**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**STARNET INSURANCE COMPANY, LLOYD'S SYNDICATE CVS 1919, LLOYD'S SYNDICATE NO. 780 ADV, and LLOYD'S SYNDICATE NO. 4020 ARK, each for his own and not one for the other, severally subscribing to Contract of Insurance No. BD-CJP-555,**
**Plaintiffs,**

**-vs-**

**Case No. A-16-CA-664-SS**

**FEDERAL INSURANCE COMPANY,**
**Defendant.**

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# ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs' Motion for Summary Judgment [#25], Defendant's Motion for Summary Judgment [#26], the parties' Responses [##27, 29] in opposition, and the parties' Replies [##28, 30] in support. Having reviewed the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

## Background

Plaintiffs Starnet Insurance Company, Lloyd's Syndicate CVS 1919, Lloyd's Syndicate No. 780 ADV, and Lloyd's Syndicate No. 4020 (Plaintiffs) bring this suit against Defendant Federal Insurance Company (Federal), claiming Federal breached its contract with non-party Border to Border Exploration, LLC (BBX). Compl. [#1] ¶ 17–19. Plaintiffs allege they are subrogated to BBX's breach of contract claim against Federal.

The parties in this case do not dispute any facts and agree the only issue before this Court is the interpretation of three insurance policies to determine the priority of the policies and consequently if Plaintiffs are entitled to recover from Federal. Pls.' Mot. [#25] at 10; Def.'s Mot. [#26] at 1–2. Nevertheless, the Court provides a brief recitation of the facts for context.

While this suit features dueling insurance companies, the underlying event centers on an oil well blowout. *See* Compl. [#1] ¶ 8. On September 1, 2014, an oil well was being drilled for BBX, the insured, when the well experienced a blowout, resulting in surface pollution to adjacent creeks and tributaries and to surrounding property owned by a third party. *Id.* Approximately $4.056 million of the clean-up expense was allocated to BBX's working interest in the well. *Id.* ¶ 12.

At the time of the blowout, BBX had multiple insurance policies. *Id.* ¶¶ 9–11. Relevant here, BBX had Cost of Well Control and Extra Expense Coverage from Plaintiffs for up to $25 million (Burke-Daniels Policy). *Id.* ¶ 11. BBX was also covered by Energy Industries Liability Insurance from Vigilant Insurance Company (Vigilant) with an incident limit of $1 million (Vigilant Policy). *Id.* ¶ 9. Finally, BBX had Commercial Excess and Umbrella Insurance from Federal (Federal Policy). *Id.* ¶ 10.

Following the blowout, Plaintiffs paid BBX $2,028,274.49, 50% of the cleanup expenses. Pls.' Mot. [#25] at 7. Vigilant then paid BBX $1 million, the cap for a single incident under the Vigilant Policy. *Id.* Federal, however, refused to pay BBX the remaining $1,028,274.49, asserting its policy was excess over all other policies, including Plaintiffs' Policy. *Id.*

After Federal refused to pay, Plaintiffs paid the remainder of BBX's claim in exchange for a release and subrogation agreement. *Id.* Thus, Plaintiffs paid a total of $3,056,548.98. *See id.* Plaintiffs now seek reimbursement from Federal. Compl. [#1] ¶ 8.

### A. Burke-Daniels Policy

Plaintiffs' Burke-Daniels Policy provided BBX with up to $25 million in coverage for control of well events, subject to a $200,000 self-insured retention, and for a variety of operator's expenses. Pls.' Mot. [#25] at 5. The operator's expense coverage included pollution expenses, such as "[t]he cost of removing, nullifying, or cleaning up seeping, polluting or contaminating substances, which [are] above the surface of the ground or water bottom, emanating from well insured under the CONTROL OF WELL INSURANCE . . . ." Pls.' Mot. [#25-3] Ex. 3 (Burke-Daniels Policy) at 4.[1]

The Burke-Daniels policy also contained the following "other insurance" clause: "In the event there is other insurance, which insures to the Assured's benefit covering any loss, damage, liability or expense covered hereunder, this insurance shall not pay until such other insurance is exhausted." *Id.* at 7.

### B. Vigilant Policy

As mentioned above, BBX also had insurance from Vigilant, a Chubb Insurance Company, which provided pollution liability insurance. Pls.' Mot. [#25-1] Ex. 1 (Vigilant Policy) at 4. The Vigilant Policy included the following "other insurance" provision:

> This insurance is primary, except to the extent that the Excess Insurance provision described below applies. If this insurance is primary, then our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in the Method of Sharing provision below.

