

INSIGHT 03

LAWSUITS AND LIABILITY RISKS: A TIMELINE OF JL FORM UPDATES

In our latest insight, we examine how losses, lawsuits and evolving risk exposures shape the extent of coverage that the specialty insurance market provides for third party liability coverage.

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CoverageClubb

THE BACKGROUND

Losses, lawsuits, and newly envisaged exposures over the course of the last two decades has led The Joint Liability Committee (JLC) to periodically assess the language and extent of cover afforded in the policy forms that they issue. The JLC comprises underwriting representatives from both the Lloyd's and International Underwriting Association (IUA) company markets. It represents the interests of those writing marine liability and related risks within the London market¹.

This insight examines the Joint Liability Committee Forms (JL Form) issued by the JLC since 2003 and the periodical changes made.

THE JL FORM

The JL Form has become commonly utilised for Marine and Energy business since the release of the JL2003/006 (London Umbrella Policy) and JL2003/007 (London Claims Made Policy). Available in both 'Claims Made' and 'Occurrence' formats, the JL Form is structured as an umbrella policy form, whereby, it provides legal and contractual third party liability coverage in excess of scheduled underlying insurances or a self insured retention, whichever the greater.

The JL Form's Insuring Agreement provides coverage for damages in respect of Bodily Injury, Personal Injury, Property Damage, and Advertising Injury caused by or arising out of an "Occurrence". The Insuring Agreement also outlines the territorial limits, providing coverage for the Insured's operations anywhere in the world. This broad territorial scope makes the JL Form particularly appealing to some Insureds, as some other liability forms used in the London Market include a default North American Jurisdiction Exclusion unless specifically endorsed otherwise.

Since the release of the 2012 JL Form, the Limits of Liability have applied on an "any one Occurrence" basis, replacing the "each Occurrence" language used in the 2003 JL Form. The JL Form provides two separate and distinct aggregate limits, one for Products and Completed Operations Liability combined, and one for all other coverages combined.

The "Claims Made" form was historically identified by the designation "/007" until it was replaced with the designation "/017" with the release of the latest iteration of the JL Form in 2022. Similarly, the "Occurrence" form was historically designated as "/006" but was updated to the designation "/016" with the 2022 update to the JL Form.

The Timeline of Changes



2003



Issuance of the JL2003/006 (London Umbrella Policy) and JL2003/007 (London Claims Made Policy);

2010



In April 2010, the offshore drilling rig Deepwater Horizon, operating in the Macondo field in the Gulf of Mexico, exploded and subsequently sank resulting in the deaths of 11 workers on the rig and resulted in the subsurface discharge of oil into the Gulf of Mexico.

The Deepwater Horizon event resulted in a multitude of litigation, including disputes relating to the extent of insurance coverage afforded to the oil-field developer, BP, as an additional insured under policies procured by the offshore drilling-rig owner, Transocean.

