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Client Alert: A Minimum is Not a Maximum: The Texas Supreme Court Rejects a Common Insurer Tactic to Reduce Additional Insured Coverage

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It is an all-too-common scenario for insurance practitioners. Company A hires an independent contractor to perform work on its premises. Their agreement specifies that Contractor will procure liability insurance—often described in the agreement as a "minimum of," "at least" or "no less than" a specified dollar limit—and further requires that Company A be named as an additional insured on that liability insurance. An accident happens; Contractor employees are injured while working on Company A premises, some fatally. The workers' compensation laws severely limit the employees' ability to recover from their employer, so they pursue tort claims against Company A, a perceived deep pocket.

This is—at least in the eyes of Company A—the very reason it negotiated for Contractor to purchase liability insurance and name Company A as an additional insured. As it turns out, Contractor purchased more than the "minimum" insurance limits required by the agreement. Company A provides notice to Contractor's liability insurers and expects confirmation of additional insured coverage up to the full limit of liability insurance purchased by Contractor.

Not so fast: the insurance industry's dislike of—at times, outright hostility toward—additional insured coverage is well established. Since at least the time when courts began to interpret the Insurance Services Offices' 1985 standard form policy language as being broad enough to expressly cover an additional insured's own alleged negligence, *e.g.*, *Casualty Insurance Co. v. Northbrook Property & Casualty Insurance Co.*, 150 Ill. App. 3d 472 (1986), the insurance industry has been taking increasingly severe steps to limit the scope of additional insured coverage going forward. The industry's attitude often results in increasingly aggressive coverage positions, and—to the great surprise of Company A—one of Contractor's excess insurers takes the position that the "minimum" limit is actually a maximum, and that its excess policy accordingly provides no coverage to Company A.

The Texas Supreme Court decision in *ExxonMobil Corporation v. National Union Fire Insurance Company of Pittsburgh, Pa.* illustrates the general scenario outlined above.[1] ExxonMobil hired an independent contractor, Savage Refinery Services, to perform work at an ExxonMobil refinery.[2] Their service agreement required Savage to "carry and maintain in force at least the following insurance and amounts: … (2) its *normal and customary Commercial General Liability insurance coverage and policy limits or at least $2,000,000, whichever is greater*."[3] The agreement also mandated that the "liability insurance policy(ies) described above shall: (i) *cover [ExxonMobil] and Affiliates as additional insureds* in connection with the performance of Services; and (ii) be primary to all other policies . . . ."[4] Among other liability insurance, Savage purchased a primary general commercial liability policy with a limit of $4.5 million and an umbrella policy with a limit of $25 million, both from National Union.

Two Savage employees were severely burned by a discharge of hot water while working at the ExxonMobil refinery, and both asserted claims against ExxonMobil that were later settled for approximately $24 million.[5] The National Union primary policy exhausted its full $4.5 million limit toward settlement, but National Union denied coverage under the umbrella policy.[6]

To ExxonMobil, at least, the National Union umbrella policy was clear: it expressly defined the term "Insured" to include "any person or organization … included as an additional insured" under the National Union primary policy. The primary policy, in turn, provided additional insured coverage to "[a]ny person or organization" to which Savage was obligated by "any contract or agreement" to name as an additional insured. National Union had already recognized ExxonMobil as an additional insured under the primary policy, so ExxonMobil's coverage rights under the National Union umbrella policy should have been apparent.[7]

Yet National Union disputed coverage. It argued that the primary policy (and therefore its umbrella policy) also incorporated the policy limit referenced in the service agreement. The Texas Supreme Court rejected National Union's effort to convert the $2 million floor into a ceiling, and did so by relying on basic contract construction principles.[8] The court held that the starting place was the contract itself (the insurance policy), and that "we refer to extrinsic documents only if that policy clearly requires doing so; and we refer to such extrinsic documents only to the extent of the incorporation and no further."[9] Applying these principles, the court began with the National Union umbrella policy, which incorporated the National Union primary policy for the purpose of determining "who is insured."[10] The court found that the National Union primary policy, in turn, incorporated the service agreement for the purpose of also determining "who is insured."[11]

The National Union umbrella policy also expressly disclaimed "broader coverage" than the National Union primary policy, and National Union argued that this "limiting clause" somehow incorporated the service agreement. The court rejected this argument, too. It reasoned that the term "broader

coverage" referred solely to losses that the primary policy would not cover: "[ExxonMobil] seeks only the *same* coverage as the primary policy but at the umbrella policy's higher limits, given that the primary policies have been exhausted."[12] The court noted that the umbrella policy "does not say anything at all, even by reference, about the service agreement's *payout limits*, much less with the clarity that our cases would require for incorporation."[13] Moreover, it found that "[t]he service agreement provides for a *minimum* amount of insurance, not a maximum," noting that "[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."[14] And last (but not least), the court concluded that interpreting "broader coverage" in the manner argued by National Union would be "self-defeating" and render the umbrella policy itself "largely meaningless," as "an umbrella policy springs into action only when the primary policy is exhausted."[15]

Policyholders can and should view the Texas Supreme Court's decision as a positive, but that feeling may be short-lived. It often can take years for a case to come before a state supreme court, and the ExxonMobil/National Union dispute was no exception. Insurance policy language, on the other hand, continues to develop while these disputes are pending. Perhaps sensing that courts are unlikely to embrace their positions, at least some insurers have begun to change their policy language in an effort to try to expressly incorporate by reference any minimum insurance requirements in underlying agreements such as the one between ExxonMobil and Savage. Whether their language successfully accomplishes this reduction remains to be seen, but it is a predictable part of the insurance industry's continuing march toward increasing limitations on the scope of additional insured coverage.

Footnotes

[1] No. 21-0936, 2023 WL 2939596 (Tex. Apr. 14, 2023).

[2] *Id.* at *1.

[3] *Id.* at *1 n.1.

[4] *Id.*

[5] *Id.* at *2.

[6] *Id.*

[7] *See id.* at *3.

[8] *See id.* at *3–5

[9] *Id.* at *3.

[10] *See id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at *4.

[15] *Id.*

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