*Id.* at 7.

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[1] The first three exhibits attached to Plaintiffs' motion appear to be excerpts of the three insurance policies at issue in this case. *See* Pls.' Mot. [#25] Exs. 1–3. Federal has not objected to any of the excerpts or provided any additional parts of the policies. *See* Def.'s Mot. [#26]. The Court therefore assumes there is no dispute concerning the other portions of the policies. In order to reference Plaintiffs' exhibits, the Court refers to the ECF page numbers.

In relevant part, the method of sharing provision stated, "If all of the other insurance permits contribution by equal shares, then we will follow this method also. Under this method, each insurer contributes equal amounts until it has paid its applicable limits of insurance or none of the loss remains, whichever comes first." *Id.* at 8. However, if the other insurance did not permit contribution by equal shares, the Vigilant Policy mandated each insurer's share be determined by "the ratio of its applicable limits of insurance to the total applicable limits of the insurance of all insurers." *Id.*

**C. Federal Policy**

Federal is also a Chubb Insurance Company. Pls.' Mot. [#25-2] Ex. 2 (Federal Policy) at 1. The Federal Policy was composed of two insuring agreements: Excess Follow-Form Coverage A (Coverage A) and Umbrella Coverage B (Coverage B). The Federal Policy specified a limit of $5 million per occurrence, with separate $5 million limits under each of the two insuring agreements. Federal Policy at 1.

Coverage A included a promise to pay "on behalf of the insured, that part of loss to which this coverage applies, which exceeds the applicable underlying limits." *Id.* at 4. Coverage A also explained that it "follow[ed] the terms and conditions of underlying insurance described in the Schedule of Underlying Insurance" but did "not apply to any part of loss within the underlying limits, or any related costs or expenses." *Id.* The Schedule of Underlying Insurance listed six insurance policies meeting the definition of underlying insurance. *Id.* at 2–3. The Vigilant Policy was listed on the Schedule of Underlying Insurance but the Burke-Daniels Policy was not. *See id.*

With respect to Coverage B, the Federal Policy specified Federal would pay, "on behalf of the insured, loss by reason of liability . . . [i]mposed by law[] or [a]ssumed in an insured contract[]

for bodily injury or property damage caused by an occurrence to which this coverage applies. *Id.* at 4–5. Coverage B explicitly excluded a "loss to which underlying insurance would apply. . . ." *Id.* at 5.

Applicable to both Coverage A and B, the Federal Policy also included an "other insurance" clause, providing in relevant part:

> If other valid and collectible insurance is available to the insured for loss we would otherwise cover under this insurance, our obligations are limited to as follows.
>
> This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis.
>
> . . . .
>
> We will pay only our share of the amount of loss, if any, that exceeds the sum of the total:
>
> - amount that all other insurance would pay for loss in the absence of this insurance; and
> - of all deductible and self-insured amounts under all other insurance.

*Id.* at 6 (emphasis omitted).

The Federal Policy defined "other insurance" as meaning any insurance affording coverage the Federal Policy would also afford, including self-insurance or other mechanisms arranged to fund a loss, but not including underlying insurance or insurance specifically negotiated to apply in excess. *Id.* at 8.

**D. Cross-Motions for Summary Judgment**

In moving for summary judgment, Plaintiffs claim Vigilant, Federal, and Plaintiffs all had a duty to reimburse BBX for its loss. Pls.' Mot. [#25] at 7–8. Plaintiffs allege BBX's total claim of $4,056,274.49 should have been divided in half, with Plaintiffs contributing $2,028,274.49 under the Burke-Daniels Policy and the Chubb Insurance Companies contributing the other $2,028,274.49 under the combination of the Vigilant and Federal Policies. *Id.* at 7–8. In support of their position, Plaintiffs argue the Burke-Daniels and the Federal Policies are competing policies with conflicting

"other insurance" clauses. *Id.* at 11–18. According to Plaintiffs, because the "other insurance" clauses in both policies conflict, Texas law mandates the "other insurance" clauses should be disregarded by the Court. *Id.* at 11–12. Plaintiffs argue, as a result, the Burke-Daniels Policy and the Federal Policy share BBX's loss on a dollar for dollar or equal share basis.[2] *Id.* Consequently, arguing they were forced to pay $1,028,274.49 more than their share of BBX's claim, Plaintiffs now seek $771,205.87 plus interest and attorney's fees from Federal.[3] *Id.* at 8.

