Indemnification Perils:
Will Your Client Be Protected When the Time Comes?
Agenda

• Introductions
• Recent Issues
• Best Practices
• Questions?
Introductions

• Theodore D. Gobillot
  • Associate General Counsel, Rowan Companies, Inc.

• Charles A. Lestage
  • Associate General Counsel and Deputy Compliance Officer, Hercules Offshore, Inc.
Recent Issues
Recent Issues

- Core Breach

- Additional Insured Provisions
Core Breach

• **Argument**: A party’s breach of contract is so fundamental that it vitiates contractual indemnity obligations

• Contractual language addressing this issue
“Fault shall be understood to be all-inclusive and shall mean every type of fault or alleged fault or theory of liability whatsoever, including . . . strict liability, product liability, tort, any breach of contract, violation of federal, state or local statutes or regulations, or negligence, gross negligence, or willful misconduct (regardless of whether such negligence or gross negligence be sole, joint, or concurrent, comparative, active or passive), or any theory of legal liability, and including claims arising by way of contract or indemnity.”

* Emphasis added
Core Breach

Example: “A party’s breach of any kind or nature as to one section or provision of this contract shall not impact or abrogate the rights and responsibilities of the parties contained in any other section or provision of the contract.”
Recent Issues

• Additional Insured Provisions
Additional Insured

- Contractual Requirement to Name as Additional Insured
- Backing Indemnities
- Exposed?
Additional Insured

- Example of Vague Additional Insured Language in a Contract:

8.3 shall be an additional insured under insurances referred to in Paragraphs 8.1.2, 8.1.3 and 8.1.4 above with respect to the contractual indemnifications, liabilities, and risks expressly assumed by CONTRACTOR under this Contract. Such policies shall contain a cross liability clause so that and CONTRACTOR are regarded as third parties to one another.

* Emphasis added
Additional Insured

• Example of Better Additional Insured Language in a Contract:

1004. Additional Insured
Contractor shall name Operator as additional insured, where permitted, under its policies of insurance, but only with respect to and to the extent of the liabilities specifically assumed by Contractor under this Contract.

Operator shall name Contractor as additional insured, where permitted, under its policies of insurance, but only with respect to and to the extent of the liabilities specifically assumed by Operator under this Contract.


* Emphasis added
Additional Insured

• Example of Contractual Requirement Prohibiting a Wrongful Claim of Additional Insured Status:
"The naming of the Operator as additional insured is not intended to and shall not derogate from risk allocation and indemnity agreements set out in this Contract. Operator agrees that it will not assert a claim against Contractor’s insurance with respect to risks, liabilities and/or losses assumed by Operator or as to which Operator has agreed to indemnify Contractor under this Contract."

* Emphasis added
Additional Insured


The naming of Mariner Group as additional insureds is not intended and shall not derogate from the division of risk and indemnity agreements set out under this Contract. The Mariner Group will not be entitled to assert a claim against Contractor’s insurance with respect to liabilities and losses assumed by Mariner or as to which Mariner has indemnified Contractor under this Contract.
Additional Insured

• Clarify Intent Within Insurance Policies
• Example of Vague Additional Insured Language in an Insurance Policy:

This Policy is subject to the following definitions:

1. INSURED:
   Only the following are included in the definition of “INSURED” under this Policy:

(C) Any person or entity to whom the Named Insured is contractually obligated to provide such coverage as is afforded by this Policy.
Additional Insured

• Endorsement Containing Better Additional Insured Language in an Insurance Policy:
Additional Insured

“Notwithstanding any other provision of this Policy, where a person or entity is an additional insured by reason of an agreement by the Named Insured to provide such additional insured status, the coverage and limits of this Policy with respect to such additional insureds are limited solely to the coverage and limits that the Named Insured is obligated to provide by a legally enforceable written contract, bid or work order entered into before any relevant occurrence and only with respect to:

• i) liability arising out of operations conducted by the Named Insured or on their behalf or

• ii) facilities owned or used by the Named Insured.”

* Emphasis added
Best Practices

• Auditing Your Company’s Contract Language:
  - **How often** should your company audit?
  - **How** should your company audit?
  - **What** should your company audit?
Best Practices

• **How Often** to Audit Language:
  - Set Intervals? (e.g., annually)
  - In Response to Industry-Changing Events?
Industry-Changing Events

2010 *Deepwater Horizon* Incident
Industry-Changing Events

- **Texas Anti-Indemnity Law (HB 2093)**
  - Became effective January 1, 2012
  - Applicable to any contract involving the “construction, alteration, renovation [and] repair of […] a building, structure, appurtenance, or other improvement to or on public or private real property”
  - Pipelines apparently encompassed in new Texas Anti-Indemnity Law
Best Practices

• How Often to Audit Language:
  ▪ Set Intervals? (e.g., annually)
  ▪ In Response to Industry-Changing Events?
  ▪ In Response to the Company’s Litigation?
Best Practices

• **How** to Audit Language:
  - Internal vs. External Audit
  - Create a budget for the audit
  - Create and implement a written contracts auditing policy
Best Practices

• **What** Should Your Company Audit:
  - **What Documents?**
    - Master Service Agreements
    - Purchase Orders
    - Contracts
Best Practices

- **What** Should Your Company Audit:
  - What Contractual Language?
    - Indemnity Provisions
    - Insurance Policies
    - Choice of Law Provisions
Questions?

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