2012

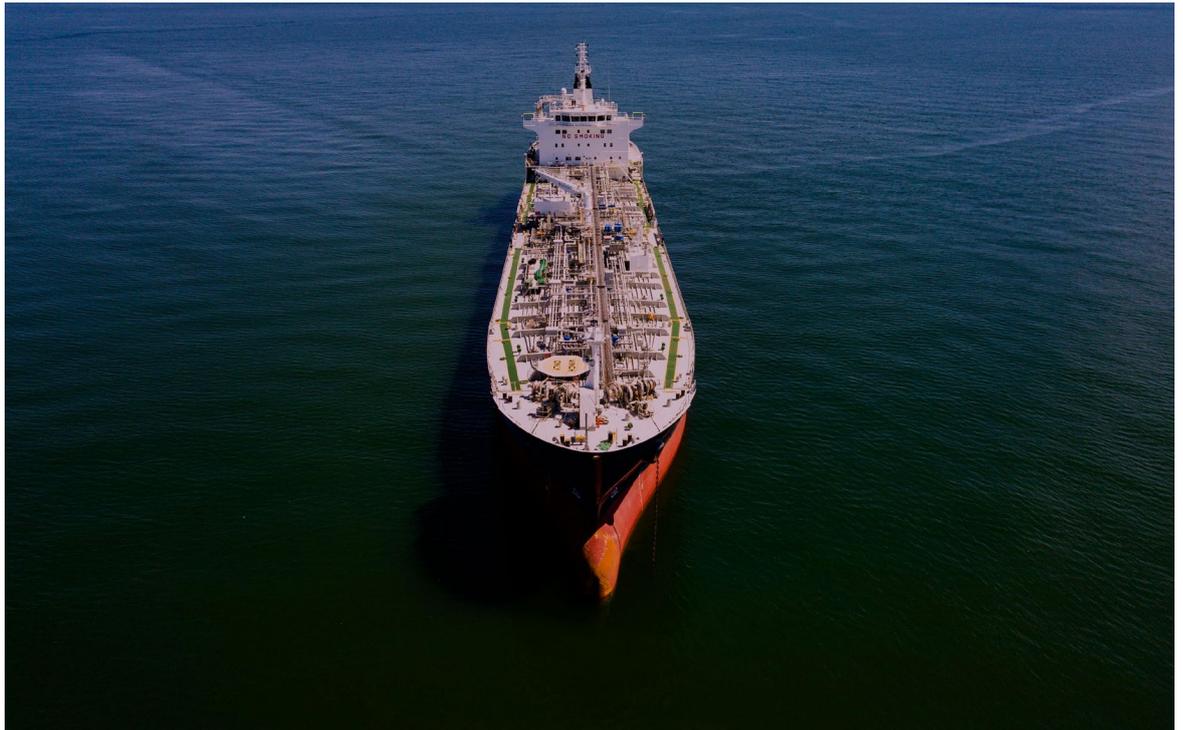


Issuance of the JL2012/006 (2012 Umbrella Policy) and JL2012/007 (2012 Claims Made Policy) in March 2012.

Summary of changes:

- Reference to *“each Occurrence”* amended to *“any one Occurrence”* in respect of the Limits of Liability and Self Insured Retention;
 - Inclusion of reference to *“Additional Insured”* within the Insuring Agreement, and a corresponding separate and distinct definition for *“Additional Insured”*. Within the JL2003/006 and JL2003/007, reference to *“additional insured”* and the extent of cover afforded to such *“additional insured”* was included within the *“Insured”* definition.
 - Language added that *“Any Underlying Insurance(s) which are self insured and the Self Insured Retention shall only be impaired or exhausted by damages which would, except for the amount thereof, be insured by this Policy.”*;
 - Reference to *“co-venture”* removed from the Joint Venture provision;
 - *“Application of Recoveries”* and *“Apportionment of Defence Expenses”* conditions both removed;
 - Condition outlining Non-Payment of Premium advance written notice by Underwriters amended from 10 days to 15 days;
 - Reference to *“human being”* amended to *“person”* throughout the form;
 - Exclusion operative language amended from *“This Policy does not apply to any actual or alleged liability”* to *“This Policy shall not indemnify the “Insured” for any actual or alleged liability”*;
 - Writeback for *“Bodily Injury”* or *“Property Damage”* arising from breach of contract included;
 - Deletion of exclusion for actual or alleged liability *“which any “Insured” may have to its own employee arising out of the actions or omissions of another of its own employees”*;
 - Writeback to the leased employee exclusion for *“Employers Liability”* if the person is enrolled under the *“Insured’s” Workers’ Compensation Program”*;
 - Deletion of exclusion for *“punitive damages, exemplary damages or any additional damages resulting from the multiplication of compensatory damages”*;
 - Expansion of scope of certain exclusions which were previously isolated to *““Bodily Injury”, “Personal Injury”, “Property Damage” and/or “Advertising Injury”*”;
 - Removal of the exclusion for actual or alleged liability *“to evaluate, monitor, control, remove, nullify and/or clean-up seeping, polluting or contaminating substances to the extent such liability arises solely from any obligations imposed by or on behalf of a governmental authority”*;
 - Revision to the *“Insured Contract”* and *“Occurrence”* definitions through the removal of reference to *““Bodily Injury”, “Personal Injury”, “Property Damage”, or “Advertising Injury”*” and replacement with reference to *“liability to which this Policy applies.”*
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2013



Issuance of the JL2013/006 (2013 Umbrella Policy) and JL2013/007 (2013 Claims Made Policy) in October 2013 amidst ongoing litigation surrounding the Deepwater Horizon event.

Summary of changes:

- Operative language of the Exclusions section amended from *“This Policy shall not indemnify the “Insured” for any actual or alleged liability”* to *“This Policy shall not indemnify for any actual or alleged liability”*. A revision of a similar nature was also made to the seepage, pollution and contamination exclusion by removing reference to *“the “Insured”*”;
 - The writeback for “Bodily Injury” or “Property Damage” arising from breach of contract that was included in the 2012 JL Forms was removed;
 - The failure to supply exclusion was widened through revision of language from *“for the “Insured’s” failure to supply”*, to *“for the failure to supply”*;
 - Revision was made to the Additional Insured definition. Additional Insured coverage was revised from *“to the extent required under said “Insured Contract”* to *“to the extent required by any indemnity given by the “Insured” in said “Insured Contract” to the “Additional Insured”*”;
 - Defence Expenses definition revised to clarify that the salaries, expenses or administrative costs of an *“Additional Insured”* are not included within the meaning of Defence Expenses;
 - Amendment to the Insured Contract definition, isolating the extent of contractual liability to “Bodily Injury” or “Property Damage”. In prior JL Forms, only “liability” was referenced in the definition. Clarification is also made of what constitutes a written contract;
 - *“Occurrence”* definition amended with reference to *“none of which was expected or intended by any “Insured”* amended to *“none of which was expected or intended”*.
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2019



Issuance of the JL2019/006 (2019 Umbrella Policy) and JL2019/007 (2019 Claims Made Policy) in December 2019.

