I. INTRODUCTION

The Deepwater Horizon oil spill in April 2010 was wrought with controversy surrounding who was responsible for the resulting devastation on the Louisiana gulf’s community and ecology. Particularly, an issue arose between conflicting language in a service agreement’s indemnity provision and a separate insurance policy between BP Exploration and Production, Incorporated and Transocean, Ltd, as well as Transocean’s insurers. When one coverage-provision provides for broader liability, the question becomes, which one controls?

Generally, a service agreement in the oil and gas industry requires the parties agree to an indemnity provision. A service agreement can require listing one party as an additional insured on the other’s insurance policies; however, an issue may arise—as is the case here—when the insurance policy coverage is broader than the liability coverage of the separate service agreement’s indemnity provision. The Fifth Circuit seeks to resolve that
issue in *In Re Deepwater Horizon.* The Fifth Circuit asks the Texas Supreme Court to revisit its current holding in *Evanston Insurance Company v. ATOFINA Petrochemicals, Incorporated* to firmly decide whether an insurance policy’s provision that extends broader liability coverage to an additional insured is read separately from the limited-liability service agreement’s indemnity provision and treated as the sole determinant for the scope of coverage. Additionally, the court asks whether contra proferentem, a contract policy defense, or the sophisticated-insured exception may be applicable to these types of disputes. This Note explains why the Texas Supreme Court should adhere to the precedent in *ATOFINA.*

Part II introduces *In Re Deepwater Horizon* while Part III provides a detailed discussion of the Texas Supreme Court holding in *ATOFINA.* Then, Part IV examines the application of *ATOFINA* to *In Re Deepwater Horizon,* followed by the potential policy defenses in Part V. Part VI concludes by answering the Fifth Circuit’s questions affirmatively; the Texas Supreme Court should find in favor of applying *ATOFINA*’s separate-and-independent rule, as well as recognize the defense of contra proferentem.

II. *IN RE DEEPWATER HORIZON: PRESENTING A DEEPER ISSUE THAN BP’S DEEP POCKETS*

After the oil spill at Deepwater Horizon on April 20, 2010, more than 200 million gallons of oil spread, “killing marine life and water birds, entering estuaries, and polluting shores.” As legal issues surfaced, one company’s name captured the titles of media headlines, BP. However, while “BP’s pockets” were and continue to be the major target for
damages,10 other entities, such as Transocean, received their own bills stemming from their contracts with BP.11

Transocean owned Deepwater, the offshore drilling unit.12 Transocean entered into a service agreement with BP to lease Deepwater for drilling in BP’s Macondo Prospect.13 The service agreement contained two important provisions: an indemnity clause and a requirement that Transocean carry insurance covering BP as an additional insured “in each of [Transocean’s] policies.”14

Transocean entered into an insurance agreement with the insurers for primary and excess liability (the “umbrella policy”) coverage, which extended to BP as an additional insured.15 Containing similar terms, the policies allowed the insurers discretion to provide additional-insured coverage “only to the extent . . . required under contract or agreement” with Transocean.16 As stated, the policies afforded insurance to “any person or entity to whom [Transocean are] obliged by any oral or written ‘Insured Contract’.”17

Following BP’s request for coverage from the insurers related to oil-spill pollution, the insurers contested BP’s subsurface-pollution claims.18 The insurers argued they were not responsible for providing coverage to subsurface pollution under the insurance policies because the separate indemnity clause in the service agreement limited Transocean’s liability to only above-surface oil pollution.19 BP countered that the insurance policies provided “broad[er] coverage” than the indemnity clause in the service agreement because, in the absence of any coverage-limiting language, the policies should be interpreted by the terms in the policies alone, which covered both subsurface and above-surface oil pollution.20

