Texas Supreme Court Finds Coverage for Defense Costs: Three Takeaways from Anadarko v. HCC

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Nearly nine years on, the Deepwater Horizon disaster continues to make law for policyholders and insurers—this time in a ruling from the Texas Supreme Court granting Anadarko Petroleum Corporation up to $150 million in coverage for defense expenses relating to underlying bodily injury and property damage claims arising out of the April 2010 blowout and oil spill.

Anadarko's London market underwriters relied on a "Joint Venture Provision" in their "energy package" insurance policy to argue that coverage for defense costs was limited to 25 percent of the policy's $150 million limit, based on Anadarko's 25 percent ownership interest in the joint venture operating the Deepwater Horizon rig. While the Joint Venture Provision includes three distinct clauses, which were all disputed in the ensuing coverage litigation, the provision that ultimately proved key to coverage contained the following language:

> *[A]s regards any liability of [Anadarko]* which is insured under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture . . . *the liability of Underwriters under this Section III shall be limited* to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.

Underwriters asserted that the "liability" to which the limitation applied included not only the damages paid by Anadarko to resolve underlying claims against them, but also Anadarko's defense costs in connection with such claims. Anadarko argued, among other things, that the provision, including its reference to "liability," limits only the Underwriters' obligation to pay damages to third-parties, not to its defense expenses.

On cross-motions for summary judgment, the trial court ruled that while the clause quoted above did apply to Anadarko's defense costs, a further exception to the clause preserved coverage for Anadarko. The Court of Appeals reversed and rendered judgment for Underwriters.

The Texas Supreme Court agreed with Anadarko. Relying on black letter rules of contract construction, the Court reasoned that while dictionary definitions of "liability" may broadly refer to any kind of debt or obligation, the use of the term "liability" elsewhere in the policy evidenced a distinction from defense costs. The initial grant of coverage in the subject policy and the definition of "Defence Expenses," among other policy terms, differentiated between and did not equate expenses incurred by Anadarko to defend itself with liabilities or damages owed to a third party. The Court also rejected Underwriters' contention that the Joint Venture Clause otherwise limited Anadarko's recovery, irrespective of how the term "liability" was construed.

The Court's decision clearly represents a significant victory for Anadarko with direct implications for other insureds with similar energy package policies containing equivalent Joint Venture Clauses. But even for other policyholders generally, the *Anadarko* decision offers the following three important takeaways.

"Context Matters." To say that words matter and context matters may seem to be stating the obvious. But the fact is, in disputed cases such as this one, claims for tens of millions of dollars in policy benefits turn on words and basic rules of construction. So often dictionaries are used to interpret the common, ordinary meaning of undefined policy terms. *Anadarko* provides a worthwhile reminder that "we cannot simply stop at the dictionary definitions." Slip Op. at 10. For risk managers, brokers and coverage counsel, finding contextual support for claims is an essential, though sometimes overlooked, part of pursuing maximum recovery of policy benefits. Before a claim is made, *Anadarko* also confirms that no part of any contract should be considered boilerplate. The choice of wording, the consistent use of that wording, and the decision to define certain words and not others in a policy can have significant implications for future claims.

"Surrounding Circumstances" and "Ambiguity"—The Dogs That Didn't Bark. Much of the briefing filed in the lower courts and with the Texas Supreme Court focused on arguments that (1) the Court should consider as a "surrounding circumstance" the deletion of a provision that would have reduced coverage for Anadarko's defense costs under the policy; and (2) any ambiguity in the terms of the Joint Venture Provision should be construed in favor of coverage and against the limitations urged by Underwriters. In a final footnote to the Court's opinion, Justice Boyd confirmed that having found the policy's "plain language" to favor Anadarko's position, no consideration was given to these alternative arguments. The Court's reference to the policy's "plain language" employs the euphemism that is perhaps most consistently used by Texas courts in construing disputed policy terms. Though not expressly stated as such, interpreting policies according to their "plain language" appears to be the rule of construction most favored by the Texas Supreme Court in particular. While the value of compelling "surrounding circumstances" evidence and the well-used rule of *contra proferetum* should not be minimized, the *Anadarko* opinion provides another reminder that in the hierarchy of arguments, little can substitute for "plain language" affording coverage for the policyholder's claim.

Potential Implications For The "Contractual Liability" Exclusion. One can hardly read the Court's analysis of the term "liability" in *Anadarko* without recalling a different rationale employed in the Court in *Gilbert Texas Construction v. Underwriters at Lloyd's, London*, 327 S.W.3d 118 (Tex. 2010). In *Gilbert*, the Court construed the terms of the CGL policy's "Contractual Liability" exclusion, which denies coverage for "bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of *liability* in a contract or agreement. In construing this language, the Court ultimately concluded that Gilbert's contractual duties represented a "liability" for purposes of the exclusion, without limiting the term to the obligation to pay damages for breach of that duty. *Id.* at 127. Compare this result with the Court's rationale in *Anadarko*: "consistent with the term's common meaning within insurance and other legal contexts, 'liability' refers in this policy to an obligation imposed on Anadarko by law to pay for damages sustained by a third party who submits a written claim." Slip Op. at 12; see also *id.* at n.18. Will the Court's rationale in *Anadarko* or the context of a general liability policy's other references to "liability" provide a future opportunity for policyholders to seek a narrower interpretation of the "Contractual Liability" exclusion than was employed in *Gilbert* or its progeny? Only time will tell. In the meantime, *Anadarko* will remain an important victory for policyholders.

If you have any questions about the Anadarko opinion or about insurance coverage in general, please contact one of Haynes Boone's Insurance Recovery Practice Group partners listed below.