STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0863

CROSSTEX ENERGY SERVICES, LP, CROSSTEX LIG, LLC, AND
CROSS TEX PROCESSING SERVICES, LLC

VERSUS

TEXAS BRINE COMPANY, LLC, ET AL.

Judgment Rendered: DEC 2 1 2017

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APPEALED FROM THE
23rd JUDICIAL DISTRICT COURT
ASSUMPTION PARISH, LOUISIANA
DOCKET NUMBER 34,202

HONORABLE JASON VERDIGETS, JUDGE

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And AIG Specialty Insurance Company
(in their respective capacities as alleged
pre-2012 insurers of Texas Brine
Company, LLC)

BEFORE: WHIPPLE, C.J., McDONALD, and CHUTZ, JJ.

McDONALD, J.

In this appeal, an insured appeals a summary judgment in favor of its insurers concluding the insurers did not owe the insured a duty to defend against the plaintiffs' claims in the underlying litigation and dismissing the insured's third party demand against the insurers with prejudice. We affirm.

FACTS AND PROCEDURAL HISTORY

This suit is one of several arising from the August 2012 appearance of a sinkhole near Bayou Corne in Assumption Parish, Louisiana. EnLink f/k/a Crosstex[1], the plaintiffs in the underlying litigation, own and operate a natural gas pipeline that traverses the edge of a salt dome. Texas Brine[2] operates brine production wells, including the Oxy Geismar #3 well, on property above the salt dome. EnLink filed suit against Texas Brine, among others, alleging the sinkhole was caused, in whole or part, by the failure of the Oxy Geismar #3 salt cavern and that the sinkhole engulfed a section of EnLink's pipeline, rendering the pipeline displaced, damaged, and unusable.

In response to EnLink's suit, Texas Brine filed a third party demand for declaratory judgment seeking defense and indemnity from insurers, National Union Fire Insurance Company of Pittsburgh, Pa. (National Union) and AIG Specialty f/k/a AISLIC[3] (sometimes, collectively AIG Insurers), under certain pre-2012 liability policies issued to Texas United Corporation.[4] In due course, the AIG Insurers filed a motion for summary judgment, claiming they had no duty to indemnify or defend Texas Brine in this suit,

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[1] The original petition was filed by Crosstex Energy Services, LP; Crosstex LIG, LLC; and Crosstex Processing Services, LLC (Crosstex). In March 2014, the plaintiffs' names changed, respectively, to EnLink Midstream Operating, LP; EnLink LIG, LLC; and EnLink Processing Services, LLC. Here, we sometimes refer to the plaintiffs in the underlying litigation as EnLink.

[2] In the original petition, EnLink named Texas Brine Company, LLC, as the defendant who operated the wells. In a fifth supplemental, amended, and restated petition, EnLink additionally named Texas United Corporation and United Brine Services Company, LLC, as defendants, claiming they were both alter egos of Texas Brine Company, LLC, which acted in concert with and/or as part of Texas Brine Company, LLC, in causing EnLink's damages. We sometimes refer to the three defendants as Texas Brine.

[3] In the original third party demand, Texas Brine named National Union, American International Surplus Lines Insurance Company (AISLIC) and American International Specialty Lines Insurance Company (also AISLIC) as third party defendants. In responsive pleadings, including their motion for summary judgment here, the third party defendants identify themselves as National Union and AIG Specialty Insurance Company f/k/a AISLIC and AISLIC. We sometimes collectively refer to these third party defendants as AIG Insurers.

[4] The relevant policies identify Texas United Corporation as the insured. For purposes of this motion for summary judgment only, without waiving their right to contest Texas Brine's status, the AIG Insurers allowed Texas Brine to be considered an additional insured.

because EnLink's alleged damages did not occur during the effective dates of any of the relevant policies, the last of which indisputably expired on March 1, 2009, more than three years before the sinkhole appeared. In a judgment signed February 14, 2017, the district court granted summary judgment in favor of the AIG Insurers, in their capacities as Texas Brine's pre-2012 insurers, and dismissed Texas Brine's third party demand against them.[5]

Texas Brine appealed from the judgment. While the appeal was pending, EnLink apparently settled its claims against Texas Brine and those claims were dismissed. According to Texas Brine, however, this appeal still presents the issue of whether genuine issues of material fact exist such that the AIG Insurers owed Texas Brine a duty to defend Texas Brine on the EnLink claims against it until the date those claims were resolved and dismissed.