10. See Palmer, supra note 8, at 106.
12. Id.
13. Id.
15. Id. at *2–3. This author notes that Insurers are not a party to the service agreement between BP and Transocean.
16. Id. at *3.
17. Id. (emphasis omitted). “The words ‘Insured Contract’, whenever used in this Policy, shall mean any written or oral contract or agreement entered into by [Transocean . . . and pertaining to business under which the [Transocean] assumes the tort liability of another party.”
18. Id. at *6.
19. Id. The indemnity clause stated that Transocean indemnified BP for “above-surface oil pollution discharges” and BP indemnified Transocean for all “subsurface” pollution. Id. at *2–6.
20. Id. at *2.
After initially finding favor with BP’s argument that the insurance policies were “separate from and additional to” the indemnity clause in the service agreement, the Fifth Circuit granted the defendants’ petition for rehearing, requesting certification from the Texas Supreme Court whether the policies should be read separate and independent from the service agreement’s indemnity provision. A discussion of the Texas Supreme Court’s decision in ATOFINA is a necessary starting point to answer the Fifth Circuit’s questions.

III. ATOFINA AND THE SEPARATE-AND-INDEPENDENT RULE

In addressing the relationship between the indemnity provision of a service agreement and a separate insurance policy, Texas courts have long held that the two provisions are separate and independent from each other, even when read in the same contract. When the two provisions are in separate and independent contracts, the Texas Supreme Court held in ATOFINA that the indemnity provision of a contract does not control the scope of coverage under an insurance policy.

ATOFINA entered into a service agreement with Triple S Industrial Corporation to complete construction work at ATOFINA’s refinery. Triple S added ATOFINA as an additional insured on its insurance policies, as required by the service agreement. An issue occurred when a Triple S employee was injured on ATOFINA’s site—the employee sued ATOFINA

22. See discussion supra Part I; In re Deepwater Horizon, 728 F.3d 491, 500 (5th Cir. 2013) (“[W]e hereby certify the following determinative questions of Texas law to the Supreme Court of Texas. 1. Whether Evanston Ins. Co. v. ATOFINA Petrochems., Inc., 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP’s coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the [d]rilling [c]ontract are ‘separate and independent?’ 2. Whether the doctrine of contra proferentem applies to the interpretation of the insurance coverage provision of the Drilling Contract under the ATOFINA case, 256 S.W.3d at 668, given the facts of this case?”)
23. See generally Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 804 (Tex. 1992) (holding that the additional-insured provision of a contract is a “separate obligation” from the indemnity provision of the same contract); Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 705–06, 708 (Tex. 1987) (finding that an indemnity provision of a contract needed to expressly state it would not be responsible for another party’s sole negligence within the four corners of the contract).
24. Evanston Ins. Co. v. ATOFINA Petrochems., Inc., 256 S.W.3d 660, 662, 670 (Tex. 2008). (“[W]e examine the interplay between a contractual indemnity provision and a service contract’s requirement to name an additional insured [and hold an] additional insured requirement in the service agreement fails to establish a separate and independent obligation for ensuring liability.”)
25. Id. at 662.
26. Id. at 662–63.
and the umbrella policy insurer. The insurer refused coverage to ATOFINA. The insurer argued the indemnity clause in the service agreement expressly denied coverage for damages that resulted from ATOFINA’s negligence, even though the insurance policy did not expressly limit coverage caused by ATOFINA’s negligence when read alone.

The Texas Supreme Court found in favor of ATOFINA, focusing on the language of the umbrella policy alone because it was separate and independent from the service agreement. The insurance policy controlled the scope of coverage because ATOFINA did “not seek indemnity from Triple S,” the partner to the service agreement, but from the insurer. The court also noted that Evanston Insurance could have protected itself through coverage-limiting language during drafting, but did not include such in the policy. This separate-and-independent ruling in ATOFINA continues to be supported in Texas today and should be upheld in response to the Fifth Circuit in In Re Deepwater Horizon.

