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## TEXAS SUPREME COURT OPINION HAS COMPANIES DOUBLE CHECKING CONTRACTUAL INSURANCE OBLIGATIONS

by Brian Waters, Darin Brooks and Kristen Kelly  
Gray Reed Insurance Practice Group  
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On February 15, 2019, the Texas Supreme Court issued its opinion in *Exxon Mobil Corporation v. The Insurance Company of the State of Pennsylvania* (ICSOP)<sup>1</sup> reversing the First Court of Appeals and finding that ICSOP had waived its right of subrogation against Exxon for worker's compensation benefits paid to employees of Savage Refinery Services, an Exxon contractor and named insured under the worker's compensation policy. The principal issue was whether the standard subrogation-waiver endorsement incorporates limitations from the underlying contract. The Court held that it does not.

Rather than listing specific parties, the policy contained a blanket endorsement extending the subrogation waiver to "[a]ny person or organization for whom [Savage] has agreed by written contract to furnish this waiver" and applied it to "[a]ll Texas Operations." ICSOP argued that the subrogation-waiver endorsement incorporates certain limitations set forth in the Exxon-Savage contract, which only required Savage to procure for Exxon a subrogation waiver "to the extent liabilities are assumed by [Savage]." In turn, ICSOP argued, Exxon was not entitled to waiver of subrogation because the injuries at issue were caused by Exxon's negligence, and Savage did not assume liability for Exxon's negligence under the indemnity provisions of the contract.

The Texas Supreme Court disagreed with ICSOP and the First Court of Appeals, holding "[t]he endorsement waiving the carrier's recovery rights is effective as to the bodily injury claim here because the endorsement refers to another contract only to identify who may claim the waiver and at what operations, but does not refer to, and thus does not incorporate, any other contract limitations." In reaching its conclusion, the Court distinguished the endorsement in the ICSOP policy from those at issue in *In re Deepwater Horizon*<sup>2</sup> and *Ken Petroleum Corp. v. Questor Drilling Corp.*<sup>3</sup> because those endorsements specifically referenced and depended upon the named insured's indemnity obligations under the referenced contract, thereby incorporating those indemnity terms into the endorsement. The Court noted "the [ICSOP] endorsement's language is more like the insurance provision at issue in *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*" which extended additional insured coverage to "a person or organization for whom [the insured has] agreed to provide insurance as is afforded by this policy . . ."

Incorporation by reference in the insurance context appears to be a moving target in Texas, and *Exxon v. ICSOP* represents the Texas Supreme Court's most recent effort to define how far Texas courts may and may not reach. Based on this opinion, it appears the Court might have an eye toward tightening the reigns on such incorporation but is struggling to reconcile this movement with its prior opinions applying the analysis more liberally.

### PRACTICAL IMPLICATIONS

*Exxon v. ICSOP* and the cases discussed therein demonstrate the importance of fully understanding both the insurance obligations of a commercial contract as well as the precise language used in the insurance policy to accomplish those obligations. Commercial contracts of various types often include provisions requiring one party or another to procure

<sup>1</sup> \_\_\_ S.W.3d \_\_\_, No. 17-0200 (Tex. 2019)

<sup>2</sup> 470 S.W.3d 452 (Tex. 2015)

<sup>3</sup> 24 S.W.3d 344 (Tex. 2000)



insurance covering the property or operations at issue in the contract, and such provisions can include a wide array of related obligations. Among others, additional obligations may include the requirement to obtain a waiver of subrogation for the benefit of the other party to the contract (as was the case in *Exxon v. ICSOP*) or the requirement to add the other party as an additional insured on the policies at issue (as was the case in *Deepwater Horizon*).

While blanket endorsements (e.g., extending additional insured status or subrogation waiver to any person or entity “where required by written contract”) are a common and often efficient way to extend the intended benefit to a class of contract counterparts without having to name them all in the policy, blanket endorsements raise unique concerns and require special attention. Both parties to the contract should have the language of the blanket endorsement reviewed by an attorney to ensure that the language of the endorsement is sufficient under *Deepwater Horizon* and its progeny to incorporate any intended terms or limitations from the parties’ contract.

From the standpoint of the party receiving the insurance right under the contract (e.g., the additional insured or subrogation-waiver beneficiary), this will help ensure the party has exactly the rights and status under the named insured’s policy as contemplated in the parties’ contract. From the standpoint of the party conveying the insurance right under the contract (i.e., the named insured), this will help ensure the party does not inadvertently breach the contract by failing to have its insurance policy provide the benefit promised in the contract.

## ABOUT THE AUTHORS



**Brian Waters, Associate** - [bwaters@grayreed.com](mailto:bwaters@grayreed.com)

Experienced at both the trial and appellate court levels, Brian Waters focuses his practice on commercial and other civil litigation matters involving a broad range of issues, including breach of contract, fraud, real estate disputes, collections, contractor-subcontractor disputes, construction defects, insurance coverage, and personal injury and property damage defense. He handles a wide variety of complex litigation for energy, real estate and construction clients throughout Texas, as well as a national docket of contract dispute and collection matters for a multinational E&P company.



**Darin Brooks, Partner/Chair of Insurance Practice Group** - [dbrooks@grayreed.com](mailto:dbrooks@grayreed.com)

Darin Brooks has built a commercial litigation and insurance coverage practice focused on flexibility and variety, allowing him to adapt to clients’ changing needs and solve a broad range of challenging problems across several industries, including insurance, energy, banking, healthcare, plus many more. As the firm’s insurance practice leader, Darin focuses his insurance practice on advising clients on complex coverage issues, providing coverage opinions and resolving related disputes before courts and arbitration panels in Texas and throughout the country. He is also a valuable resource for colleagues and clients who need his unique insight when policy interpretation questions, scope of insurance needs and other insurance issues arise in various disputes and transactions.



**Kristen Kelly, Counsel** - [kkelly@grayreed.com](mailto:kkelly@grayreed.com)

Kristen Kelly has achieved successful results for clients in numerous commercial litigation matters before federal, state and appellate courts throughout Texas. She has significant experience working with clients across several industries, with a strong emphasis on insurance, energy, oilfield services, financial institutions and construction. Kristen has resolved a variety of disputes involving insurance policy interpretation and related issues, ranging from duty to defend and indemnification to additional insureds and other coverage disputes.