By contrast, in its cross-motion for summary judgment, Federal argues its policy is an excess policy over both the primary policies, the Vigilant and the Burke-Daniels Policies. Def.'s Mot. [#26] at 8–9. Thus, according to Federal, its duty to BBX could only be triggered if both the Vigilant and Burke-Daniels Policies were exhausted. *Id.* As both policies were not exhausted here, Federal claims it had no duty to contribute to BBX's loss. *Id.*

## Analysis

### I. Legal Standards

### A. Summary Judgment

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.,* 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–25 (1986)).

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[2] Plaintiffs claim they agreed to contribute to BBX's loss in equal shares as specified under the terms of the Vigilant Policy's "other insurance"clause. Pls.' Mot. [#25] at 6.

[3] While Plaintiffs claim Federal was obligated to pay $1,028,274.49, one of the underwriters affiliated with the Burke-Daniels Policy declined to participate in this lawsuit. Pls.' Mot. [#25] at 8 n.18. Plaintiffs therefore reduced the amount sought from Federal by his share, resulting in a claim for $771,205.87. *Id.*

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325. Although the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.,* 402 F.3d 536, 540 (5th Cir. 2005). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.,* 560 F.3d 316, 326 (5th Cir. 2009) (internal quotation marks omitted). "'If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response.'" *United States v. $92,203.00 in U.S. Currency,* 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam)).

When the parties cross-move for summary judgment, the court must review "each motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Mid–Continent Cas. Co. v. Bay Rock Operating Co.,* 614 F.3d 105, 110 (5th Cir. 2010) (alteration omitted) (internal quotation marks omitted). When the moving party has met its Rule 56(a) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings. *Baranowski v. Hart,* 486 F.3d 112, 119 (5th Cir. 2007) (requiring the nonmovant to identify specific evidence in the record and explain how that evidence supports that party's claim). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux,* 402 F.3d at 540 (quoting *Little,* 37 F.3d at 1075). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party.

*Connors v. Graves,* 538 F.3d 373, 376 (5th Cir. 2008). Nevertheless, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: . . . consider the fact undisputed for purposes of the motion." FED. R. CIV. P. 56(e)(2).

**B. Texas Insurance Law**

In a diversity case involving the interpretation of a contract, courts apply the substantive law of the forum state. *McLane Foodservice, Inc. v. Table Rock Rests., L.L.C.,* 736 F.3d 375, 377 (5th Cir. 2013). Consequently, Texas rules of contract interpretation control this case.

Texas courts interpret insurance contracts under the same rules that apply to contracts generally. *Potomac Ins. Co. of Ill. v. Jayhawk Med. Acceptance Corp.,* 198 F.3d 548, 550 (5th Cir. 2000) (citing *Barnett v. Aetna Life Ins. Co.,* 723 S.W.2d 663, 665 (Tex. 1987)). Under Texas law, the interpretation of an insurance policy is a question of law for the court to determine. *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.,* 739 F.3d 848, 858 (5th Cir. 2014) (citations omitted). The primary objective is to ascertain the parties' intent as expressed in the written instrument. *Mid–Continent Cas. Co. v. Swift Energy Co.,* 206 F.3d 487, 491 (5th Cir. 2000) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex. 1995)).

With respect to the priority of multiple insurance policies, Texas law mandates that primary policies' limits must be exhausted before excess insurers become liable. *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.,* 78 F.3d 202, 209 & n.23 (5th Cir. 1996) (citing *Emscor Mfg., Inc. v. All. Ins. Group,* 879 S.W.2d 894, 903 (Tex. App.—Houston [14th Dist.] 1994, writ denied)). In particular, primary insurance is insurance coverage where an insurer's liability attaches immediately upon the happening of the occurrence that gives rise to the liability. *Id.* By contrast, an excess policy is one

where the insurer is only liable for the excess above and beyond what might be collected from primary insurance. *Id.* Where both a primary and excess insurance policy apply, the two policies do not cover the same risk. *Id.* Rather, the policies cover "separate and clearly defined layers of risk." *Id.* (emphasis omitted).

Conflicts involving the priority of insurance policies arise when "more than one policy covers the same insured and each policy has an 'other insurance' clause which restricts its liability by reason of the existence of other coverage." *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 586 (Tex. 1969). Emphasizing that "dominant consideration" should be given to the rights of the insured, Texas applies the following rule to reconcile such conflicts:

> When, from the point of view of the insured, she has coverage from either one of two policies but for the other, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the concurrent insurance, there is a conflict in the provisions . . . . [This conflict is] solved by ignoring the two offending provisions.