IV. SCOPE OF THE INSURANCE POLICY: ANALYSIS

Since ATOFINA, Texas courts and courts applying Texas law have held that when an additional-insured seeks coverage from the insurer, the insurance policy itself determines the scope of insurance coverage, not the indemnity provision within a separate contract. In Re Deepwater Horizon defendants, Transocean and Insurers, identify two arguments that provoked the Fifth Circuit to question the precedent and effect of ATOFINA in determining the extent of liability coverage for an additional insured. First, the defendant’s argument that the coverage-limiting language employed by Transocean in the indemnity clause of the service agreement that prevents the insurance policy from providing broader coverage. Second, since the language of the insurance policy cannot be interpreted without reference to

27. Id. at 663.
28. Id.
29. Id.
30. Id. at 663–64.
31. Id. at 664.
32. Id.
33. See id. at 666 (stating that limiting-language was available to drafters if they chose to limit the policy from covering the additional insured’s negligence).
34. See, e.g., Aubris Resources, LP v. St. Paul Fire & Marine Ins. Co., 566 F.3d 483, 488 (5th Cir. 2009) (applying Texas law, the court agreed that Texas looks to the insurance policy alone to determine the scope of coverage, not the service agreement); Pasadena Refining Sys., Inc. v. McCraven, No. 14-10-00837-CV, No. 14-10-00860-CV, 2012 WL 1693697, at *17 (Tex. App.—Houston [14th Dist.] May 15, 2012, no pet.) (finding the Texas Supreme Court has held, and this court agrees, that they must look to the insurance policy to determine what coverage is applicable to an additional insured).
35. Id.
the service agreement, it is unreasonable to treat the insurance policy as a completely independent, separate contract capable of controlling the scope of coverage.\textsuperscript{36} The next paragraphs show that the defendants’ arguments fail to negate the application of \textit{ATOFINA}’s separate-and-independent holding.

\textbf{A. The Service Agreement Indemnity Provision Coverage-Limiting Language}

Distinguishing \textit{ATOFINA} from their case, the defendants first argue the insurance policies do not extend broad coverage to all surface-oil pollution because the language in the indemnity provision of the service agreement is more “limited” than that of Triple S’s in \textit{ATOFINA}.\textsuperscript{37} The defendants distinguish the broad language of Triple S’s service agreement that insures ATOFINA on “each of Triple S’s policies”\textsuperscript{38} from Transocean’s service agreement, which limits insurance to “only the liabilities Transocean took.”\textsuperscript{39} They contend that the narrow and coverage-limiting language in the service agreement determines what liabilities Transocean absorbs—which then determines what the Insurers are responsible for—whereas Triple S’s language in the service agreement allows the separate insurance policies to guide the scope of coverage because of the service agreement’s inclusive language.\textsuperscript{40}

While the defendants point to a valid difference in the language between the two service agreements’ indemnity provisions, they misapply \textit{ATOFINA}’s separate-and-independent rule. The defendants improperly argue that the degree of inclusivity or exclusivity in the language of the indemnity provision of the service agreement determines whether the insurance policies are separate and independent, when it is clear \textit{ATOFINA} defines “separate and independent” based on whom the additional insured is seeking indemnity or coverage from.\textsuperscript{41} The key to determine the scope of liability is to identify whom the additional insured is bringing the claim against, revealing which contract controls the scope of coverage—either the service agreement between the contractor and the property owner or the insurance policy extending coverage from the insurer to the additional insured.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{36} \textit{In re Deepwater Horizon}, 728 F.3d 491, 492 (5th Cir. 2013).
\item \textsuperscript{37} \textit{Id.} at 498.
\item \textsuperscript{38} \textit{Id.} at 497.
\item \textsuperscript{39} \textit{In re Deepwater Horizon}, 728 F.3d at 498; see discussion \textit{supra} Part II (regarding Transocean’s indemnification of BP’s subsurface oil pollution).
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Evanston Ins. Co. v. ATOFINA Petrochems., Inc.}, 256 S.W.3d 660, 664 (2008); see also discussion \textit{supra} Part III.
\item \textsuperscript{42} \textit{Id.}
\end{itemize}
ATOFINA further discredits the defendant’s argument that coverage-limiting language in the indemnity provision of the service agreement should control the scope of the insurance coverage because ATOFINA specifically noted that if the parties intended to limit the scope of coverage in the insurance policy, there was “language available” to the parties to achieve that goal.43 Here, there is no such language in the insurance policies.44 Consequently, the defendants’ argument does not take the court outside the holding in ATOFINA. BP is an additional insured and its claim is brought to hold the Insurers responsible under the insurance policies. Therefore, the policies should be read separate and independent from the service agreement, leaving only the insurance policies to determine the scope of coverage.

