



BP'S \$700 MILLION EXCESS INSURANCE QUESTION – DID POLLUTION DAMAGE ORIGINATE ABOVE THE SURFACE OF THE WATER?

Pamela A. Palmer¹

BP's liability for the Deepwater Horizon spill is estimated to range anywhere from \$20 to \$70 billion.² Although BP has agreed to set up a \$20 billion fund for victims of the spill, it has made it clear that it will seek to recoup those costs from the numerous different parties it believes shares blame for the spill. These parties range from BP's partners to the rig contract to the manufacturer of the blowout preventer cited as a cause of the accident.³

As with any major casualty, one of the most important sources of recovery is that of insurance. BP, however, is self-insured. The owner of the Deepwater Horizon, Transocean Ltd, on the other hand, has approximately \$700 million worth of excess pollution coverage. Seeking to tap into Transocean's insurance coverage, on May 14, 2010, BP put Transocean's carriers on notice that it would seek to recover as an additional insured under Transocean's excess policies.⁴

In response to BP's notice, the excess insurers filed a Declaratory Judgment action in the U.S. District Court for the Southern District of Texas in Houston against BP.⁵ In the action, the excess insurers are seeking a declaration that they do not have any additional insured obligations to BP due to the scope of liabilities assumed by Transocean under its drilling contract with BP.⁶ The suit alleges the drilling contract between Transocean and BP required that Transocean obtain additional insured protection that was limited by the scope of the liabilities assumed by Transocean under the terms of the contract.⁷ The insurers claim that the drilling contract stated only that Transocean would assume liability for damage "originating above the surface of the land or water from spills, leaks or discharges." Because the liabilities BP faces for pollution

emanating from BP's well are from below the surface and from the well, the insurers argue those liabilities are not within the scope of the additional insured protection provided by the excess policies.⁸

As of press time, BP had not answered the insurers' complaint, and a stipulation agreed to by the parties extended its time to answer until mid-August 2010. Nor has BP publicly commented on its anticipated response to the suit. Possible arguments BP may make include an argument that the terms of the insurance policies, as well as the drilling contract, provide far broader protection for BP than what is asserted by the excess insurers. Notably, in corporate filings with the U.S. Securities and Exchange Commission only a few weeks after the explosion, Transocean described the availability of additional insurance that "would otherwise be assumed by the well owner, such as costs to control the well, redrill expenses and pollution from the well. . . . [This insurance] provides coverage for such expenses in circumstances in which we have legal or contractual liability arising from our gross negligence and/or willful misconduct."⁹ Such language raises the possibility that the contract with BP contains a gross negligence/willful misconduct catchall that would allow BP to recover under the policies to the extent the damage resulted from Transocean's conduct.¹⁰ The scope of Transocean's contractual liability to BP will need to be hammered out to determine whether BP is entitled to this excess coverage.

Even absent a gross negligence/willful misconduct provision in the contract, to the extent BP can argue that the damage is a result of liability Transocean agreed to assume that originates above the surface of the water, it may have a valid argument for recovery

¹ Pamela A. Palmer is an attorney in the Los Angeles office of Morris Polich & Purdy, LLP. Pam's practice focuses on insurance coverage, environmental and admiralty matters. She can be reached at ppalmer@mpplaw.com

² Jad Mouawad, *BP Tries to Reassure Shareholders*, N. Y. TIMES, July 7, 2010.

³ See John Schwartz, *Liability Questions Loom for BP and Ex-Partners*, N. Y. TIMES, June 24, 2010.

⁴ *Certain Underwriters at Lloyd's, London and Various Insurance Companies v. BP plc et al.*, Complaint for Declaratory Relief, Case No. 4:10-cv-01823 (S. D. Tex. filed May 21, 2010) ("Lloyd's Complaint") at ¶¶ 4-5.

⁵ See, Lloyd's Complaint, *supra*.

⁶ *Id.* at ¶¶ 1, 20-24.

⁷ *Id.* at ¶¶ 11-12.


⁸ *Id.*

⁹ May 5, 2010 Transocean 10-Q filing, available at <http://www.deepwater.com/fw/main/SEC-Filings-57.html>.

¹⁰ Of course, at least one of BP's partners in the oil rig, Anadarko Petroleum Corporation, claims that BP's intentional misconduct and gross negligence in failing to react to "critical warning signs" on the Deepwater Horizon prior to the casualty absolves it of liability under its contract with BP. See *supra* note 1; see also, News Release, Anadarko Petroleum Corp., (June 18, 2010) (available at <http://www.anadarko.com/Investor/Pages/NewsReleases/NewsReleases.aspx?release-id=1439839>).

under the policies. Impacting such an argument is a preliminary investigation indicating that the explosion and resultant spill resulted from, among other things, a hydraulic leak of a blowout preventer under the surface of the water.¹¹ A possible focus of this coverage battle, therefore, may be on whether the “originating damage” referred to in the oil rig contract between BP and Transocean is the spill itself below the surface or

whether the contract actually refers to the cause of the damage. If the latter, that cause may well indeed prove to be surface-based and within the scope of coverage provided by the excess insurers.

As with the other legal issues arising from the spill, there appear to be no easy answers concerning the availability and extent of insurance coverage responsive to the damages from the accident. 

¹¹ See *Inquiry into the Deepwater Horizon Gulf Coast Oil Spill*, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (May 12, 2010) (opening Statement of Rep. Henry A. Waxman, Chairman), http://energycommerce.house.gov/Press_111/20100512/Waxman.Opening.oi.05.12.2010.pdf.