

Marine Insurance Day – October 5, 2012
Additional Insureds
&
Marine Insurance

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WIGGIN AND DANA

Agenda

- General Principles
- Case Studies
- Takeaways and Q&A

Named Insureds v. Additional Insureds

- Named Insureds

Persons or organizations specifically named in the policy

First Named & Additional Named Insureds

- Additional Insureds

Individuals or entities that enjoy “insured status,” but are not named insureds

Two types of additional insureds:

1) Status Additional Insureds

2) Named Additional Insureds

Differences Between Named Insureds and Additional Insureds

Rights / Liabilities and Coverage – Generally	Named	Additional
Coverage for employees, executive officers, and directors	Yes	No
Required to reimburse deductible paid by insurer	Yes	No
Duty to provide notice	Yes	Implied Duty
<u>Policy Exclusions:</u> <ul style="list-style-type: none"> •Damage to insured’s own products •Damage to insured’s own work •Recall of products, work or impaired property •Damaged to impaired property or property not physically injured 	Apply	Don’t Apply

Status Additional Insureds v. Named Additional Insureds

- Status Additional Insureds

Individuals or entities who have a special relationship that triggers a provision in a liability policy granting them automatic “insured status”

- Example: certain contractors of insured

Named Additional Insureds—Two Types

- 1) Individuals or entities that have been identified as covered by a named insured in an additional insured endorsement
- 2) Individuals or entities that have a contract with a named insured requiring additional insurance coverage which is covered by a blanket endorsement for such contracts in the named insured’s policy

Additional Insureds distinguished from Loss Payees

- Additional Insureds

Individuals or entities that enjoy “insured status,” but are not named insureds and do not have certain responsibilities of named insureds

- Loss Payees

A person or entity, other than the named insured, designated in a loss payable clause to receive insurance proceeds whose right of recovery is no greater than the named insured and is derivative of the named insured’s policy rights and obligations

- Example: Mortgagee

Identifying Additional Insureds

- Inclusion as Part of a Named Group
 - Additional insured coverage generally must be documented within the “four corners” of the policy
 - A party may achieve additional insured status by its inclusion in a group or a category of entities identified as insureds or additional insureds either in the policy’s Who Is Insured section or in an “automatic” insured endorsement to the policy

Identifying Additional Insureds

Continued . . .

- Specific Endorsement and Best Practices

Insurers can specifically name an additional insured without regard to its relationship status with the named insured, or an insurer can clearly link additional insured protection to a particular project or risk or status.

- Certificates of Insurance

Certificates may be the only proof of insurance an additional insured has, but additional insureds should be cautious about unduly relying on such certificates, as they generally do not disclose all terms and conditions of coverage.

Duty to Defend / Duty to Indemnify

- Covered Claims

The policy must extend coverage to additional insureds and coverage may be restricted to claims relating to the named insured's activities or operations for which a third party is seeking to hold the additional insured responsible.

- Agreement to Procure Coverage

Generally, without explicit language requiring a party to be named as an additional insured, a contract will not be read to include such language.

- Causal Relationship: "Arising out of"

A typical policy clause extending coverage to additional insureds may provide coverage only for liabilities "arising out of" the named insured's activities.

Duty to Defend / Duty to Indemnify

Continued . . .

- Duty to Defend

An insurer has a broad duty to defend its insureds whenever allegations against the insured suggest a reasonable possibility of coverage.

- Duty to Indemnify

In contrast, there is no duty to indemnify, unless a covered loss exists in fact.

- Priority of Coverage

When the additional insured also is a named insured under a different policy, priority of coverage is determined in accordance with the terms of the policies' "other insurance" clauses.

Scope of Coverage

- Additional insureds are generally entitled to the same protection as the named insured
- The scope of coverage afforded to additional insureds is generally no greater than the coverage afforded to named insureds
- However, coverage for the additional insured may be available even when coverage is excluded for the named insured
- Additional Insured's Own Negligence:
Whether an additional insured is entitled to coverage for its own negligence is dependant upon the language of the additional insured clause/endorsement and the applicable law.

Notice

- Claims-Made Notice
- Occurrence-Based Notice (as soon as practicable)
- Notice Duties of the Additional Insured

Unless otherwise provided in the policy, anyone may give notice of an occurrence or a claim on behalf of an additional insured, so long as the notice is sufficient and timely. What constitutes sufficiency and timeliness is established by the policy language and applicable law.

- Receipt of Notice

The party being notified must be the party to whom notice is to be provided as set forth in the insurance contract, or at least a legally recognized agent of the insurer. In certain circumstances notice provided by the named insured may be sufficient as to the additional insured, but separate notice by the additional insured is strongly recommended.

Limits Issues

- Deductibles

An insurer generally defends and indemnifies from the outset and then seeks reimbursement of deductible from its insured.