B. The Policies

The defendants’ second point is that the language of each insurance policy refers back to the service agreement, requiring that the documents be read together to determine the scope of liability; without referring outside the insurance policy, there would be no named additional insured.45 In Re Deepwater’s policies state a requirement for an “Insured Contract” between Transocean and another unidentified party as a condition to extend additional-insured coverage.46 The defendants argue the court must refer to the service agreement for the policies’ scope because the policies require a contract to exist for the purpose of identifying the additional insured—justifying the use of the service agreement to set the scope of coverage.47

Texas courts consider minor references to another contract as merely “placeholder language” that does not create an interdependent relationship between the service agreement and the insurance policy; therefore, the defendants’ argument has no significant impact on the separate-and-independent rule.48 The insurance policies requirement that Transocean have an “Insured Contract” is no different from the service agreement requirement that BP be listed as an “additional insured.”49 Both of these

43. Id. at 666.
44. In re Deepwater Horizon, 728 F.3d at 498, 500 (noting that BP argued that the insurance coverage should be provided to the extent “as is afforded by this policy,” which would include above-surface and subsurface pollution without any coverage-limiting language).
45. Id. at 499.
46. Id.
47. Id.
49. See generally In re Deepwater Horizon, 728 F.3d at 499; see also supra discussion Part IV.A.
“brief statement[s] . . . merely evince the holder’s status” under the contract.\(^{50}\) Current Texas case law supports treating the policy as a separate, independent scope of coverage even when placeholder terms require a brief reference to the service agreement to acquire their definition.\(^{51}\) Regardless of placeholder language in the insurance policy, the service agreement and the insurance policies are separate and independent documents; thus, ATOFINA would still apply.

V. CONTRA PROFERENTEM VERSUS THE SOPHISTICATED-INSURED EXCEPTION

The Fifth Circuit asks the Texas Supreme Court to consider the effects of two policy arguments on insurer liability in contract disputes: contra proferentem and the sophisticated-insured exception.\(^{52}\) Contra proferentem is “a tie break[ing]” device that resolves all contractual ambiguities in favor of the insured and against the insurer.\(^{53}\) Texas courts have applied contra proferentem in an insurer-liability context when dealing with unclear contract language.\(^{54}\) Identical to the reasoning used by ATOFINA,\(^{55}\) contra proferentem applies even when the insurer offers an “objectively more sensible” interpretation, as long as both are reasonable.\(^{56}\) Though the Texas Supreme Court has not expressly identified the connection between ATOFINA’s application and contra proferentem, they are essentially one and the same—both protect the non-drafting party by construing ambiguities against the drafter.\(^{57}\)

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50. ATOFINA, 256 S.W.3d at 670.
51. McCraven, 2012 WL 1693697, at *14–16. Placeholder language of both the insurance policy and the service agreement requires the court to look at both documents to determine who the additional-insured party is; however, the scope of the insurance policy is found only by looking at the insurance policy alone. Id. The court had to refer to the service agreement to determine who was covered by the insurance policy; however, the policy still controlled the scope of coverage, even though “the additional-insured provision expressly links its coverage to the indemnification and . . . [its] additional insured status is triggered ‘to the extent [the additional insured] is indemnified by [owner or contractor] in the terms of the contract.’” Id. (emphasis added).
52. In re Deepwater Horizon, 728 F.3d at 499.
55. ATOFINA, 256 S.W.3d at 668 (construing ambiguities in favor of the insured when it offers a reasonable interpretation, regardless if the insurer offers a more reasonable interpretation).
56. Evergreen, 111 S.W.3d at 677.
57. See, e.g., In re Deepwater Horizon, 728 F.3d at 499.
The purpose of contra proferentem is to protect the third-party additional insured from the disadvantage of unequal bargaining power. Third parties to an insurance policy contract are not at the same advantage as a direct-insured party because typically they are not directly involved in the bargaining and drafting process. Without equal bargaining power, the additional insured must be cautious of certain losses, such as a lapse of insurance, inability to choose legal representation, and a lack of control over the drafting process.

An alternative policy argument is the sophisticated-insured exception, which is a defense in contract disputes between informed businesspersons capable of equally bargaining for and interpreting the contract, such as large companies with in-house counsel. This exception requires the contract to be taken as it is written, without any favor to the insured. Texas courts sparingly apply this exception to insurer–insured relationships involving business-minded individuals. Some have found the sophisticated-insured exception unfairly prejudices insured parties by assuming capacity to contract based on externalities such as their wealth or size, but it fails to consider whether the insured had an equal part in the drafting process.

The Texas Supreme Court should apply contra proferentem as the primary exception to ambiguous contract disputes and only apply the sophisticated-insured exception under limited circumstances. By holding that contra proferentem is a defense to these types of cases, the Texas

58. Bleh, supra note 53, at 90; Philip L. Bruner et al., Risk Allocation Principles as Applied to Contract Interpretation: Consequences of Knowing Other Party’s Meaning—Consequences of Drafting Ambiguous Language: Contra Proferentem Rule, in 1 Bruner & O’Connor Construction Law § 3:28 (2013) (noting that insurance contracts have been considered to be contracts that are negotiated unfairly).
59. See generally Bleh, supra note 53, at 90 (stating that most courts wrongly presume that the parties are equally informed in the contracting process); see also Robert N. Sayler et al., “Sophisticated Insured” Exception, in 7 Bus. & Com. Litig. Fed. Cts. § 79:41 (3d ed. 2013) (stating that contra proferentem protects an insured, no matter its “size or sophistication” because the insurer drafts the contract).
62. Bleh, supra note 53, at 86.
63. See, e.g., Brookshire Grocery Co. v. Bomer, 959 S.W.2d 673, 677 (Tex. App.—Austin 1997, pet. denied) (stating the insurer was a sophisticated-insured and should have known not to enter into an illegal side agreement with the insurer). But cf. Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118, 133 (Tex. 2010) (noting that ambiguities in a contract are construed in favor of the insured, however there is no reference to a sophisticated-insured exception even though the court determined the contract was not in fact ambiguous).
64. Bleh, supra note 53, at 87, 93.
Supreme Court would encourage insurance providers to carefully draft, take more responsibility, and insure against risks they may incur on behalf of their clients.\textsuperscript{65} While the sophisticated-insured exception may help to facilitate quicker litigation over contract disputes between businesses, it should only be applied when the parties equally participate in the bargaining process.\textsuperscript{66}

VI. CONCLUSION

The Texas Supreme Court should answer questions proposed by the Fifth Circuit in the affirmative: The insurance policy alone determines the scope of coverage when it is separate and independent from the service agreement’s indemnity provision and \textit{contra proferentem} should be a primary defense to protect unequal bargainers when the language of the insurance policy is unclear. Applying this to \textit{In Re Deepwater}, the Fifth Circuit should find BP’s oil-spill pollution coverage is determined by the insurance policies alone because BP is bringing the suit against the insurers’ for coverage, not Transocean. Additionally, any ambiguities should be interpreted in BP’s favor as an additional insured. Upholding \textit{ATOFINA} will encourage thoughtful participation of all contracting parties in the bargaining process when they agree to insure potential costly liabilities. Finally, this will encourage the use of thorough coverage-limiting terms to prevent contracting for non-negotiated risks.

\textit{Laura J. Thetford}

\textsuperscript{65} See \textit{In re Deepwater}, No. 11-274 c/w 11-275, MDL No. 2179, 2011 WL 5547259, at *24 (E.D. Louisiana, Nov. 15, 2011) (“Insurers have to know what risks they are insuring to be able to appropriately calculate the premiums they must collect.”).

\textsuperscript{66} Bleh, \textit{supra} note 53, at 92 (“Thus, it is hardly a surprise that insurers should advance arguments such as the sophisticated-insured exception to avoid [\textit{contra proferentem}] rules in litigation.”).