Texas Brine contends the district court erred in granting summary judgment to the AIG Insurers because there are genuine issues of material fact as to when EnLink's damage began that preclude summary judgment on the AIG Insurers' duty to defend. Specifically, Texas Brine argues the pre-2012 AIG policies do not limit coverage to property damage that manifests itself during the policy period but should be interpreted to cover possible hidden property damage to EnLink that may have resulted from earth movement that may have occurred during the policy periods. Texas Brine also contends the district court erred, because another district court in other sinkhole-related cases denied summary judgment to insurers on the duty to defend issue.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *Jones v. Anderson*, 16-1361 (La. App. 1 Cir. 6/29/17), 224 So.3d 413, 417. After an opportunity for adequate discovery,

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[5] Zurich American Insurance Company, another insurer against which Texas Brine filed an incidental demand, moved for summary judgment and partially joined in the AIG Insurers' motion for summary judgment. Texas Brine filed an omnibus opposition to the motions. The district court heard the motions at the same hearing and then issued one judgment in the AIG Insurers' favor and another judgment in Zurich's favor. Texas Brine appealed both judgments. We review the AIG Insurer judgment here, under docket number 2017 CA 0863, and the Zurich judgment under docket number 2017 CA 0895, also decided this day.

a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966A(3). The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. LSA-C.C.P. art. 966A(4).

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. LSA-C.C.P. art. 966D(1).

Appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Jones,* 224 So.3d at 417. Thus, appellate courts ask the same questions: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. *Id.* Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Id.*

DUTY TO DEFEND

Whether an insurance policy provides or precludes coverage is a dispute that can be properly resolved within the framework of a motion for summary judgment. *George S. May Int'l Co. v. Arrowpoint Capital Corp.*, 11-1865 (La. App. 1 Cir. 8/10/12), 97 So.3d 1167, 1171. The party seeking a declaration of coverage under an insurance policy must establish every fact essential to recovery and that the claim falls within the policy coverage. *Id.* Generally, the insurer's obligation to defend suits against its insured is broader than its obligation to indemnify for damage claims. *Arceneaux v. Amstar Corp.*,

10-2329 (La. 7/1/11), 66 So.3d 438, 450. The issue of whether a liability insurer has the duty to defend a civil action against its insured is determined by application of the "eight-corners rule," under which an insurer must look to the "four corners" of the plaintiff's petition and the "four corners" of its policy to determine whether it owes that duty. *Maldonado v. Kiewit Louisiana Co.*, 13-0756 (La. App. 1 Cir. 3/24/14), 146 So.3d 210, 218. The insurer's duty to defend suits brought against its insured is determined by the factual allegations of the injured plaintiff's petition, with the insurer being obligated to furnish a defense unless it is clear from the petition that the policy unambiguously excludes coverage. *See Arceneaux,* 66 So.3d at 450. Thus, assuming the factual allegations of the petition are true, if there could be both coverage under the policy and liability to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit. *Id.* Additionally, the court must liberally interpret the factual allegations of the petition in determining whether they bring the plaintiff's claim within the scope of the insurer's duty to defend the suit brought against its insured. *Maldonado,* 146 So.3d at 219. If a petition does not allege facts within the scope of coverage, however, an insurer is not legally required to defend a suit against its insured. *Id.*

We now review de novo the documents filed by the parties in support of and in opposition to the AIG Insurers' motion for summary judgment. *See* LSA-C.C.P. arts. 966A(4) and D(2). It is undisputed that the AIG Insurers provided insurance coverage to Texas United Corporation under policies effective from March 1, 1991 through March 1, 1995 and from March 1, 1996 through March 1, 2009 (the pre-2012 AIG policies). The AIG Insurers filed pertinent excerpts from the pre-2012 AIG policies in support of their motion. Generally, the Insuring Agreement of each of the policies provided, in pertinent part:

> **SECTION I – COVERAGES**
>
> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement.**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of

> "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. ...
>
> **b.** This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

Also, generally, the policies defined "property damage" as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.[6]

Further, each of the pre-2012 AIG policies defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The pre-2012 AIG policies provided coverage for property damage only if it occurred during the policy period. It is undisputed that no pre-2012 AIG policy was in effect on August 3, 2012, the day the sinkhole near Bayou Corne appeared. Nevertheless, Texas Brine argues that, although EnLink may have *discovered* its pipeline damage on August 3, 2012, there are genuine issues of material fact as to whether hidden damage *occurred* before then, due to subsidence and other non-visible underground damage in the years before the sinkhole became visible. Thus, according to Texas Brine, the possibility that EnLink could have sustained damage during the pre-2012 AIG policy periods precludes summary judgment on the AIG Insurers' duty to defend.

