Article

Breaking Down the Bumbershoot: Energy and Marine Umbrella Insurance Policies in the Wake of *Indemnity Insurance Co. of North America v. W&T Offshore*

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I. Introduction

Me ol' bam-boo, me ol' bam-boo
You'd better never bother with me ol' bam-boo.
You can have me hat or me ***bum-ber-shoo***
But you'd better never bother with me ol' bam-boo.[1]

The timeless words of Dick Van Dyke resonate when considering the breadth of coverage offered by an umbrella, or "bumbershoot"[2] insurance policy in the maritime and offshore context. This begs the question: is a bumbershoot an umbrella? Is an umbrella policy accessible regardless of how the underlying policies are exhausted? This is the issue the United States Court of Appeals for the Fifth Circuit was confronted with in *Indemnity Insurance Co. of North America v. W&T Offshore*.[3]

A. Ike the Instigator

Over the warm waters of the Gulf of Mexico, Ike, a category two hurricane, grew in size and strength, ultimately making landfall near Galveston, Texas on September 13, 2008, with maximum sustained wind speeds of 110 miles per hour;[4] it destroyed 150 of W & T Offshore, Inc.'s

1. Chitty Chitty Bang Bang (United Artists 1968) (emphasis added).
2. Merriam-Webster's Dictionary defines "bumbershoot" as an umbrella. Merriam-Webster's Collegiate Dictionary 164 (11th ed. 2011); *see infra* Part II.C regarding umbrella or "bumbershoot" insurance policies.
3. Indem. Ins. Co. of N. Am. v. W & T Offshore, Inc., 756 F.3d 347, 349 (5th. Cir. 2014).
4. NOAA, *Hurricane Ike (2008)*, Nat'l Weather Serv. Weather Forecast Office—

("W&T") Gulf platforms on the way.[5] W&T—an energy exploration and development company—purchased a significant amount of insurance to indemnify itself against hurricane-related damage to its offshore properties.[6] The policies constituted three diverse forms of insurance providing hundreds of millions of dollars in coverage, and included the following: 1) a general liability policy; 2) five Energy Package Policies; and 3) four Umbrella/Excess Liability Policies (the "Umbrella Policies").[7] The Umbrella Policies, the only insurance in dispute, excluded W&T's first-party claims, including property damage and operators extra expense ("OEE"), risks that were insured by the Energy and Primary Liability policies.[8] The Umbrella Policies, therefore, exclusively covered claims made against W&T by third parties.[9]

B. Ensuing Litigation

W&T filed a number of claims with its numerous insurance carriers as a consequence of the damage caused by Hurricane Ike.[10] First, it submitted 150 million dollars in claims for OEE and property damage under the Energy Package, which contained a ten million dollar self-insured retention ("SIR") that required exhaustion before any other claims could be filed;[11] an additional 150 million dollars in coverage was accessible over-and-above the SIR.[12] W&T's OEE and property damage claims were in excess of 150 million dollars, leading their loss adjustor to forecast that W&T would submit its more than fifty million dollars in Removal of Debris ("ROD") claims under the Umbrella Policies.[13]

Litigation ensued when the four Umbrella Underwriters sought a declaratory judgment absolving them from liability for W&T's ROD damages.[14] The United States District Court for the Southern District of Texas granted the Underwriters' motion for summary judgment, holding that the Umbrella Policies were triggered only when W&T's underlying/primary insurance was exhausted by claims covered by the Umbrella Policies.[15] The court reasoned that exhaustion had not sufficiently occurred

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Houston/Galveston, TX, http://www.srh.noaa.gov/hgx/?n=projects_ike08 (last visited Sept. 7, 2015).

5. *Indem. Ins. Co.*, 756 F.3d at 350.
6. *Id.* at 349.
7. *Id.* at 349-50.
8. *Id.* at 350.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 349.
15. *Id.*

because the claims used to exhaust the underlying policies were for OEE and property damage, risks not covered by the Umbrella Policies.[16] On appeal, the Fifth Circuit reversed, holding that the Umbrella Policies became effective once all underlying insurance was exhausted, irrespective of the nature of the underlying claims, or how exhaustion occurred.[17]

This article analyzes umbrella policies in the offshore energy context and the effect the Fifth Circuit's interpretation of exhaustion provisions will have on policies currently in force, the premiums imposed, and the parties affected. Part II provides critical background information on the energy insurance market, the available coverages, the applicable law, and the notable interplay between offshore energy and marine insurance. Part III explains the intricacies of the Fifth Circuit's decision, discusses the appropriateness of the court's rationale, and synthesizes the impact such interpretative guidelines will have on umbrella policies. Part IV concludes by highlighting the insured-friendly approach now applicable in the Fifth Circuit and subsequent need for adaptation by umbrella insurers regarding the allocation of their own risk.

II. Background

A. The Energy Insurance Market

Lloyd's of London[18] writes approximately twenty-eight billion dollars in premiums between its sixty-four syndicates, across the gamut of insurance markets including marine, aviation, motor, life, general property and casualty, and reinsurance.[19] Twenty-eight of Lloyd's syndicates write energy policies, with another fifteen insurers making up the balance of the international energy insurance market.[20] In the 1960s, the London market provided the majority of the offshore energy policies, a share that dropped to roughly sixty to sixty-five percent as other international markets entered the business.[21]

International markets supplementing London are centered in Scandinavia, North America, and Europe.[22] Norwegian insurers lead the Scandinavian energy insurance sector, with Sweden, Denmark, and Fin-

16. *Id.* at 351.

17. *Id.* at 355.

18. Lloyd's began in Edward Lloyd's 17th century coffee shop insuring maritime ventures to the new world. This represented the conceptual birthplace of all insurance. *See* New Orleans Chapter of the EBA, *Insurance for the Energy Industry in the Wake of Katrina and Rita*, 28 Energy L.J. 93, 96 (2007) [hereinafter New Orleans Chapter].

19. *Id.*

20. *Id.*

21. *See* David W. Sharp, Offshore Oil and Gas Insurance 7 (1994).

