

(Aug 7, 2008)

missed something. Once a David-focused counseling and advisory session was going on, and David indicated he didn't want or need auto coverage, Randy should have said, "Are you sure? How much have you got?" David would have answered, and then Randy would have said, "Wow! That's not enough. You need \$X, at least. Let me get it for you. David's-Dad, don't you agree?" Of course, there might be a contract case built into this, but the chances of a negligence case are much better, if for no other reason than there was no consideration flowing from David to Randy.

Fourth, the court consistently refers to those in the process of buying insurance as "insureds." This designation may or may not be true. If they don't have any insurance yet, they are not insureds. If they haven't bought insurance from a particular intermediary, they are not his insureds. This point is not a matter of legal doctrine. It is a matter of grammar.

Fifth, the court says that someone buying insurance has an "obligation"—a duty—to read any policy he buys. To whom does this duty run? Who has a right that someone buying insurance must read the contract he is buying? Whose right is violated if the customer does not read what he buys? To be sure, it may be an affirmative defense, though it should only be that in a limited number of cases.

Setting aside the forgoing criticism of the court's opinion, it is worth observing that the court's decision fits with current trend. The recent controversies about whether insurance intermediaries should receive contingency commissions, especially those which are not disclosed, is illustrative. Before, he was disgraced, Eliot Spitzer made himself famous partly from his raising legal hell about this. See Brooke A. Masters, *Spoiling for a Fight: The Rise of Eliot Spitzer*. New York: Times Books, 2006. The controversy has continued. In fact, the July 21, 2008 issue of *Business Insurance* reports a four person debate on exactly this issue in a hearing held in Buffalo, New York state officials. The editors of *Business Insurance* state their own opinion on the editorial page. Here is part of it: "Agents are entitled to receive compensation from insurers, as agents represent insurers, not policyholders. But brokers represent buyer clients. Their compensation should come from buyers, ideally as fees. The only thing a broker's pay should be contingent on is providing valuable service to a client." Obviously, the decision of the Nebraska court

in this decision fits that alleged paradigm. Still, one doubts that the language of the industry is as uniform as *Business Insurance* would have the reader believe. // Quinn

Excess Insurance

Excess Insurer May Contest Coverage under "Follow Form" Excess Policy after Primary Insurer Pays Policy Limits to Settle Claim

Damage to Precious Treasures on Shipwreck Constitutes "Property Damage" within Meaning of Liability Policy, Even Though Title to Property Is Indeterminate

American Home Assurance Co. v. Oceaneering Int'l Co., Civil Action No. H-06-2105 [2008 WL 2169411] (S.D. Tex., May 22, 2008)

Case at a Glance

If an excess liability policy states that it "follows form" with respect to a primary liability policy, this is not the same as stating that it "follows the fortune" of the primary, so that the excess insurer may contest coverage after the primary concedes coverage and pays its policy limits. In order to obtain payment under that excess policy, the insured must prove coverage under the primary, and the excess carrier must fail to prove an applicable exclusion.

If an underseas petroleum pipeline inspection company damages artifacts at an ancient shipwreck as a reasonable part of its inspection work, and it has coverage for its "Specialist Operations," for indemnity agreements it has signed, or for damages to physical objects which involved an "interference with rights in relation to any fixed or movable property" anywhere in the world," the inspection company has coverage.

An exclusion governing physical objects which are baggage, or baggage-like, under carriage, does not apply to artifacts retrieved from shipwrecks or simply encountered for the first time in the open sea while on a voyage.

Summary of Decision

Factual Background. The facts are perhaps the most interesting part of this case. In 2002, Shell and BP formed a corporation to obtain a pipeline right-of-way along the Outer Continental Shelf on the ocean floor in the Gulf of Mexico. The subsidiary corporation was named Okeanos Gas Gathering Company, LLC ("Okeanos"), and it applied for a right-of-way from Department of Interior Minerals Management Service ("MMC"). During the application process, a contractor hired by a Shell affiliate discovered an 18th Century shipwreck along the right-of-way. This entity and its contents were probably protected by the National Historic Preservation Act, 16 U.S.C. § 460 *et seq.*, administered by MCC, which issued voluminous and relevant administrative regulations. See 30 C.F.R. §§ 250.101-.1404 *et seq.* The contractor did not realize what it had found or that it had a legal obligation to report all this to MMC. Similarly, Okeanos, which apparently was unaware of the contractor's discovery, informed MMS that it had "located an unidentified sonar contact and agreed to lay the pipeline a specified distance from the site." Eventually, MMC learned the whole story, and so it promptly entered into negotiations with Okeanos regarding the protection of the site and regarding the failures to give it notice.