To support its opposition to the summary judgment, Texas Brine filed three expert opinions. The first expert, William Barnhart, opined that InSAR analysis, a

[6] This language is the same in most of the pre-2012 AIG policies and is substantively the same in all of the policies.

technique used to observe active ground surface deformation, was consistent with ground surface subsidence near the salt dome from 2007 through 2011. The second expert, John Carico, opined that pre-2012 earth movement in the Bayou Corne area "could have" damaged EnLink's pipeline earlier than March 1, 2012. The third expert, Peter Knowe, opined that, "if" pre-2012 earth movement damaged EnLink's pipeline, such hidden damage would be covered under pre-2012 occurrence policies, even if the sinkhole did not appear until 2012.

We first note that, under the "eight-corners rule," Texas Brine's experts' opinions are irrelevant to determining the AIG Insurers' duty to defend Texas Brine against EnLink's claims. It is EnLink's allegations that determine the AIG Insurers' duty to defend, and Texas Brine cannot use expert opinions to add to EnLink's allegations, or to dictate a certain interpretation of EnLink's allegations, in its attempt to defeat summary judgment on the duty to defend issue. *See Vaughn v. Franklin*, 00-0291 (La. App. 1 Cir. 3/28/01), 785 So.2d 79, 85, *writ denied,* 01-1551 (La. 10/5/01), 798 So.2d 969 (rejecting insurer's argument to look beyond allegations of petition to determine duty to defend). Further, even if we did consider the expert opinions, they do not create a factual dispute as to whether EnLink sustained property damage during any of the specific, relevant policy periods, but only speculation that such could have occurred before 2012.

We now review EnLink's petition to determine if it alleged that property damage occurred during any of the pre-2012 AIG policy periods. EnLink filed its original petition against Texas Brine in April 2013 and then amended it multiple times. In support of their respective positions on summary judgment, the AIG Insurers and Texas Brine both point to allegations from EnLink's petition, including the original, first amended, second amended, and fifth amended and restated petitions. We summarize pertinent allegations as follows, italicizing words and phrases relevant to EnLink's damages:

- EnLink owns/operates a petroleum gas storage facility situated near Bayou Corne; EnLink also owns/operates a pipeline that traverses the western edge of the Napoleonville salt dome near the Oxy Geismar #3 brine production salt cavern.

- Since 1975, Texas Brine has leased the right to produce salt from land located on the salt dome.

- In 1982, Texas Brine and a land lessee drilled the Oxy Geismar #3 well and Texas Brine remained the operator at least until 2015.

- In 1984, Texas Brine was informed of concerns about Oxy Geismar #3's proximity to the edge of the salt dome; Texas Brine knew or should have known of all risks related to drilling and mining of the Oxy Geismar #3 and had a duty to operate the Oxy Geismar #3 as a prudent operator and in a reasonable manner.

- In at least 2007, Texas Brine became aware that the Oxy Geismar #3 cavern was mined so close to the edge of the salt dome so as to threaten the cavern's integrity but continued to operate on the cavern.

- In about March 2009, Texas Brine ceased mining the Oxy Geismar #3 well, and in June 2011, Texas Brine plugged and abandoned the Oxy Geismar #3 well.

- *Beginning in May 2012,* reports were made that natural gas was bubbling to the surface of waterways near the salt dome, which forced EnLink to perform continuous inspections, monitoring, probing, excavation, surveying, gas sampling and analysis, and related permitting to ensure the integrity of its pipelines in the area.

- *On August 3, 2012,* a sinkhole emerged adjacent to EnLink's pipeline and has since engulfed a section of the pipeline.

- EnLink's pipeline was displaced, damaged, and rendered unusable due to the *sudden* soil subsidence, earth movement, and soil instability caused *when the sinkhole occurred.*

- The failure of the Oxy Geismar #3 cavern *caused, in whole or in part, the sinkhole* and associated soil subsidence and instability; the Oxy Geismar #3 cavern is unstable and continues to collapse.

- EnLink has incurred substantial damage *from the sinkhole*, and Texas Brine's role in causing or contributing to the sinkhole renders it directly liable to EnLink for damages sustained *as a result of the sinkhole emergence.*

- Due to the salt dome's potential instability, caused by the Oxy Geismar #3 cavern failure, EnLink conducted structural integrity tests of its caverns and has transferred butane from adjacent caverns to more remote caverns.