22. *Id.*

land providing supplemental markets.[23] European insurers have been slower to enter the energy insurance market, in large part because of the development of reinsurance companies[24] that underwrite supplemental policies on offshore installations, and thus make it economically infeasible to concurrently insure offshore risks in a direct capacity.[25]

The development of energy insurance markets in Scandinavia and North America is directly linked to the marine insurance industry shared by both of these regions.[26] This development emanated from similar histories as "[b]oth Scandinavia and North America have had a traditional marine insurance industry which, to a large degree, was built upon the status of the two areas as maritime traders with significant shipping industries. Having developed marine insurance capability it was a natural step to move into the energy sector."[27] It follows logically then, that insurers of energy coverage in North America arranged themselves in New York, a historic center of hull and cargo insurers, and in the Gulf States of Texas (especially Houston) and Louisiana, the geographic epicenter of American oil and gas exploration.[28] As discussed in more detail below, marine and energy insurance are linked not only by origin, but also overlap in coverage for offshore companies that employ maritime employees or utilize mobile rigs with transient vessel status.[29]

1. The Energy Package Policy

The Energy Package Policy represents the pervasive insurance coverage for offshore corporations in the United States;[30] it has become ubiquitously embedded in the offshore industry such that "relationships among the Assureds, their Brokers, and given underwriters have effectively turned certain packages into well known 'Market Brands.'"[31] Ad-

23. *Id.*

24. These reinsurance companies are most notably centered in Germany and Switzerland. *Id.* at 8.

25. *Id.*

26. *Id.* at 7.

27. *Id.*

28. *Id.* at 7-8. Referring to energy insurers in the Gulf states, Sharp notes that "[m]any of these companies underwrite on the basis of 'surplus line' reinsurance placed in London and other markets . . . ." *Id.* at 8.

29. *See infra* Part II.D.2 regarding the relationship between marine and energy insurance, and the effect each can have on the other.

30. J. Clifton Hall III, *Offshore Energy Insurance*, 83 TUL. L. REV. 1303, 1304 (2009); *see also* Claude L. Stuart III, Presentation at the 18th Annual Insurance Law Institute: Downhole, Offshore and Blowouts: A Primer on Oil, and Gas Coverage: the Offshore Energy Package Policy 1 (Nov. 7-8, 2013) (transcript on file with author).

31. Stuart, *supra* note 30, at 1 (citing DAVID SHARP, UPSTREAM AND OFFSHORE ENERGY INSURANCE 339 (2009) (regarding the universal acceptance of the energy package concept: "by developing its own operating package the oil company is able to focus its market relationship

vanced "by the London Insurance Market and having at its core Control of Well Insurance [("COW")],[32] the package bundles together a series of complimentary policies and endorsements which each provide separate coverage."[33] Brokers and underwriters formulate custom polices that afford the assured hundreds of millions of dollars in coverage.[34] And, because "[e]ach broker and underwriter tend[ ] to approach the various coverages differently, . . . it is essential that every policy's wording be considered to determine when there are variations from the norm . . . ."[35] It is undeniable, therefore, that the Energy package policy "is an essential necessity for offshore drilling."[36]

These policies are divided into multiple sections each including separate coverages containing the following: physical damage; OEE or Energy Exploration and Development ("EED"); pollution; business interruption ("BI") or loss of production income ("LOPI"); liability; construction risk; charter's liability; and windstorm.[37]

2. *Physical Damage Coverage*

Discussion of physical damage coverage is instrumental to the discussion of the noted case, as W & T fulfilled the exhaustion requirements of its Umbrella Policies solely with first-party damage claims. Physical damage in the energy policy includes a number of insurable risks,[38] the most important of which is the "all risks of physical loss or damage coverage."[39] In assessing the expanse of "all risks" coverage, it is important to recognize that only *physical* loss or damage is insured, and that such dam-

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with a chosen panel of leaders and following markets, creating continuity with these market and a 'brand' or identity in the market. The package approach is now universal practice . . . .")).

32. "Beginning in the 1940's, the London Market began offering Control of Well policies (Cow) as an add on to onshore physical (property) damage policies." SHARP, *supra* note 31, at 339.

33. *Id.*

34. *Id.*; *see also* Stuart, *supra* note 30, at 1 ("Taken together, the Offshore Energy Package Policy addresses a wide array of interlocked operational and property risks.").

35. SHARP, *supra* note 31, at 339.

36. Stuart, *supra* note 30, at 1.

37. *See id.* Another commentator lists the coverage as including some or all of the following: OEE or EED; physical damage; pollution; business interruption; third party liability; construction risk; charterer's liability; windstorm, crude oil shortage; political risk; war and related risks; contingent OEE/EED. *Id.* at 1-3.

38. The physical damage coverage of an energy insurance policy will usually include the following, in addition to all risks of physical loss or damage: deliberate damage resulting from actions of government or authorities; physical damage resulting from political perils; general average and salvage charges; sue and labor; removal of wreckage or debris; cancellation costs; and miscellaneous other costs, such as repositioning, retesting and forwarding charges. *See* SHARP, *supra* note 21, at 149-50.

39. *Id.*

age must be the result of an underwritten risk.[40] Physical loss denotes damage that is not merely economic in nature, and "refer[s] to tangible loss which will require a physical repair or replacement of the part damaged."[41] It should be inferred, therefore, that physical repair must be undertaken to correct the damaged part or parts of the insured interest.[42]

a. The Errors and Omissions Clause

Property damage to offshore rigs is the most obvious insurable interest to corporations involved in the oil and gas exploration industry.[43] Because of the common purchase and sale of offshore properties, it can be difficult to ascertain what interests are actually being insured.[44] This is often the case when operators acquire properties in bulk and do not itemize the properties included in the purchase.[45] This issue becomes important when property owned by the operator is damaged or destroyed and is not listed in the schedule of insured properties.[46] The inclusion of an errors and omissions ("E&O") clause, however, will negate this problem.[47] An E&O clause "provides that the unintentional failure to include any property on the schedule will not prejudice the assured's ability to make a claim under the policy."[48]

b. Removal of Wreckage or Debris Coverage

ROD coverage in the first-party setting "includes additional coverage and additional limits for the costs associated with the removal of the wreckage of covered property."[49] Historically, ROD coverage includes an additional twenty-five percent of the value of the insured property.[50]

40. *Id.*

41. *Id.*

42. *Id.*

43. Hall, *supra* note 30, at 1306.

44. *Id.* at 1305.