In 2004, Oceaneering, "a provider of engineering services," contracted with Okeanos to conduct an inspection of the pipeline. This happened in the aftermath of Hurricane Ivan. Oceaneering was unaware of the discovery of the shipwreck—by then "a protected archeological site"—but it picked it up by sonar. Apparently sound inspecting procedure authorized Oceaneering to take a look; it was after all an unusual solid object in the neighborhood of a petroleum pipeline and therefore a potentially expensive and embarrassing danger. Oceaneering inspected what it found using a remotely operated vehicle ("ROV"), the shorthand name of which is partially descriptive, since it is "an unmanned underwater vehicle equipped with robotics and tethered to a vessel from which it is operated." Unfortunately, Oceaneering's ROV operator "disturbed or destroyed several shipwreck artifacts, primarily glass bottles but also an 'octant'—an 18th century navigational instrument—which was brought on board Oceaneer's vessel, but subsequently tossed

back to the sea.

As a result of the several errors, MMC threatened Okeanos, and so a settlement was negotiated. In exchange for releases from civil liability, and administrative liability, and criminal charges, Okeanos promised to pay \$4.87 million to Texas A & M University for historical preservation and video-plus-internet publicity of the site. Okeanos demanded payment of this sum from Oceaneering and threatened it with litigation. The basis of the suit was a "Master Diving Contract" between the two in which Oceaneering agreed to indemnify Okeanos for "all damages to or losses of Third Parties' property . . . caused by or resulting from the negligence or fault of [Oceaneering]." Oceaneering and Okeanos eventually settled for \$3 million "worth of fully-crewed ROV time, based on market rates at the time of the release of the work.

Insurance & Declaratory Relief Action. Upon being threatened with a lawsuit by Okeanos, Oceaneering contacted both its primary liability carrier, Associated Electric & Gas Services Limited ("AEGIS") and its excess liability carrier, American Home Assurance Company ("AHA"), the plaintiff in the lawsuit under discussion here. AEGIS paid its policy limits of \$1million. AHA, which issued a "follow form" policy, thought there was no coverage under the AEGIS policy and hence none under its policy. AHA filed a declaratory judgment action against the insured asking for a judgment finding no coverage or a judgment to the effect that Oceaneering's damages did not reach its policy. Oceaneering counterclaimed, seeking a declaration that coverage existed under the AHA contract of insurance.

In a detailed and lengthy opinion, Judge Atlas—a truly outstanding judge, including insurance matters—reviewed summary judgment standards and general rules on policy interpretation at some length. Nothing particularly striking—or even very interesting—is to be found in these sections, encyclopedic though they are. The concrete analyses, findings, and arguments with respect to the AEGIS—and hence the AHA—policies are a different matter.

Follow Form. Judge Atlas first found, as a matter of law, that AEGIS's paying (at least purportedly) under its policy did not itself create or guarantee coverage under the AHA policy. This is true notwithstanding the fact the AHA policy followed the coverage terms, the exclusionary terms, and the

conditions of the AEGIS policy. The court explained that, in general, *follow form* policies do not imply the conclusion Oceaneering wanted, although *follow the fortunes* reinsurance policies usually do.

The court, however, found that there actually was coverage under the AEGIS and therefore under the AHA policy. Many of the judge's other findings pertained to the concrete language of the AEGIS policy.

Insuring Agreements. By following the AEGIS form, the AHA policy insured the insured's legal liability "to pay or by contract or agreement become liable to pay in respect to any claims made against the insured for damages of whatsoever nature, on account of...Property Damage...caused by or arising out of each occurrence" happening anywhere in the world.

The AEGIS policy contained coverage for risks arising out of "Specialist Operations." These risks included "liabilities, costs or expenses incurred [by Oceaneering when it contracted] to perform specialist operations, including but not limited to... pipe laying, maintenance or removal," among a variety of activities. AEGIS claims handlers concluded that this form of "Specialist Operations" included Oceaneering's use of an ROV to conduct, under contract with a third party, underwater inspections of mineral pipelines. AHA presented no evidence or arguments that this conclusion was erroneous. Unquestionably, at the time Oceaneering encountered the ship wreck, its employees "were conducting a pipeline inspection to check the integrity of Okeanos's line and ensure that there were no oil leaks." What happened with respects the shipwreck site was not required by Oceaneer's contract, but the event occurred within the context of and as a result of performance under the contact. Okeanos was damaged as a result of Oceaneering's allegedly negligent performance of the contract—mainly, due to Oceaneering's decision to deviate from the pipeline right-of-way to investigate, and subsequently disturb a sonar site that Okeanos had an interest in preserving. In addition there was unchallenged evidence that Oceaneering's doing what it did was an accepted practice and procedure, even if what happened would not count as a "best practice" for a salvage operation.

The AEGIS policy contained a provision providing coverage for "loss of or damage to or *interference*

with rights in connection to any fixed or moveable property" anywhere in the world. (Italics added here.) AHA argued that the term "property" covers only that in which there is a demonstrable proprietary interests and that the liability coverage is only for the interests of a person or entity with a proprietary interest in that which is damaged. Thus, according to AHA, there is no such thing as property that is not owned; a physical object which is damaged does not sustain property damage, unless someone owns it.