*Id.* at 589. If both policies provide coverage in the absence of the conflicting clauses, liability is equally prorated between the two companies. *Id.* at 590.

The Fifth Circuit "has interpreted *Hardware Dealers* broadly, holding that even when a plausible interpretation of opposing 'other insurance' clauses would render one policy's coverage primary and the other's excess, if a 'reasonable construction' of the two policies from the insured's perspective would result in full coverage under each policy but for the existence of the other, the policies conflict and liability should be apportioned pro rata." *Am. States Ins. Co. v. Ace Am. Ins. Co.*, 547 F. App'x 550, 553 (5th Cir. 2013) (per curiam).

## II. Application

The key issue in this case concerns the priority of BBX's three insurance policies and how BBX's loss should be apportioned between them. In order to decide this issue, the Court evaluates the policies based on parties' intent as expressed in the written instruments and looks to the overall pattern of coverage. Where there is concurrent coverage and the concurrent policies both have "other insurance" clauses, the Court employs the *Hardware Dealers* test. Here, the Court finds the Burke-Daniels and Vigilant Policies shared primary responsibility while the Federal provided excess coverage. Under *Hardware Dealers*, the "other insurance" clauses of the Burke-Daniels Policy and the Vigilant Policy are knocked out. While ordinarily pro rata division of BBX's loss would apply, Plaintiffs have agreed to contribution by equal shares as described in the Vigilant Policy. Because Federal's duty as an excess insurer is not triggered by this allocation of liability, Federal has no liability to BBX and therefore no liability to Plaintiffs via subrogration. Thus, the Federal is entitled to judgment as a matter of law. Correspondingly, the Court GRANTS Federal's motion for summary judgment and DENIES Plaintiffs'.

First, the Court finds the both the Burke-Daniels and Vigilant Policies provided BBX with primary insurance coverage for a pollution event while the Federal Policy provided BBX with excess coverage. In the light of the parties' intent as expressed in the written instruments, the Burke-Daniels Policy protected BBX from risk associated with well control events, including pollution events, and the Vigilant Policy protected BBX from the risk of pollution liability. Burke-Daniels Policy at 4 (covering pollution expenses such as "[t]he cost of removing, nullifying, or cleaning up seeping, polluting or contaminating substances, . . . emanating from [the] well insured"); Vigilant Policy at 4–6 (covering damages and costs from both offsite and onsite pollution liability). By contrast, the

Federal Policy protected BBX against the risk a loss exceeded underlying insurance or was not covered by underlying insurance. Federal Policy at 4–5. With such a structure, the Court finds the parties intended for Vigilant and Plaintiffs provide to primary coverage for BBX's pollution costs with no contribution from Federal unless the limits of both primary policies were exhausted.

Plaintiffs argue, however, BBX's loss should be apportioned between the Burke-Daniels, Vigilant, and Federal Policies for two main reasons: (1) Vigilant and Federal are both Chubb Insurance Companies; and (2) the Federal Policy should not be treated as excess over the Burke-Daniels Policy. The Court disagrees. Plaintiffs's first argument incorrectly allocates insurance liability based on a shared parent company rather than via the insurance policies for which the parties contracted. *See Swift Energy Co.*, 206 F.3d at 491 ("In interpreting a[n insurance] policy, the court's primary focus is to ascertain the true intent of the parties as expressed in the written document.").

In full, Plaintiffs's second argument alleges the Federal Policy was not excess over the Burke-Daniels Policy because the Federal Policy listed the Vigilant Policy, but not the Burke-Daniels Policy, as underlying insurance for Coverage A and Coverage B does not apply to BBX's loss. This argument ignores the role its own policy played in protecting BBX. The Burke-Daniels Policy afforded primary coverage and only became excess if another primary policy applied, provided the other primary policy did not have a conflicting "other insurance" clause. Burke-Daniels Policy at 7. Comparatively, the Federal Policy provided either excess or umbrella coverage for all the events to which it applied. Federal Policy at 1; *see also Nutmeg Ins. Co. v. Emp'rs Ins. Co. of Wausau,* No. CIV.A. 3:04-CV-1762B, 2006 WL 453235, at *13 (N.D. Tex. Feb. 24, 2006) (Finding an excess carrier liable only "when the limits of the primary coverages are exhausted"). As primary and excess insurance policies cover "separate and clearly defined layers of risk[,]" the Federal Policy protected

BBX against a second layer of risk while both the Burke-Daniels and Vigilant Policies were responsible for the first layer. *See St. Paul Mercury Ins. Co.*, 78 F.3d at 209 & n.23 (citing *Emscor Mfg., Inc.*, 879 S.W.2d at 903). Plaintiffs should not be able to shirk responsibility for the first layer of risk merely because BBX also protected itself against additional risks.