45. *Id.*

46. *Id.* at 1306. If damaged property is not listed in the schedule, then "the assured paid no premium for that property, and the policy affords no coverage for that property." *Id.*

47. *Id.* It should be noted, however, that oil or gas wells are not considered property from an insurance perspective. "[T]here is reluctance by property insurers to include oil wells as insured property on the property damage form. Typically, the well is excluded from the well head down. Physical damage coverage can be afforded for property downstream from the well head." *Id.*

48. *Id.* (Providing also that "[the E&O] clause now typically has some form of sublimit to create an appropriate incentive for the assured to schedule all properties for which insurance is sought.").

49. *Id.*; *see also* New Orleans Chapter, *supra* note 18, at 98 (providing "[r]emoval of wreckage is another . . . big exposure . . . . [O]nce you . . . have a blowout, you have to do something with what is left in the water. And the cost of that can be quite significant, as we have seen after Katrina and Rita.").

50. Hall, *supra* note 30, at 1306; *see also* New Orleans Chapter, *supra* note 18, at 99 (discuss-

The scope of coverage contains insured properties for which removal is legally or contractually required, or alternatively, necessary to "prevent interference with the assured's operations."[51]

The inclusion of "debris" in ROD clauses is derived from non-maritime settings, when oil and gas exploration was primarily undertaken on land.[52] The continued presence of "debris" is important to note, however, as a component that falls from an offshore rig may not be covered under "wreckage," consistent with the traditional interpretation of ROD clauses.[53] And, because operators often have a legal obligation to remove debris that constitutes a hazard to shipping, offshore companies could be exposed to an uninsured removal expense, were "debris" not included in the ROD clause.[54]

This coverage is more expansive than it may facially appear, and normally insures "the costs incurred in an actual or attempted raising, removal or destruction."[55] Implicit in the wording of this cover is the notion that the removal must involve a mere attempt and need not be successful to trigger coverage of the associated costs of the operation.[56] Additionally, the ROD clause extends to insure "costs incurred to remove the wreckage of non-owned property for which costs the Operator may in any event be liable."[57] This protects operators where the owner of the removed property lacks insurance, or is insolvent.[58]

Third-party ROD coverage, the central claim dispute in the noted

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ing the interplay between debris removal cost, business interruption, and casualty exposures: "the Philips Pasadena Chemical Complex near Houston suffered an insured loss in 1989 due to a massive fire and explosion, and that loss cost about a billion dollars. So it is not unusual if you have a significant fire and explosion at one of the upgrading or refining or chemical plants to have those kinds of values experienced"); SHARP, *supra* note 21, at 158 (stating "it is common practice to provide a sub-limit within the amounts insured for physical damage and to impose an overall limitation of 125% or 150% in a combined physical damage, sue and labor and removal of wreck situation.").

51. Hall, *supra* note 30, at 1306-07. A first-party ROD policy will usually look similar to the following: In consideration of the premium charged herein, it is hereby agreed to indemnify the Assured for all costs and/or expenses of or incidental to the raising, removal or destruction of the wreckage and/or debris, following loss or damage insured herein, however caused, which is the property of the Assured or of others and to indemnify the Assured for costs and expenses incurred in providing and maintain lights, markings, audible warning devises, or the like for such wreckage and/or debris. Indemnity will be payable hereunder for costs and expenses incurred whether or not such costs and/or debris interfere with the Assured's or others' operations. *Id.* at 1307.

52. SHARP, *supra* note 21, at 158.

53. *Id.*

54. *Id.*

55. *Id.* at 157.

56. *Id.*

57. *Id.*

58. *Id.*

case, is also included in many comprehensive energy policies.[59] Coverage in the third-party setting, however, is more restrictive, and the insurer will only be obligated to cover the ROD expenses where a legal obligation is present or an insured interest is affected.[60]

3. Operator's Extra Expense

An OEE policy covers three primary risks associated with control of well risks including the following: "[the] cost of controlling wells which are out of control; the subsequent redrilling expense; and voluntary or obligatory expenditures incurred in clean-up and containment, plus liabilities to third parties resulting from pollution."[61] The majority of the forms used to underwrite these policies are variants of the 1986 EED form advanced through the Rig Committee at Lloyd's of London in conjunction with energy brokers.[62] This coverage is not "all risk," and is exclusively provided for wells, with physical damage insurance covering the balance of the nonwell rig property.[63] Thus, well coverage is as specific as physical damage coverage is broad.[64]

B. Excess Insurance

Primary liability policies represent initial, and often insufficient, liability coverage, and are usually buttressed with secondary insurance in the form of one or several excess insurance policies.[65] Excess covers represent the vertical aspect of insurance, providing security for claims above the primary policy limit.[66] The contracting parties in excess policies are the same as in primary insurance contracts, the original insured, and one or several underwriters.[67] Defined more completely, excess insurance is:

> [A]n insurance in respect of the difference between the amount acceptable to the insurer and the amount required to be covered. This may occur when a market has refused to take any more of the risk but a balance still remains to be placed. This balance is called "the excess" and is usually placed in another market but subject to the same terms as the other policy, which is

59. *Id.*
60. *Id.*
61. *Id.* at 66.
62. *See* Hall, *supra* note 30, at 1308; *see also* Sharp, *supra* note 21, at 68.
63. Hall, *supra* note 30, at 1309.
64. *Id.*
65. Margaret M. Sledge & Gerald M. Baca, *Rights and Duties of Primary and Excess Insurance Carriers*, 15 Tul. Mar. L.J. 59, 60 (1990).
66. Raymond P. Hayden & Sanford E. Balick, *Marine Insurance: Varieties, Combinations, and Coverages*, 66 TUL. L. REV. 311, 353 (1991).
67. *Id.*

called the underlying policy.[68]