- Self-Insured Retentions (SIR)

Insurer pays only the defense costs and indemnification in excess of the SIR

- Dilution of Policy Limits

Typically all insureds under one policy share the same per-occurrence and aggregate limits, which can result in dilution of policy limits. “Severability clauses” or “separation of insureds clauses” state that the insurance applies separately to each insured except with respect to policy limits.

Marine Insurance Cases

Re: Additional Insureds

- Coverage for additional insureds under marine insurance policies operates in much the same way as coverage for additional insureds under non-marine policies.
- However, marine insurance policies are subject to federal maritime case law rather than any particular state's law, unless there is no entrenched federal case law on point. Thus, marine insurance policies are generally not subject to state laws that may invalidate any indemnification provisions in contracts.

Seabulk Offshore Ltd. v. American Home Assurance Co.

377 F.3d 408 (4th Cir. 2004)



Seabulk Offshore Ltd. v. American Home Assurance Co.

377 F.3d 408 (4th Cir. 2004)

FACTS

- Seabulk entered into a manning agreement with Dyn Marine whereby Dyn Marine would provide crews to two vessels owned by Seabulk.
- Under the Agreement Dyn Marine was to secure and maintain a comprehensive general liability (CGL) policy that included, in addition to the usual CGL coverage, *in rem* coverage, contractual liability coverage, and “completed operations” coverage for Seabulk as an additional insured.

Seabulk Offshore Ltd. v. American Home Assurance Co.

377 F.3d 408 (4th Cir. 2004) Continued . . .

FACTS (continued)

- The Dyn Marine policy also included a footnote that indicated the policy functions with respect to Dyn Marine “To Cover Dyn Marine’s US Office Exposures *Only*.”
- Dyn Marine’s insurer was to waive its rights of subrogation against Seabulk.
- Seabulk agreed to secure and maintain full protection and indemnity insurance (P&I) and to name Dyn Marine as a co-insured with a waiver of subrogation.

Seabulk Offshore Ltd. v. American Home Assurance Co.

377 F.3d 408 (4th Cir. 2004) Continued . . .

FACTS (continued)

- The *Seabulk New Hampshire*, manned by a Dyn Marine crew, collided with another vessel, injuring two crewmen on the other vessel, who sued Seabulk and Dyn Marine, both of which settled. Seabulk then demanded indemnification and defense from American Home, which denied the claim.



Seabulk Offshore Ltd. v. American Home Assurance Co.

377 F.3d 408 (4th Cir. 2004) Continued . . .

- Liability underwriter argued that because Dyn Marine was not covered by the policy, Seabulk could not be afforded more coverage than Dyn Marine.
- Liability underwriter also argued it was not obligated to cover Seabulk, which had been reimbursed by its P&I insurer.

Seabulk Offshore Ltd. v. American Home Assurance Co.

377 F.3d 408 (4th Cir. 2004)

Additional Insured's Coverage May Exceed Coverage of Named Insured

- When a policy provides coverage to a number of named insureds, an insurer must specify in that policy that an additional insured's coverage is limited to the coverage provided to the named insured through which the additional insured acquired its coverage.
- If there is nothing in the policy that limits an additional insured's coverage to the coverage provided to the named insured through which it acquired its coverage, the scope of the additional insured's coverage may exceed the coverage of the named insured.

Johnson v. Seacor Marine Corp.

404 F.3d 871 (5th Cir. 2005)



Johnson v. Seacor Marine Corp.

404 F.3d 871 (5th Cir. 2005)

FACTS

- SEACOR, a company providing ferrying services to Chevron and its contractor PMI, executed a “Vessel Boarding and Utilization Agreement Hold Harmless” (VBA) with PMI whereby PMI was required to name SEACOR as an additional insured under its comprehensive general liability policy with a waiver of subrogation rights and deletion of the CGL watercraft exclusion.

Johnson v. Seacor Marine Corp.

404 F.3d 871 (5th Cir. 2005)

FACTS (continued)

- PMI's insurer sent SEACOR an insurance certificate noting its coverage as an additional insured. However, the insurer was unaware of the content of the VBA and made no change to the watercraft exclusion.
- The incident was the subject of three actions, each assigned to a different judge. The district courts were split on the question of whether the VBA was supported by adequate consideration and enforceable.

Johnson v. Seacor Marine Corp.

404 F.3d 871 (5th Cir. 2005)

Insurer Not Liable to Additional Insured Where Insurer Not Informed of Terms of Contract between Named Insured and Additional Insured

- When a company is required to name another company as an additional insured with specific provisions that the company never communicates to their insurer, the exchange of that promise of additional insured status for services is adequate consideration to support a VBA.
- However, although the VBA is enforceable as to the company providing insurance, the insurer and the additional insured have no contractual relationship.
- An insurer is not liable to an additional insured for negligent misrepresentation when the insurer is unaware of any required additional provisions and the certificate of insurance sent to the additional insured contained no incorrect information.