Therefore, just as the Texas appellate court remarked in *Liberty Mutual*, Plaintiffs' reliance on the *Hardware Dealers* to divide liability between the all three insurance policies is misplaced. *See* 590 S.W.2d at 785. In *Hardware Dealers*, the Court examined two primary insurance policies. *Id.* At issue here are two primary policies, the Burke-Daniels and the Vigilant Policies, and an excess and umbrella policy, the Federal Policy. *See Carrabba v. Emp'rs Cas. Co.*, 742 S.W.2d 709, 715 (Tex. App.—Houston [14th Dist.] 1987, no writ) (holding that all other collectible insurance must be exhausted before liability attaches under an umbrella policy). The *Hardware Dealers* rule is triggered only where concurrent coverage, coverage protecting against the same layer of risk, exists. *Scottsdale Ins. Co. v. Steadfast Ins. Co.*, No. CV H-16-0273, 2017 WL 661520, at *4 (S.D. Tex. Feb. 17, 2017) (quoting *Hardware Dealers,* 444 S.W.2d at 589).

Concurrent coverage does exist in this case where the Burke-Daniels and Vigilant Policies overlap. Significantly, both of these policies contain "other insurance" clauses. If the clauses conflict, then they drop out, requiring Plaintiffs and Vigilant to contribute pro rata to BBX's loss. *See id.* If the clauses do not conflict, then they are enforced. *See id.*

The *Hardware Dealers* test, as applied by the Fifth Circuit, requires this Court to analyze each policy "but for" the other from the insured's perspective. *See id.* (citing *Royal Ins. Co. of Am. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 644 (5th Cir. 2004) and *St. Paul Mercury Ins. Co.*, 78 F.3d at 210). But for the Burke-Daniels Policy, BBX had a primary policy from Vigilant. If BBX

had not purchased the Burke-Daniels Policy, the Vigilant Policy would have expended its policy limits and BBX would have turned to Federal to recover the remainder of its loss. Likewise, but for the Vigilant Policy, BBX had a primary policy from Plaintiffs via the Burke-Daniels Policy. Without the Vigilant Policy, the Burke-Daniels Policy would covered all of BBX's loss.

Consequently, the Court turns to the "other insurance" clauses of Burke-Daniels Policy and the Vigilant Policy. Under the terms of its "other insurance" clause, the Burke-Daniels Policy only became an excess insurer in the presence of the Vigilant Policy. Burke-Daniels Policy at 7. On the other hand, the Vigilant Policy's "other insurance" clause (1) required each insurer to "contribute[] by equal amounts until it has paid its applicable limits" if permitted by the other insurance policy or (2) mandated contribution by limits if the other insurance policy did not permit equal contribution. Vigilant Policy at 7–8.

Because a reasonable construction of these two policies and their "other insurance" clauses from the insured's perspective could result in full coverage under each policy but for the existence of the other, the policies conflict. *See Hardware Dealers*, 444 S.W.2d at 586 (classifying where one policy contains an excess clause and the other contains a pro rata apportionment clause as a conflict). As result, the Court ignores the two conflicting provisions. While such a finding would typically merit pro rata division of liability, here Plaintiffs agreed to contribute equal shares as provided in the Vigilant Policy. BBX's loss was therefore appropriately divided with Vigilant paying its applicable limit and Plaintiffs paying the remaining $3,056,548.98, significantly less than the Burke-Daniels Policy limit.

## Conclusion

For these reasons, the Court finds Federal has no liability to BBX and therefore Plaintiffs via subrogration. As Federal is entitled to judgment as a matter of law, the Court GRANTS Federal's motion for summary judgment and DENIES Plaintiffs' motion for summary judgment.

Accordingly:

IT IS ORDERED that Defendant Federal Insurance Company's Motion for Summary Judgment [#26] is GRANTED; and

IT IS FINALLY ORDERED that Plaintiffs' Motion for Summary Judgment [#25] is DENIED.

SIGNED this the 5th day of April 2017.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE