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5th Circuit Broadens Insurance Coverage for Many E&P Companies

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The Fifth Circuit just issued an important decision on insurance coverage that the risk managers and insurance brokers for every E&P company should become familiar with. On June 23, 2014, in *Indemnity Insurance Company of North America v. W&T Offshore, Incorporated*, the Fifth Circuit ruled that W&T Offshore was entitled to $50 million in excess coverage for offshore damage it suffered from Hurricane Ike, even though it exhausted its underlying insurance with claims not covered by the excess policies.

Like most E&P companies operating offshore in the Gulf of Mexico, W&T had a package of insurance policies, including a primary commercial general liability (CGL) policy, five primary "Energy Package Policies" and four umbrella/excess liability policies. All the policies covered removal of debris (ROD) expenses and claims against W&T by a third-party. But unlike the underlying CGL and Energy Package Policies, the excess policies did not cover operators' extra expenses (OEE) or property damage incurred by W&T itself. After Hurricane Ike damaged over a hundred offshore platforms in which W&T had an interest, W&T submitted over $150 million in claims for (OEE) and property damage. Because those claims exceeded its primary limits, W&T submitted all of its ROD claims (estimated to exceed $50 million) to the excess policies.

The excess insurers denied coverage. They argued that excess coverage does not apply unless the underlying primary coverage is exhausted by claims also covered by the excess policies. Although the district court ruled for the excess insurers, the Fifth Circuit reversed and rendered judgment in favor of W&T. The Fifth Circuit noted that the insurers' argument "has force at first glance"; nonetheless, it concluded that "a careful reading of the contract unambiguously precludes Underwriters' interpretation."

The full analysis of the Fifth Circuit is less important for E&P companies than is the result. Although the policy language in W&T's excess policies is not universal, it is fairly common. Thus, whenever an E&P company faces losses exceeding its underlying primary coverage, the

company should first determine whether any of its losses would be covered by its primary policies but not its excess policies; in such cases, it should consider coordinating its submissions to maximize the available excess coverage.

But E&P companies should not become complacent with this new decision. The Fifth Circuit's reasoning emphasizes that the result could have been different had the excess policies at issue had other language. Thus, in reviewing and renewing their insurance packages, E&P companies (whether operating on the OCS, on the shelf or onshore) should pay attention to the language in the excess policies relating to exhaustion of the underlying policies—and indeed to all the provisions in their insurance policies. As any experienced transactional lawyer will admit, the "boilerplate" in a contract can often be critical. Excess insurers will certainly be attentive to this issue, and many will likely change their policy language accordingly. Although some insurers may still be willing to issue excess policies with the same exhaustion provisions as in W&T's policies, they undoubtedly will insist on higher premiums for such provisions. But the bottom line is that, with the huge exposures they face, it remains critical for E&P companies to be attentive to their insurance coverage.