The release of the updated JL Forms in 2019 came in response to *Anadarko Petroleum Corporation and Anadarko E&P Company, L.P. v. Houston Casualty Company, et al.*, where the Texas Supreme Court opined that the Joint Venture provision in the Insured's liability form only scaled indemnity payments and not defence costs, reversing a lower appellate court ruling.

Anadarko held a 25% interest in the Macondo field at the time of the Deepwater Horizon event and purchased an excess liability policy with a limit of USD150 million per Occurrence. Underwriters paid Anadarko USD37.5 million under the excess liability coverage (being 25% of the USD150 million limit), however, Anadarko contended that the Underwriters must also pay all of Anadarko's defence expenses, up to the USD150 million limit.

The Texas Supreme Court delivered an opinion that "liabilities" (i.e. an obligation imposed on Anadarko by law to pay for damages sustained by a third party who submits a written claim) and "defence expenses" are both included in the definition of Ultimate Net Loss, but the policy consistently distinguished between "liabilities" and "defence expenses". The Court stated that because only "liabilities" were referenced in the Joint Venture provision of Anadarko's policy, then only the "liabilities" were subject to the scaling, and not any "defence expenses".

The Texas Supreme Court concluded that the Joint Venture "liabilities" could be scaled to the 25% interest in the amount of USD37.5 million, but that the defence expenses, which were not mentioned in the Joint Venture provision, were separate from the liabilities and not subject to the 25% scale, and therefore were 100% fully recoverable by the Insured, up to the full USD150 million limit.

Summary of changes:

- The Joint Venture provision was revised with reference to *"As regards any liability of the "Insured" which is covered under this Policy"* revised to *"As regards any coverage under this Policy for "Ultimate Net Loss"*, thus seeking to scale defence expenses;
 - Reference made within the form to "the liability of Underwriters" and other similar references to Underwriters liability within the JL Form was also revised to language such as "the amount Underwriters must pay" and "Underwriters' share of "Ultimate Net Loss"
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2022



Issuance of the JL2022/016 (2022 Umbrella Policy) and JL2022/017 (2022 Claims Made Policy) forms in response to a series of newly envisaged exposures.

Summary of changes:

- The 90 days' notice of cancellation that Underwriters must give to the Insured was reduced to 30 days;
 - Reintroduction of the exclusion of *"punitive damages, exemplary damages, aggravated damages or any additional damages resulting from the multiplication of compensatory damages"*. This exclusion was last seen in the JL2003/006 and JL2003/007 forms;
 - The so called 'bad actors / harmful substances' exclusion was expanded upon, with more expansive exclusionary language used such as the introduction of *"concurrently"* exclusionary language. In addition an exclusion for Perfluorinated Compounds, Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) was introduced along with a corresponding definition for PFAS;
 - The introduction of an exclusion for actual or alleged liability *"arising out of any allegation or claim that the "Insured" or any "Additional Insured" caused or contributed to "Climate Change" or its consequences"*. A corresponding definition for Climate Change was also introduced. This exclusionary language and definition was based on the Lloyd's Market Association's (LMA) Climate Change Exclusion, LMA5570, released in 2021;
 - Revision to the "Additional Insured" definition. The revised definition explicitly limits coverage *"to the minimum extent required by any indemnity given by the "Insured" in said "Insured Contract" to the "Additional Insured"*", whereas the JL2019 Forms only stated that coverage is limited to the extent required, without specifying *"minimum"*.
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CONCLUSION

Over the past two decades, the Joint Liability Committee (JLC) has made significant adjustments to the JL Form in response to evolving risks, legal challenges, and industry demands. These updates reflect the changing landscape of marine and energy liabilities, particularly in light of major events like the Deepwater Horizon disaster and subsequent legal rulings. The regular revisions have addressed issues such as coverage limits, exclusions, and the scope of liability, providing clearer definitions and more precise coverage terms. Notably, the 2022 JL Form updates introduce new exclusions related to climate change and harmful substances, as well as refining coverage for additional insureds, highlighting the JLC's proactive approach to emerging exposures. These continuous revisions help ensure that the JL Form remains a relevant and effective tool for managing marine and energy risks in an increasingly complex environment.

It should be noted the JL Forms are considered 'model clauses'. As stated on the Lloyd's Market Association website, "*The models are therefore purely illustrative and distributed for the "guidance" of its Members, who are free to agree to different conditions or amend as they see fit*"². Based on this, revisions to the JL Form are permissible. It has become convention in the Marine and Energy insurance market for any amendments to the JL Form to be made through endorsements attaching to the forms, preserving the structural integrity of the JL Form while clearly indicating any changes made to all parties to the contract.

CoverageClubb have extensive experience in making revisions to the JL Form that are widely accepted within the specialty insurance market, whether to enhance coverage, or clarify coverage. Contact us today to find out more.

REFERENCES

1. Joint Liability Committee
2. Wordings Home



CoverageClubb

james@coverageclubb.com

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