

In Deepwater Horizon Insurance Coverage Dispute, Fifth Circuit Affirms Favorable Ruling for Policyholders and Certifies Unfair Insurance Practices Question to Texas High Court



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In the latest development in the insurance coverage litigation arising out of the *Deepwater Horizon* oil spill, the U.S. Court of Appeals for the Fifth Circuit affirmed a \$50 million finding of coverage, holding that only the presence of other actual, available insurance coverage—rather than the mere potential for other insurance—can trigger an “other insurance” clause. [*In re Deepwater Horizon*](#), No. 14-31321, slip op. at 10 (5th Cir. Nov. 19, 2015). Additionally, the court asked the Texas Supreme Court to weigh in on whether the insured must demonstrate damages beyond the denied policy benefits in order to sustain a claim for unfair insurance practices under the Texas Insurance Code.

In a November 19 opinion, the Fifth Circuit examined the “other insurance” clause in a Liberty Insurance Underwriters policy covering Cameron International, the

manufacturer of the failed blowout preventers involved in the *Deepwater Horizon* spill. The policy provided: “If other insurance applies to a ‘loss’ that is also covered by this policy, this policy will apply excess of such other insurance.” *Id.* at 6. The court rejected the insurer’s argument that the mere potential for indemnification could trigger the other insurance clause, in large part because the use of “applies,” written in the present tense, indicates a need for actual rather than theoretical coverage. *Id.* at 7. Moreover, writing the word “potential” into the policy would make it one of “last resort” rather than simply protecting against a double recovery. *Id.* at 7-8.

On a separate cause of action for unfair insurance practices, which could allow treble damages under certain circumstances, the court certified a question of law to the Texas Supreme Court, asking whether a policyholder must show damages beyond the denied policy benefits in order to recover under Chapter 541 of the Texas Insurance Code. *Id.* at 12-14.

This follows a series of insurance coverage cases stemming from the *Deepwater Horizon* oil spill, including a [decision by the Texas Supreme Court](#) early in 2015 involving another certified question from the Fifth Circuit on the interplay between indemnification agreements and additional insured coverage.

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