These policies work to spread the risk across the insurance market and are triggered by the exhaustion of the policy limit under the primary insurance policy.[69] Unlike other insurance law relationships which are "delineated by applicable precepts, statutes and jurisprudence, the relationship between primary and excess insurers is poorly defined."[70] This is to say that, while most of the insurance industry is governed by contract law, "the relationship between primary and excess insurers is customarily not contractual."[71] So, "insurance contracts, whether primary or excess, are generally silent or conflicting as to the duties and obligations existing between these two participants in the modern insurance scheme."[72]

Excess insurers' obligations are triggered by identifiable events.[73] The most common occurrence is where the claim exceeds the limits of the initial policy.[74] The insolvency of the primary insurer, and a claim exceeding the primary policy, however, are not synonymous;[75] an excess insurer is only liable for amounts that exceed the primary policy limits, regardless of the insolvency of the primary insurer.[76]

C. Umbrella Policies

Umbrella, or "bumbershoot" policies are "intended to fill any coverage gap between the primary and excess policy limits, or when underlying coverage of the risk does not exist."[77] The latter of these criteria often occurs when a primary coverage is self-insured, and not covered by any other policy forms.[78] Umbrella polices, therefore, are triggered only when the underlying policy has been exhausted.[79] Generally, umbrella policies are included in complicated insurance schemes that aim to distribute risks across a diverse number of insurers.[80]

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68. *Id.*

69. Sledge & Baca, *supra* note 65, at 60.

70. George A. Frilot III, *Primary and Excess Insurers – "Friends or Foes?"*, 14 Tul. Mar. L.J. 201, 201 (1990).

71. *Id.*

72. *Id.*

73. Sledge & Baca, *supra* note 65, at 62.

74. *Id.* at 63.

75. *Id.*

76. *Id.*

77. Robert Bocko et al., *Marine Insurance Survey: A Comparison of United States Law to the Marine Insurance Act of 1906*, 20 Tul. Mar. L.J. 5, 39 (1995).

78. Hayden & Balick, *supra* note 66, at 353-54.

79. Bocko et al., *supra* note 77, at 39.

80. Hayden & Balick, *supra* note 66, at 353.

D. Insurance Fundamentals

1. State Governance of Insurance

Under the general construct of American federalism, "[t]he control of all types of insurance companies and contracts has been primarily a state function since the States came into being."[81] As early as 1868, the United States Supreme Court recognized the states' power to regulate insurance, stating in *Paul v. State of Virginia* that "[i]f foreign bills of exchange may . . . be the subject of State regulation, much more so may contracts of insurance . . . ."[82] Energy insurance, therefore, is dictated by the state insurance codes incorporated in the choice of law provisions of the relevant insurance contract between the insured, insurers, and underwriters. Because of the geographical locus of the American offshore oil and gas industry, however, federal courts in the Fifth Circuit play a substantial role in applying and subsequently shaping the state insurance law of many of the Gulf states.

2. The Interplay Between Marine and Offshore Energy Insurance

a. Coverage Options for Mobile Drilling Rigs

Marine and energy insurance are inexorably intertwined because of the increased prevalence of mobile drilling rigs, such as jack-up rigs, semi-submersible rigs, and drilling ships.[83] For example, an offshore company will often purchase marine hull and machinery insurance if a mobile drilling rig is present, in large part because mobile rigs may be considered vessels when in transit, or not affixed to the sea floor.[84] This is to say that "many drilling barges and especially those of the semi-submersible type are insured on conditions more akin to those used for mercantile vessels;

81. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316 (1955).

82. Paul v. Virginia, 75 U.S. 168, 184-85 (1868) (overruled on other grounds).

83. *See* New Orleans Chapter, *supra* note 18, at 96-97.

84. *Id.*; *see* Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344, 351 (5th Cir. 1998) ("[O]ur drilling rig cases recognize the premise that a vessel can serve the dual function of transporting cargo, equipment, or persons across navigable waters and acting as a work platform . . . . These drilling rigs and other special purpose craft do more than merely float on navigable waters and serve as work platforms . . . . Because we find . . . indistinguishable special purpose craft such as submersible drilling barges and jack-up rigs that this Court has previously found to be vessels, we conclude that the district court erred in finding that Rig 3 was not a vessel as a matter of law.") (internal citations and quotations omitted); *see also* W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355, 1376 (2001) ("Admiralty judges have considered the status of jack-up rigs, submersible rigs, submersible drilling rigs, semisubmersible drilling rigs, drill ships, pipeline barges, derrick barges, compressor stations, fixed platforms, tenders, with widowmakers, spud barges, a quarterboat barge serving as a floating hotel, a submarine pipe alignment rig, and a spar . . . .") (internal citations and quotations omitted); *see generally* David W. Robertson & Michael F. Sturley, *Vessel Status in Maritime Law: Does Lozman Set a New Course?*, 44 J. Mar. L. & Com. 393 (2013).

for example the American Institute Hull Clauses . . . are frequently used as a base set of conditions for such units."[85] If coverage is sought under a traditional hull and machinery policy, the risks insured will be on a "named perils" basis which have historically included the following:

> Perils of the Seas, Men of War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality so ever, Barratry of the Matter and Mariners and of all other like Perils, Losses and Misfortunes . . . .[86]

An alternative coverage method for drilling barges is to purchase a policy under an amended London Standard Offshore Drilling Barge Form.[87] Coverage in this context will be on an "all risks" basis for damage incurred by insured property;[88] these mixed policies reflect the hybrid status of the mobile rigs they insure. And, since marine and energy insurance are predominantly controlled by principles of state law, each can impact the other not just through overlapping policy coverage, but also because of the effect each can have on state insurance precedent.[89]

b. The Progeny of Wilburn Boat: Marine Insurance and the Applicable Law

Nearly one hundred years after the Court's decision in *Paul*, the High Court took up the question of whether state or federal law controlled marine insurance in the seminal case *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*[90] Facially, *Wilburn Boat* is unequivocal in its reservation of the regulation of marine insurance to the States.[91] Writing for the majority, Justice Black stated that "the whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties."[92] The spirit of the Court's opinion could not have been more decisive in reserving to the States the right to regulate insurance, marine, or otherwise, stating that:

> [U]nder our present system of diverse state regulations, which is as old as

85. SHARP, *supra* note 21, at 34.

86. *Id.* at 38. An "Inchmaree" Clause will also be included, which "provides additional named perils coverage in respect of accidental damage and negligence." *Id.*

87. *Id.* at 37-38.