Texaco Exploration & Production, Inc.

v.

Amclyde Engineered Products Co., Inc.

448 F.3d 760 (5th Cir. 2006)

FACTS

- An oil platform tower deck section owned by Texaco fell into the Gulf of Mexico
- The insurers of the project argued that subcontractors were not covered as additional insureds.



Texaco Exploration & Production, Inc.

v.

Amclyde Engineered Products Co., Inc.

448 F.3d 760 (5th Cir. 2006)

**Subcontractor Covered as Additional Insured without
Written Contractual Relationship to Named Insured**

- A covered subcontractor is not required to enter into a written contract with a principal assured, thereby becoming a contractor, to be covered as an additional insured.

Becker v. Tidewater Inc.

586 F.3d 358 (5th Cir. 2009)

FACTS

- Becker was injured while working for Baker, which was using the *Republic Tide*, a vessel outfitted for well-stimulation services. Baker was using the *Republic Tide* pursuant to a time-charter with Tidewater, the vessel's owner. Becker was aboard a rig for which *Republic Tide's* crew was performing well-stimulation service when he was injured as a result of an accident involving the vessel.

Becker v. Tidewater Inc.

586 F.3d 358 (5th Cir. 2009)

FACTS (continued)

- He sued Baker and Tidewater under the Jones Act and the Longshore and Harbor Workers Compensation Act (LHWCA), and the jury found Baker 55 percent liable and Tidewater 45 percent liable for the injuries under the Jones Act.

Becker v. Tidewater Inc.

586 F.3d 358 (5th Cir. 2009)

FACTS (continued)

- The time charter contained reciprocal indemnity agreements between Baker and Tidewater, and also required Tidewater to procure and maintain P&I insurance covering Tidewater's liabilities, including "Collision/Towers/Liability and crew coverage, but excluding Cargo Liability coverage and coverage for those risks, if any, assumed or insured by CHARTERER [Baker] in this Charter."

Becker v. Tidewater Inc.

586 F.3d 358 (5th Cir. 2009)

FACTS (continued)

- The P&I policy also specified that the policy would “include CHARTERER, in its capacity as charterer of the vessel, but only with respect to the risks assumed by OWNER [Tidewater] in this Charter.”

Becker v. Tidewater Inc.

586 F.3d 358 (5th Cir. 2009)

Charterer Not Covered Under Reciprocal Indemnity Agreement for Risks It Assumed

- The additional insured provision does not cover a party's liabilities for its own employees' injuries when the reciprocal indemnity agreement excludes coverage for those risks, if any, assumed or insured by the that party, because the party assumes the risk of injury to its own employees.

Cal-Dive International, Inc. v. Seabright Ins. Co.

627 F.3d 110 (5th Cir. 2010)

FACTS

- Coastal Catering had entered into a contract with Horizon to provide catering services aboard Horizon's vessel, the *M/V American Horizon*.

Cal-Dive International, Inc. v. Seabright Ins. Co.

627 F.3d 110 (5th Cir. 2010)

FACTS (continued)

- The contract provided that Coastal Catering would defend Horizon through its maritime general liability (MGL) insurer.
- Coastal Catering also had a maritime employer's liability (MEL) policy.

Cal-Dive International, Inc. v. Seabright Ins. Co.

627 F.3d 110 (5th Cir. 2010)

FACTS (continued)

- The injured employee, Brown, alleged that he was employed by both Coastal Catering and Horizon.
- Horizon maintained a P&I policy covering the crew on its vessel.

Cal-Dive International, Inc. v. Seabright Ins. Co.

627 F.3d 110 (5th Cir. 2010)

Absent Language to the Contrary, Additional Insureds Enjoy the Same Benefits and Are Subject to Same Restriction as Named Insured

- When endorsements add additional insureds to a policy, the additional insureds enjoy the same benefits and are subject to the same restrictions as a named insured, absent policy language to the contrary.

In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010

No. 2179, E.D. La. (November 15, 2011)

FACTS

- Deepwater Horizon explosion on 4/20/10
- BP sought coverage as Additional Insured under Transocean’s policies



In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010

No. 2179, E.D. La. (November 15, 2011)

The 12 Corners Rule?

- When an insurance agreement requires reference to an underlying work contract, it is the intent of the insurers that any insurance provisions or indemnities contained within the underlying contract will shape the scope of additional insured coverage.
- An insurer does not have additional insurance obligations as to liabilities assumed by an additional insured.

TAKEAWAYS

- Identify Additional Insureds to the greatest extent possible.
- Clarify scope of coverage and, in particular, any differences in coverage between Named Insured and Additional Insureds
- Clarify application of policy limits

TAKEAWAYS

Continued . . .

- Identify terms of Contracts entered into by Insureds to the fullest extent possible
- Choice of Law and Jurisdiction provisions are vital!
- Q&A

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