Fields Howell

Case Advisory **March 2015**

This month we report on an important decision from the Texas Supreme Court in the Deepwater Horizon disaster, and a decision from the California Court of Appeal.

Texas Supreme Court Holds BP Not Entitled to Additional Insured Coverage

The Texas Supreme Court has held BP is not entitled to insurance coverage for the Deepwater Horizon disaster. *In Re Deepwater Horizon* (13th February 2015). The explosion and sinking of the *Deepwater Horizon* oil-drilling rig in April 2010 exposed the oil-field developer, BP, to billions of dollars in damages for the oil pollution and loss of lives. BP did not buy insurance, but sought coverage as an additional insured on policies purchased by the rig owner, Transocean, through Underwriters at Lloyd's, London.

Underwriters and Transocean asserted that BP was not entitled to additional insured coverage for the oil pollution damage and filed declaratory proceedings against BP. Underwriters and BP argued that BP would only be entitled to coverage under the Transocean policy to the extent Transocean assumed liability under the terms of the drilling contract between BP and Transocean. However, in that contract, BP, not Transocean, agreed to be responsible for any oil pollution originating below the surface, under the so-called "knock for knock" indemnity agreement. Notwithstanding the contractual indemnity agreement, BP argued it should be entitled to additional insured coverage under Transocean's policies.

The Texas Supreme Court held BP was not entitled to the additional insured coverage. The court held that where the terms of the insurance policy wording confer additional insured coverage by reference to the drilling contract, then the scope of liability under the drilling contract governs the right to the additional insured coverage. In this case, the court held the only reasonable interpretation is that, because BP agreed to be responsible for subsurface oil pollution, it was not entitled to coverage under the Transocean policies.

California Court of Appeal Upholds Intellectual Property Exclusion

The California Court of Appeal in San Francisco has issued a decision upholding an insurer's denial of coverage based on the intellectual property exclusion in the ISO form policy. *Alterra Excess and Surplus Ins. Co. v. Estate of Buckminster Fuller* (9th March 2015).

Buckminster Fuller was a celebrated architect best known for his design of the geodesic dome. He died in 1983, but his estate has licensed the "Bucky" image to a number of companies for marketing and other uses over the years. This litigation arose out of a claim made by the estate against a company which used the "Bucky" image to market desk toys known as Buckyballs, without licensing or permission.

The insurer declined coverage on grounds the "intellectual property" exclusion in the policy barred coverage for the claims. That exclusion barred coverage for "infringement of copyright, patent, trademark, trade secret or other intellectual property rights." The court held the "other intellectual property" wording applied to bar coverage for the claims of unfair competition, invasion of privacy and unauthorized use of the "Bucky" image. The court held the exclusion, contained in the ISO CG 00 01 12 07 form, was "conspicuous, plain and clear."

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