88. *Id.* at 38.

89. *See infra* notes 103-11 and accompanying text regarding the notion that state insurance law predominantly controls marine and energy insurance.

90. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 311 (1955).

91. *Id.* at 321.

92. *Id.* at 316.

> the Union, the insurance business has become one of the great enterprises of our Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. *We, like Congress, leave the regulation of marine insurance where it has been—with the states.*[93]

The Court chose to distinguish, yet not limit, the interpretation of *Wilburn Boat* six years later, in *Kossick v. United Fruit Co.*,[94] reaffirming its rationale regarding the deference of marine insurance to the states in the absence of an existing federal rule, and stating that "the application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented."[95] *Kossick* therefore is consistent with the holding of *Wilburn Boat*, that where no federal law governs, state law will apply.[96]

Despite the Court's silence on the issue since *Kossick*, the Fifth Circuit has not strayed far from the teachings of *Wilburn Boat* regarding the application of state law in marine insurance cases where appropriate.[97] In *Transco Exploration Co. v. Pacific Employers Insurance Co.*, the court stated that "[u]nder *Wilburn Boat*, the interpretation of a contract of marine insurance is—in the absence of a specific and controlling federal rule—to be determined by reference to appropriate state law."[98] Thus, "[n]ot only courts, but Congress, insurance companies, and those insured have all acted on the assumption that States can regulate marine insurance."[99]

Therefore, decisions by federal courts regarding general insurance principles under state law will inevitably affect the interpretation of both marine and energy insurance policies, as both are generally governed by the law of the states.[100] That overarching premise exists with reference to the noted case, as maritime employers, like offshore corporations, often purchase excess insurance as well as umbrella policies to protect themselves from unpredictable liability and resulting monetary exposure. Accordingly, the decision in the noted case regarding excess and umbrella policies under state law could predictably influence the interpretation of umbrella policies in the marine insurance setting. And, as noted, energy and marine insurance policies overlap more than in the realm of judicial interpretation, as an offshore corporation will often obtain both marine

93. *Id.* at 320-21 (emphasis added).

94. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

95. *Id.*

96. *See id.*

97. Transco Exploration Co. v. Pac. Emp'rs Ins. Co., 869 F.2d 862, 863 (5th Cir. 1989).

98. *Id.* (citing Ingersoll-Rand Fin. Corp. v. Emp'rs Ins. of Wausau, 771 F.2d 910, 912 (5th Cir. 1985)).

99. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 317 (1955).

100. *See supra* Part II.D.1 regarding state governance of insurance.

and energy insurance depending on the nature of the company's rigs[101] and employees.[102]

3. *Judicial Review of Insurance Policies*

Texas law,[103] which governs the insurance coverages in the noted case as well as much of the offshore Gulf and maritime industry, employs general contract principles of interpretation in construing an insurance policy.[104] This is to say that insurance policies must be construed to effectuate the intent of the parties at the time of contract formation.[105] Likely for this reason, the Texas insurance code is particularly insured-friendly. Consistent with this theme, if a policy includes ambiguities or inconsistencies, the insured will often be awarded coverage.[106]

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101. *See supra* note 84 and accompanying text for further discussion regarding the transient vessel status of mobile drilling rigs often utilized by offshore oil and gas companies in the Gulf of Mexico.

102. Because of the indefinite status of marine workers, but mutually exclusive remedial regimes, employers implement a coordinated program of employer's liability and workers' compensation insurance to limit their exposure, regardless of the employee's ultimate classification. John W. DeGravelles, *Harbor Tug & Barge Co. v. Papai: Another Turn in the Labyrinth?*, 10 U.S.F. MAR. L.J. 209, 232 n.162 (1998) ("[E]mployers often have various insurance coverages in place to cover the employer regardless of how a maritime worker's status issue is ultimately resolved.") (citing Frank L. Maraist, *Admiralty in a Nutshell*, 112-13 (3rd Ed. 1996)); *see also* Hayden & Balick, *supra* note 66, at 352 ("A particular cover may be but a single component of a corporate insurance scheme providing the assured not only with P&I protection, but perhaps workmen's compensation, business interruption, political risk, and even medical coverage as well.").

103. Most states, including insurer-friendly California, recognize that "[i]nsurance contracts, like any other contract, must be construed in accordance with their plain meaning pursuant to ordinary rules of contractual interpretation." Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co., 803 F. Supp. 2d 1113, 1119 (E.D. Cal. 2011) (citing AIU Ins. Co. v. Superior Court, 799 P.2d 1253 (Cal. 1990)). "Although they have special features, the ordinary rules of contractual interpretation apply to insurance agreements." Am. Safety Indem. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 759 F. Supp. 2d 1218, 1220 (S.D. Cal. 2011) (quoting Gen. Star Indem. Co. v. Superior Court, 55 Cal. Rptr. 2d 322, 324 (Cal. Ct. App. 1996) (stating also that the aim "is to give effect to the mutual intention of the parties, and such intent is to be inferred, if possible, solely from the written provisions of the contract."). Under California law then, "if contractual language is clear and explicit, it governs.'" *Gen. Star Indem. Co.*, 55 Cal. Rptr. 2d at 325 (quoting Bank of the West v. Superior Court, 833 P.2d 545 (Cal. 1992)).

104. Performance Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 853-54 (5th Cir. 2003) (citing Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995)); *see also* Travelers Lloyds Ins. Co. v. Pac. Emp'rs Ins. Co., 602 F.3d 677, 681 (5th Cir. 2010) ("[I]nsurance policies and indemnity agreements are contracts, and the general rules of contract interpretation apply."); Valmont Energy Steel, Inc. v. Commercial Union Ins. Co., 359 F.3d 770, 773 (5th Cir. 2004).