"AHA devote[d] a majority of it's briefing to arguing that no one ha[d] a proprietary interest in the items associated with the shipwreck site—asserting specifically that no person or entity had *title* to the items." (Italics in the opinion.) Judge Atlas rejected this argument for two stated reasons. First, no language in the policy so much as suggested that someone has to have title in order for there to be property damage. Second, what the policy does say is that there is coverage if the conduct of the insured causes some "interference with rights" with respect to physical property. Significantly, MMS has, under federal law, "a right and a duty to ensure that the activities it oversees—including the construction of pipelines in extraterritorial waters—do not adversely affect archeological resources and significant historical properties."

The court explained that a person, government agency, or business entity need not have title to historical property in order to have federally recognized rights. MMS certainly had both duties and rights. Okeanos assumed a related duty by making arrangements with MMS. Therefore, "Oceaneering—albeit unknowingly—interfered with Okeanos's and MMS's *legal interests* in pursuing the integrity of the ship wrecked site, which is sufficient to trigger coverage under the provision of the AEGIS policy affording coverage for interference of rights." (Italics added here.)

Thus, Oceaneering proved that they had coverage under the insurance agreement. The next question is whether any exclusions apply. Of course the burden of proof shifted here, so that AHA bore the burden of proof with respects to exclusions.

Exclusionary Clauses. the principal exclusion in the AEGIS policy upon which AHA relied actually containing language affording coverage, language excluding a fraction of the coverage that has been provided, and a range of exceptions to the exclusion

and exceptions to the exceptions. Here is the relevant provision of coverage: "Loss of or damage to baggage, property and effects[.]" and now we turn to the exclusion, "save for specie, bullion, precious or rare metals or stone, plate or other objects of rare and precious nature," and so forth. The shipwreck and the artifacts were unquestionably objects of a rare and precious nature, given the applicable federal stature. Thus, the language after "save for" constitutes an exclusion, or set of exclusions. Interestingly, there is then an exception—or set of exceptions—to the exclusions, stating or implying that if the appropriate personnel at the insurer have been notified prior to the "carriage" of excluded items and if the insured complies with any directions made by them, then the item is covered after all. Interestingly, the word which is central to the court's decision is to be found in the exception.

The district judge rejected this exclusion. It is tied, she said, to the "carriage" of a listed item. Therefore, "this provision is clearly intended to apply to an item carried by an Oceaneering vessel and not "rare or precious" items encountered on the open sea while on a voyage."

AHA argued that there was an exclusion in the AEGIS policy for anything covered under Oceaneer's Hull and Machinery insurance policy. Judge Atlas similarly rejected this suggestion. A "Hull and Machinery" insurance policy generally provides "coverage for damage resulting from a collision between a covered vessel and another vessel or other property." The phrase "other property" would include "fixed and floating objects," a standard phrase found in Hull Machinery policies. Nothing of that sort occurred in this case. Moreover, there was no proof before the court that Oceaneering had such policy.

AHA pointed out that "the indemnification provision of Oceaneering's Master Diving Services Contract with Okeanos...provides that Oceaneering will indemnify Okeanos for 'all damaged to or losses of *Third Parties*' property." (The italics were added by the court.) AHA suggested that the terms of the AEGIS policy must track and are limited by the language just quoted. In rejecting this view, the district court noted, "there is nothing in the language of the 'Specialist Operations' or 'fixed and floating' policy provisions requiring that coverage be tied to the *terms*, rather

than simply the existence, of an underlying contract between the insured and a third party." (The italics is that of the court.)

Finally, AHA argued that the damages caused were purely economic and not really insured property damage. The court rejected this view. Cleaning up physical national treasures, at least where the government is involved, is not simply an economic loss. Indeed, it is very much like cleaning up in the context of environmental losses, and a good number of courts have held that there may well be coverage for this.

Scope of Coverage. Proof as a matter of law that there is some coverage does not—said Judge Atlas—demonstrate the scope of the coverage. There are two important problems here. For one thing, Oceaneering's settlement with Okeanos was based on the market rates for Oceaneering's services rather than Oceaneering's actual cost. Of course, the market rate would be what Oceaneering charged for its services, and that would include its profit. Indeed, Oceaneering's Executive Vice President testified that, "the actual 'cash value' of the services is 'somewhere in the neighborhood of a million...could be...a million and half.'" This means that the insurer may owe only half of what Oceaneering "paid" by providing services.

Comment

This is a fascinating case. Alas, Judge Atlas does not tell us enough about the AEGIS policy. Let us suppose that its coverage terms are CGL-ish. If so, then it would not cover events which are not accidents or injuries which are either expected or intended. At least some of the property damage was caused by Oceaneering's employees throwing small physical objects off its boat back into the sea. These do not sound like accidents; they sound like deliberate acts. Moreover, one wonders why this happened? If these small items were thrown into the deep blue sea, might not some sort of property damage, e.g., loss of use, be expected. It is important to remember here, that the phrase "property damage" in CGL policies is usually defined to include loss of use, taken just by itself. // Quinn