horizon* court correctly determined the scope of additional insured coverage available to BP is subject to debate, policyholders should expect that insurers will continue to make arguments similar to those made by Transocean's insurer in coverage disputes arising out of the interpretation of ISO's April 2013 and later additional insured endorsements, as will contracting parties in disputes over the responsibility for paying deductibles.