105. *See Natl'l Union Fire Ins.*, 907 S.W.2d at 520. *But see* Progressive Cnty. Mut. Ins. Co. v. Sink, 107 S.W.3d 547, 551 (Tex. 2003) (stating that the ordinary, everyday meaning of the words governs, rather than the actual intent of the parties, where the language of the policy form is mandated by a state regulatory agency).

106. Mid-Continent Cas. Co. v. Swift Energy Co., 206 F.3d 487, 491 (5th Cir. 2000).

A mere disagreement over the terms is not tantamount to ambiguity; however, an ambiguity is present only when the parties offer differing, but reasonable understandings of the insurance policy.[107] A policy composed of definite and certain legal meaning should be considered unambiguous.[108] Consequently, a lack of ambiguity obligates the court to enforce the policy consistent with its plain meaning,[109] and to "consider the contract as a whole."[110] Moreover, if a policy is deemed to be unambiguous, the court is barred from considering parol evidence.[111]

III. Discussion

A. The Court's Decision: Indemnity Insurance Co. of North America v. W&T Offshore

In the noted case, the Fifth Circuit applied general contract principles mandated by Texas insurance law in construing the plain language of the Umbrella Policies at issue.[112] Interpreting the insurance contracts as a whole, the court weighed W&T's contention that the policies were triggered once exhaustion had occurred, regardless of the manner, against the Underwriters' assertion that triggering of the Umbrella Policies did not occur because W&T exhausted the underlying policies with OEE and property damage claims, risks not covered by the Underwriters' insurance contract.[113] Finding no ambiguity in the contract, the court reversed the District Court's decision, holding that W&T's interpretation fit squarely within the plain text of the contract, the definition of a Retained Limit, and other contractual provisions relating to coverage and payment.[114] The court therefore found that sufficient exhaustion had occurred, the Umbrella Polices had been triggered, and the Underwriters were liable for W&T's more than fifty million dollars in ROD claims.[115]

Bound by the principles of contract interpretation, the court natu-

107. *See* Cent. States Se. & Sw. Areas Pension Fund v. Creative Dev. Co., 232 F.3d 406, 414 n.28 (5th Cir. 2000) (citing D.E.W., Inc. v. Local 93, Laborers' Int'l Union of N. Am., 957 F.2d 196, 199 (5th Cir. 1992)); Wards Co. v. Stamford Ridgeway Assocs., 761 F.2d 117, 120 (2d Cir. 1985) (stating that "'words do not become ambiguous simply because lawyers or laymen contend for different meanings.'") (quoting Downs v. Nat'l Cas. Co., 152 A.2d 316, 319 (Conn. 1959)).

108. *Travelers Lloyds Ins. Co.*, 602 F.3d at 681 (citing *Nat'l Union Fire. Ins.*, 907 S.W.2d at 520); *see also* Glover v. Nat'l Ins. Underwriters, 545 S.W.2d 755, 761 (Tex. 1977); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

109. *Travelers Lloyds Ins. Co.*, 602 F.3d at 681 (citing Puckett v. U.S. Fire Ins. Co., 678 S.W.2d 936, 938 (Tex. 1984)).

110. Schneider Nat'l Transp. v. Ford Motor Co., 280 F.3d 532, 537 (5th Cir. 2002).

111. *Nat'l Union Fire Ins.*, 907 S.W.2d at 520.

112. Indem. Ins. Co. of N. Am. v. W & T Offshore, Inc., 756 F.3d 347, 355 (5th Cir. 2014).

113. *Id.* at 352.

114. *Id.* at 352-53.

115. *Id.* at 355.

rally began its analysis of the Underwriters' coverage obligations in the policy at issue.[116] Conducting a plain language analysis, the court found that the coverage terms of insurance agreement obligated the Underwriters to pay "those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay by reason of liability imposed by law" and that payment limitation deferred to the section of the contract regarding "Limits of Insurance."[117] Moving one layer deeper, the court then critically analyzed the applicability of the Retained Limit, observing that the Underwriters' obligations under the coverage provisions were triggered by sums in excess of the Retained Limit that W&T was legally obligated to pay, because of an event covered by the policy.[118]

The court recognized that understanding the definition of the Retained Limit was essential, since the policy specified that the Underwriters were responsible only for those sums in excess of the Retained Limit.[119] Looking to the Umbrella Policies, the court stated that the Retained Limit is defined as "the greater of (1) the amount of the underlying insurance or (2) the amount of SIR[120] that is not covered by the underlying insurance."[121] Applying the Retained Limit to the facts before it, the court stated that "the greater amount here is the total of the applicable limits of the underlying policies listed . . . which amounts to $161 million in coverage."[122]

Logically, the court then moved to the "When Loss Is Payable" section of the Umbrella Policies which stated in pertinent part that:

> Coverage under this policy will not apply unless and until the Insured or the Insured's Underlying Insurer is obligated to pay the Retained Limit. When the amount of loss has finally been determined, we will promptly pay on behalf of the Insured the amount of loss falling within the terms of this Policy.[123]

The court found this section illustrative of its ultimate holding that exhaustion of the underlying policies may occur in any fashion regardless of whether the claims would have been covered under the Umbrella Policies.[124] To this end, Judge Clement noted that the Retained Limit is the triggering mechanism for the Umbrella Policies, and that the Underlying

116. *Id.* at 351-52.

117. *Id.* at 352-53.

118. *Id.* at 353.

119. *Id.*

120. *See supra* Part I.B notes and accompanying text regarding the ten million dollar Self Insured Retention in this case.

121. *Indem. Ins. Co.*, 756 F.3d at 353.

122. *Id.*

123. *Id.* at 354.