- Due to the Oxy Geismar #3 cavern failure, EnLink was prevented from expanding its storage facility as planned; lost storage cavern contracts with third parties; and, was required by state agencies to take responsive actions to the incident.

- Acts by Texas Brine, Texas United, and United Brine, and defective things they owned or over which they had garde, caused or directly contributed to the destabilization of the Oxy Geismar #3 cavern and *the eventual formation of the sinkhole causing damages to EnLink.*

- Texas Brine's fault caused EnLink *the following damage*, without limitation: expenses associated with testing to determine the source of natural gas releases and subsequent gas monitoring; lost revenues associated with the shutdown of the pipeline; costs to relocate the

> pipeline; anticipated demolition costs for removing the pipeline's unusable section; expenses associated with salt dome and cavern structural integrity tests; costs and lost revenues associated with product transfers between caverns; lost storage cavern contract revenue; lost future revenue from lost facility and business expansion opportunities; costs to respond to state agency directives; interests, and other damages to be proven at trial.

Liberally reading EnLink's allegations, we do not find that they bring EnLink's claims within the scope of the AIG Insurers' duty to defend Texas Brine in this case. Although EnLink alleges that Texas Brine has operated the Oxy Geismar #3 well and cavern since 1982, had a duty to be a prudent operator, and was aware in 1984, or at least in 2007, of concerns about the stability of the Oxy Geismar #3 well and cavern, the first property damage for which EnLink seeks compensatory damages are expenses associated with inspections, monitoring, and other actions that it performed in response to May 2012 reports of bubbling natural gas. The May 2012 natural gas bubbling occurred over three years after the last pre-2012 AIG policy expired. Contrary to Texas Brine's assertions, EnLink does not allege that there was hidden damage to its pipeline, due to subsidence or other non-visible underground damage, at any time before the sinkhole became visible on August 3, 2012. Thus, also contrary to Texas Brine's assertions, this court need not resolve a "conflict" created by another district court judge's rulings in the *Pontchartrain Natural Gas System v. Texas Brine, et al.*, case, 23rd JDC, No. 34,265 *(Pontchartrain)*, and in the *Florida Gas Transmission Company, LLC vs. Texas Brine Company, LLC, et al.* case, 23rd JDC, No. 34,316 *(Florida Gas)*. Those rulings are not before us here and have no bearing on what EnLink has alleged in this case.

Based on our application of the "eight-corners rule," under the clear terms of the pre-2012 AIG policies, the AIG Insurers' duty to defend Texas Brine has not been triggered, because EnLink has not alleged that property damage occurred during a relevant policy period. And having so found based on EnLink's allegations alone, we need not consider purported "admissions" EnLink or Texas Brine may have made in earlier summary judgment litigation against Liberty Insurance Underwriters, Inc., another of Texas Brine's insurers; nor need we address Texas Brine's argument that the

"exposure" theory versus the "manifestation" theory triggers insurance coverage in property damage cases.

After a thorough de novo review of the record, we find that the AIG Insurers met their initial burden of pointing to an absence of factual support for an element essential to Texas Brine's duty to defend claim. *See* LSA-C.C.P. art. 966D(1). The AIG Insurers pointed out that EnLink's allegations against Texas Brine did not bring EnLink's claim within the scope of the AIG Insurers' duty to defend Texas Brine during the effective dates of any of the pre-2012 AIG policies. *See Maldonado*, 146 So.3d at 219. Once the AIG Insurers demonstrated this lack of evidence, the burden shifted to Texas Brine to specifically show where EnLink alleged any property damage that occurred during a relevant policy period. *See* LSA-C.C.P. arts. 966D(1) and 967B. Since Texas Brine did not do so, but instead relied on speculative expert opinions extraneous to EnLink's allegations, there is no genuine issue of material fact, and the AIG Insurers are entitled to summary judgment as a matter of law. *Id.*; *accord Craig M. v. DA Exterminating Co., Inc.,* 12-0626 (La. App. 1 Cir. 9/13/13), 186 So.3d 673, 679-80. Accordingly, we find the district court properly granted summary judgment in the AIG Insurers' favor.

CONCLUSION

For the foregoing reasons, the district court's February 14, 2017 judgment, granting summary judgment in favor of National Union Fire Insurance Company of Pittsburgh, Pa. and AIG Specialty Insurance Company, in their alleged capacities as Texas Brine's pre-2012 insurers, and dismissing Texas Brine's third party demands against them with prejudice, is affirmed. We assess appeal costs to Texas Brine.

AFFIRMED.