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# In Its Latest *Deepwater Horizon* Ruling, the Texas Supreme Court Clarifies the Application of a "Joint Venture Scaling" Provision

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Insurance Recovery

On January 25, 2019, the Texas Supreme Court decided the latest insurance appeal arising from the explosion of the *Deepwater Horizon* drilling rig and blowout of the Macondo Well on April 20, 2010. *See* *Anadarko Petroleum Corp. & Anadarko E&P Co., L.P. v. Houston Cas. Co., et al.*, No. 16-1013 (Tex. Jan. 25, 2019). In doing so, the Texas Supreme Court closely construed the insurance policy language and held that the "joint venture scaling" provision at issue applied only to the policyholder's liability for damages to third parties, and did not apply to defense costs. This ruling will likely be helpful to energy companies involved in joint ventures whose insurance policies may contain similar provisions, which are common in the industry. It also restores a degree of predictability to Texas insurance coverage law.

This is the latest insurance appeal from the *Deepwater Horizon* incident. David Goodwin, Allan B. Moore, and Mark Herman of Covington represented BP in insurance recovery litigation arising from the *Deepwater Horizon* incident, as lead counsel in five related actions before the federal district courts in New Orleans and Houston, the United States Court of Appeals for the Fifth Circuit, and the Texas Supreme Court.

## Background

Anadarko Petroleum Corporation and Anadarko E&P Company, L.P. (collectively, "Anadarko") had a 25% interest in the Macondo Well.

Anadarko purchased an "energy package" insurance policy from various underwriters at Lloyd's, London. The policy provided excess liability coverage, including coverage for Anadarko's defense costs, up to $150 million per occurrence.

The policy also contained a standard joint venture clause providing, in relevant part:

> [A]s regards any liability of [Anadarko] which is insured under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture . . . in which [Anadarko] has an interest, the liability of Underwriters under this Section III shall be limited to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.

Anadarko sought insurance coverage for defense costs up to the policy's full $150 million limit of liability, but its insurers paid only $37.5 million. In doing so, the insurers contended that the joint venture clause "scaled" Anadarko's limits down to only 25%—Anadarko's interest in the joint venture at issue—of the full policy limit.

Anadarko disagreed with the insurers' scaling approach and sued for the remaining 75%. Relying on the provision's prefatory clause, Anadarko asserted, inter alia, that the joint venture provision applies only "*as regards any liability* of [Anadarko]," and "liability" does not encompass defense costs. The insurers, for their part, argued that the term "liability" was a broad enough term to encompass Anadarko's liability to pay its defense costs, such that the limit was reduced for defense costs, as well as for settlements and judgments.

## The Texas Supreme Court's Decision

The Texas Supreme Court accepted Anadarko's argument that the joint venture scaling provision applied only to *indemnity* (i.e., settlements or judgments) and did not operate to reduce the limits available for *defense costs*.

Although the court observed that the policy did not define the term "liability," it did not accept the insurers' argument that the term "liability" was broad enough to encompass Anadarko's obligation to pay defense costs. Instead, the court said, in construing insurance policies, "context matters." So the court held that it must consider whether the language of the insurance policy demonstrates that the parties intended a different or technical meaning for "liability," and that it "must consider how the policy uses the term at issue and apply that usage unless the provision at issue clearly requires a contrary meaning."

The court then considered the use of the term "liability" and the phrase "Defense Expenses" throughout the policy, including in the relevant coverage grant and definition of "Ultimate Net Loss." In doing so, the court concluded that the policy used the term "liability" to mean something distinct from "expenses." As to the former, the court concluded that "'liability' refers in th[e] policy to an obligation imposed on Anadarko by law to pay for damages sustained by a third party who submits a written claim," and thus did not apply to defense costs.

Applying this understanding of the term "liability," and because scaling under the joint venture provision applied only "as regards liabilities," the court concluded that the joint venture provision did not apply to reduce limits for defense costs.

## Implications

While coverage for joint ventures will depend on the particular language in the insurance policy at issue, the Texas Supreme Court's *Anadarko* decision should help joint venture policyholders by making the policy's full limits of liability available to pay defense costs. The decision also signals a return by the Texas Supreme Court to insurance coverage decisions based on a close reading of the insurance policy language. This makes Texas insurance law easier to predict and allows policyholders and insurers to assess insurance coverage issues governed by Texas law with a greater degree of confidence.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Insurance Recovery practice:


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