124. *See id.*

Insurance must pay the Retained Limit, but specifies neither how it must be satisfied, nor goes so far as to require that the Retained Limit "be met with claims covered under the Umbrella Policy; it simply states that it must be met."[125] And, to further deflect the Underwriters' argument and solidify its understanding of the policy, the court noted that "[i]f the terms of the Umbrella Policy also governed how the Retained Limit must be exhausted, one would expect to find similar language to that effect."[126]

Given the dearth of precedent regarding the issue presented, the court discussed and distinguished the one relevant case on point, *Westchester Fire Insurance Co. v. Stewart & Stevenson, Inc.*,[127] to further crystallize its reading of the Umbrella Policies, and the subsequent viability of W&T's ROD claims.[128] *Westchester*, upon which the District Court and Underwriters relied, involved the same issue presented, but with a distinguishable umbrella policy.[129] The court highlighted that in *Westchester*, the policy "provided that if the aggregate limit of the underlying policies was exhausted 'by reason of payment of losses not covered by this policy,' Westchester would apply the policy 'as if such aggregate limit [had] not been reduced or exhausted.'"[130]

This, the court noted, was how the Underwriters should have written their policy had they wanted it to be read in a way that would preclude exhaustion underlying insurance by claims similarly provided for in the Umbrella Policies.[131] Judge Clement reasoned that the *Westchester* policy "is far more explicit than the provision at issue . . . which merely outlines what will happen *if* the underlying insurance is entirely exhausted by claims covered under the policy; it says nothing about what will happen if the Retained Limit is exhausted by non-covered claims."[132] This ostensibly clear rationale therefore negated the Underwriters' argument that the exhaustion provision in the Umbrella Policies provided to W&T "'mean[s] the same' thing as the provision in *Westchester*."[133] The court's refusal to agree with the Underwriters' interpretation of the Policies, therefore attached liability for W&T's more than fifty million dollars in ROD claims.[134]

125. *Id.*

126. *Id.* at 355.

127. Westchester Fire Ins. Co. v. Stewart & Stevenson Servs., 31 S.W.3d 654, 658 (Tex. App. 2000).

128. *Indem. Ins. Co.*, 756 F.3d at 355 (citing *Westchester*, 31 S.W.3d at 658).

129. *Id.* (quoting *Westchester*, 31 S.W.3d at 658).

130. *Id.*

131. *Id.*

132. *Id.* (emphasis in original).

133. *Id.*

134. *Id.*

B. Breaking Down the Bumbershoot

The court's decision represents the application of strict contract principles, and an attempt to effectuate the ex ante intent of the parties. Additionally, Judge Clement's rationale emphasizes the Fifth Circuit's interpretation of exhaustion clauses in umbrella policies.[135] Insurers in general, and specifically those in the maritime and offshore energy business, are now on notice regarding the level of specificity with which their umbrella policies must be worded. This is to say that for an umbrella policy to be interpreted as requiring exhaustion of the underlying policies only by those risks covered in the umbrella policy, the wording must unambiguously reflect that preformation intent.

Insurers, however, are not in the dark regarding the manner in which this intent can be perfected, for the court made a clear distinction between the successful limiting exhaustion language in *Westchester*, and the unsuccessful policy text in the noted case.[136] As discussed above, the inherent overlap between marine and energy insurance indicates that a decision in the energy arena will be applied in the maritime context.[137] While the noted case is a narrow decision, within an even more inclusive area of law, the effect of this decision could be far-reaching, given the amount of coverage energy and maritime corporations require, combined with the prevalence of umbrella policies in the offshore setting.

And, while the court's decision and logic appears sound, it overlooked an inherent flaw in the Underwriters' case, as the risk coverage under the primary liability and Umbrella Policies were mutually exclusive; because the underlying policies provided only for first-party claims and the Umbrella Policies exclusively covered third party claims, exhaustion was implausible in the way the Underwriters contended.[138] Insurance does not exist in a vacuum, and the prevalence of excess and reinsurance schemes distributes risk across the industry, making increased liability for umbrella insurers relevant for all interested parties.[139]

C. Contracting Out of Exhaustion

While the subject matter of the noted case involves complex insurance schemes, the essence of Judge Clement's rationale leans on some of the most fundamental principles of contract construction and interpretation.[140] At the most basic level, insurance policies are contracts of insur-

135. *Id.* at 355.
136. *See id.*
137. *See supra* Part II.D.2.b.
138. *See Indem. Ins. Co.*, 756 F.3d at 353 n.2-3.
139. Hayden & Balick, *supra* note 66, at 352-53.
140. *See id.* at 353-55.

ance.[141] As such, the policies must be construed to effectuate the intent of the parties, absent any ambiguity in the plain meaning of the contract itself.[142] In this fashion, Judge Clement rigidly, and appropriately, interpreted the Umbrella Policies, paying credence to the contract as a whole, while correctly refusing to "read in" the Underwriters' exhaustion terms that appeared nowhere in the policy itself.[143] The importance of this method cannot be emphasized enough, for failing to hold parties to their contractual obligations would undermine the reliance insureds place on their bargained-for coverage.

The court appropriately identified that the policy dispute rested on the interpretation of the Retained Limit and the "When Loss Is Payable" section of the insurance contract. Reading the definition of the Retained Limit and the policy coverage together, Judge Clement correctly stated that the Retained Limit in this instance was 161 million dollars, such that claims in excess of that figure would trigger exhaustion, as well as the Umbrella Underwriters' obligations for third-party ROD claims.[144] To this end, the court agreed only to interpret what the policy included, not what it failed to contain.[145] Simply put, the court instructed that if the Underwriters wished for exhaustion of the Retained Limit to occur only by risks similarly covered in the Umbrella Policies, the Underwriters should have specifically included language to that effect in the text of the policy.[146]

This analysis is correct not just from a common sense approach, but is also in line with the applicable Texas insurance law.[147] Only when a contract is markedly ambiguous may a court look beyond the plain language of the contract.[148] The policy in question contained no uncertainties, and under Texas law a mere disagreement between the parties does not rise to the level of ambiguity so as to justify the inclusion of terms by a court ex post.[149] A lack of ambiguity therefore obligated the court to enforce the policy as a whole, consistent with its plain meaning. Judge Clement's rationale was correct therefore, that analysis of the contract begins and ends with the policy itself, and should go no further.

The propriety of the court's analysis of the policy becomes even more apparent when comparing the contractual language to that of the

141. *See supra* Part II.D.3 (regarding the judicial interpretation of insurance contracts).

142. *See id.* (discussing Texas insurance law).

143. *See Indem. Ins. Co.*, 756 F.3d at 354-55.

144. *Id.* at 353-55.

145. *Id.* at 354-55.

146. *Id.* at 355.

147. *See supra* Part II.D.3.

148. *See supra* notes 103-11 and accompanying text regarding Texas contract law as applied in the insurance setting.

149. *See id.*

exhaustion language in *Westchester.* In *Westchester* the policy specifically stated that:

> In the event of the reduction or exhaustion of the Aggregate Limits of Liability of the 'Underlying Insurance' by reason of payment of losses not covered by THIS policy; this policy shall apply in the same manner it would have applied had such aggregate limit not been reduced or exhausted.[150]

The insured in *Westchester* was clearly on notice that it had contracted for a policy that would only be triggered when the underlying insurance was exhausted by claims included in the umbrella policy.[151] It is ironic, then, that the Underwriters' policy interpretation relied on *Westchester*, a case that exemplified the fundamental shortcoming in the Umbrella Polices at issue.

To the contrary, the "When Loss Is Payable" section notes only that "[c]overage under this policy will not apply unless and until the Insured or the Insured's Underlying Insurer is obligated to pay the Retained Limit" but fails to specify how the Retained Limit must be fulfilled.[152] In the absence of limiting language, therefore, it was fair for the court to accept that the Retained Limit could be exhausted with any claims, not just those covered under the Umbrella Policies. The Underwriters were free to contract around this assumption, an undertaking they inferably chose to ignore. Furthermore, the apparent mutual exclusivity of the underlying policy and umbrella coverages made the Underwriters' contentions difficult to justify, as "the Umbrella Policies indemnify against third-party claims, not first-party claims",[153] and ROD damages, though not mentioned in the Umbrella Policies, were incorporated by endorsement.[154]

D. Umbrella Policies In the Wake of Indemnity Insurance Co. of North America v. W&T Offshore

1. Specific Exhaustion, Specific Premium

The court's decision demanding specificity as to exhaustion clauses will presumably have an effect on the amount of premium charged for umbrella policies. Thus, a policy that clearly indicates that exhaustion will only be triggered by risks covered by the umbrella policy will presumably cost an insured a smaller premium, as the coverage is narrower, exposing the insurer to less risk. Conversely, policies like the one in the

150. Westchester Fire Ins. Co. v. Stewart & Stevenson Servs., 31 S.W.3d 654, 658 (Tex. App. 2000).

151. *Id.*

152. Indem. Ins. Co. of N. Am. v. W & T Offshore Inc., 756 F.3d 347, 354 (5th Cir. 2014).

153. *Id.* at 353 n.2.

154. *Id.* at n.3.

noted case that permit exhaustion of the underlying insurance by any risks, ostensibly mandate a larger premium, as the umbrella insurer is more likely to be obligated to pay out on the policy and experience increased exposure.[155] It follows then, that reinsurance for these risks will likely parallel the increased exposure, as the umbrella insurer has insured a precarious risk.

Presumably, W&T paid a relatively high premium for its Umbrella Policies, as the language left the Umbrella Insurers open to great and likely exposure in the event of a hurricane, or other significant first party loss. Thus, for the Umbrella Insurers to retrospectively argue that they should escape liability is disingenuous, given the likelihood that W&T compensated the insurers for the increased liability that ultimately came to fruition. The Fifth Circuit has now mandated that exhaustion clauses be abundantly clear as to how they may be fulfilled;[156] a likely reaction by insurers is to charge even higher premiums for those policies that allow liberal exhaustion of the underlying insurance. This is to say, that with increased specificity in coverage will come heightened premiums, as the Fifth Circuit demonstrated that the default presumption is a liberal interpretation of exhaustion and subsequent enforcement of the policy.[157]

2. *Moving Forward: The Fifth Circuit as an Insurance Forum*

As noted earlier, the Fifth Circuit hears a majority of the insurance disputes in the offshore context, given its proximity to the Gulf of Mexico.[158] As such, the effect of the court's decision will likely have a tremendous impact not only for energy offshore companies, but also for the entirety of the maritime industry that insulates themselves from liability with gap-filling umbrella policies.[159] Thus, maritime employers with umbrella policies should be wary of how the exhaustion clauses in their current policies are worded, and should bear in mind the court's interpretive approach when contracting for umbrella insurance in the future.

It is unclear whether the substantive law of Texas will be affected by a federal appellate court's interpretation of an umbrella policy based on Texas contract principles.[160] The insured-friendly nature of Texas insurance law, however, will likely lead Texas state courts to follow the approach employed by the Fifth Circuit when confronted with a similar

155. *See id.* at 355.

156. *Id.*

157. *Id.* at 354-55.

158. *See supra* Part II regarding the general construct of the insurance industry, including insurance litigation.

159. *See supra* notes 77-80 and accompanying text regarding the scope and purpose of umbrella insurance policies.

160. *See supra* Part II.D.

issue of policy interpretation.[161] As such, insurers with unclear exhaustion provisions similar to those in W&T's policy will likely seek to avoid the Fifth Circuit, or the state courts of Texas when challenging insured's claims.

IV. Conclusion

In holding that exhaustion clauses in umbrella insurance policies may be fulfilled by any underlying insurance unless otherwise specified, the court exhibited a conservative approach to insurance contract interpretation that will likely affect many stakeholders in the offshore energy and marine insurance industry. Policyholders that currently possess umbrella policies with unspecific exhaustion clauses will be positively affected, as the Fifth Circuit has made clear that the default position is to enforce coverage regardless of how exhaustion occurred. Conversely, underwriters must now adjust to the increased specificity requirements by purchasing more reinsurance to limit their exposure, charging higher premiums for unspecific exhaustion clauses, and including forum selection provisions that avoid the Fifth Circuit. Adaptation by all stakeholders is necessary, as offshore companies will continue to limit risk exposure through gap-filling umbrella policies.

161. *See id.*