Opinion issued August 27, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00184-CV

ZURICH AMERICAN INSURANCE COMPANY, IN ITS CAPACITY OF POLICY NO. GLO 9264204-03, AND IRONSHORE SPECIALTY INSURANCE CO., Appellants

V.

CERTAIN UNDERWRITERS SUBSCRIBING TO OEE POLICY NRG 475535-9-02, CERTAIN UNDERWRITERS SUBSCRIBING TO ENERGY PACKAGE POLICY B1263EG0062313 AND CERTAIN UNDERWRITERS SUBSCRIBING TO ENERGY PACKAGE POLICY B1263EG0062314, Appellees

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On Appeal from the 234th District Court
Harris County, Texas
Trial Court Case No. 2016-02663

O P I N I O N

This is a dispute between three insurers over whether and to what extent they are liable for the loss of an insured. In 2014, a fire erupted at a wellsite operated by Statoil USA Onshore Properties, Inc., resulting in a pollution incident. Statoil sought insurance coverage for more than $27,000,000 in costs under policies issued by three insurers: Certain Underwriters at Lloyd's, London; Ironshore Specialty Insurance Company; and Zurich American Insurance Company. The insurers settled Statoil's claim for $24,000,000, unallocated to any specific costs, but reserved rights against each other to litigate both apportionment of the loss and allocation of responsibility for the settlement.

After the settlement with Statoil, the insurers filed a series of summary-judgment motions and cross-motions seeking declaratory relief determining which of their policies were in effect at the time of the incident, what those policies covered, and whether the loss should be allocated among them. The trial court ruled that: (1) each insurer issued a primary policy providing coverage for some but not all of Statoil's loss; (2) the loss could not be allocated among the policies; and (3) equity therefore demanded that the policies share liability pro rata based on their respective limits.

We hold that the trial court did not err in making the first ruling but did err in making the second and third rulings. Therefore, we affirm, in part, and reverse and remand, in part.

Factual Background

This insurance dispute arises from a pollution incident resulting from a massive fire at an Ohio well-pad site, which Statoil leased and operated. The material facts are undisputed.

The Pollution Incident

On June 28, 2014, a fire ignited on Statoil's well-pad. The fire quickly spread and began burning the chemicals staged on the pad. As the chemicals burned, a crane collapsed and sheared off a lubrication valve on one of the wells, rendering the well out of control and causing it to flow uncontrollably. As a result, pollution emanated from the surface fire and subsequent flow from the well. Statoil paid over 1,000 invoices and incurred over $27,000,000 in expenses from dealing with the fire and pollution.

Statoil's Claim and Policies

In the months following the fire, Statoil submitted these invoices to its insurers.

Specifically, Statoil submitted a claim to Underwriters on their: (1) 2013-2014 Onshore Primary OEE policy (the 2013-2014 Primary OEE Policy); (2) 2013-2014

Energy Package policy (the 2013-2014 EPP policy); and (3) 2014-2015 EPP (collectively, the OEE policies). Generally, Underwriters' OEE policies provided control-of-well coverage, including first-party and third-party liabilities for pollution from an out-of-control well via the 2013-2014 Primary OEE policy ($2,500,000 deductible, $7,5000,000 in well-pollution coverage) and 2013-2014 EPP policy ($10,000,000 deductible, $50,000,000 in well-pollution coverage).

Statoil submitted a claim to Ironshore on its Site Pollution Incident Legal Liability Select (SPILLS) policy—a $50,000,000 primary policy with a $500,000 deductible. Generally, the SPILLS policy starts paying Statoil once Statoil incurs $500,000 in pollution invoices and then pays the next $49,500,000 in pollution invoices. It generally covers environmental pollution legal liability for first-party and third-party liabilities resulting from fire or well pollution incidents, including Statoil property, onshore and offshore wells, facilities, pipelines and other equipment, and out-of-control wells.

Finally, Statoil submitted a claim to Zurich on its Commercial General Liability policy. Zurich's CGL policy provided general liability coverages with some pollution coverage for third-party liabilities, excluding pollution from an out-of-control well ($10,000 deductible, $1,000,000 in fire-pollution coverage).

Each policy contained various limitations and exclusions. And each policy contained so-called "other insurance" provisions purporting to limit the policy's contribution to the amount exceeding the limits of all other insurance.

Appellants initially reserved or denied coverage for Statoil's claim because of Ironshore's "other insurance" exclusion and Zurich's well-control exclusion. Underwriters did not deny coverage. Instead, after receiving notice of the claim, Underwriters agreed to preliminarily pay Statoil some of its claim pending allocation of the loss between responsible policies.

The Settlement

Underwriters filed this lawsuit seeking declarations regarding the priority of coverage and allocation of Statoil's loss. Underwriters, Zurich, Ironshore, and Statoil then settled Statoil's claim for a collective payment of $24,000,000 (which included the $2,813,956 Underwriters previously paid), unallocated to any specific invoice, policy, coverage, or cost. Underwriters contributed $11,937,500, Ironshore contributed $11,937,500, and Zurich contributed $125,000. The insurers expressly reserved all rights to litigate loss allocation and cost apportionment and to seek contribution or reimbursement from underpaying insurers.

Months after the Settlement Agreement, Underwriters paid an additional $1,700,000 to settle a claim by Newpark Mats ("Newpark") against Statoil for property damage to equipment Newpark leased to Statoil and destroyed in the fire.

Procedural History

After settling with Statoil, the insurers filed a series of summary-judgment motions and cross-motions. In three orders, the trial court declared that:

- Zurich's policy, Ironshore's policy, and Underwriters' 2013-2014 Primary OEE policy provide primary coverage for Statoil's claims;
- Underwriters' 2013-2014 EPP provides excess coverage for Statoil's claims;
- the applicable primary policies had sufficient limits to pay the loss, so Underwriters' 2013-2014 EPP was not triggered;
- the primary policies' "other insurance" provisions conflict and are therefore disregarded under *Hardware Dealers Mut. Fire Ins. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969);
- the insurers will each pay a pro-rated share of the loss based on individual policy limits if no allocation by source was possible; and
- two pollution sources—the surface fire and flow from the Well—caused Statoil's loss.

After the trial court entered its orders, Underwriters stipulated they would not pursue their claim for further allocation of liability for Statoil's settlement based on a factual source-of-pollution allocation. Underwriters then moved for entry of final judgment, arguing that their stipulation negated the remaining fact issue—loss allocation—and thereby enabled the trial court to rule that such allocation was not possible. The trial court agreed and entered final judgment awarding: (1) $311,900.00 in damages and $47,868.10 in prejudgment interest against Zurich-

CGL; and (2) $10,036,000.00 in damages and $1,540,251.04 in prejudgment interest against Ironshore.

Ironshore and Zurich now appeal.

Summary Judgment

On appeal, Zurich and Ironshore raise thirteen issues, which fall into two broad categories.

The first category of issues concerns which policies apply, what those policies cover, and how the loss should be allocated among them. This category consists of Ironshore Issues 1, 2, 3, 4, 5, 6, and 7, in which Ironshore contends that:

- the trial court erred in failing to hold that Ironshore's policy's "other insurance" exclusion limits the policy's coverage to the amount exceeding the limits of all other applicable policies (Ironshore Issue 1);

- the trial court erred in holding that Ironshore's policy's "other insurance" exclusion conflicts with the other applicable policies' "other insurance" exclusions (Ironshore Issue 1);

- the trial court erred by failing to hold that each Underwriters policy provides primary, non-contributory coverage (Ironshore Issue 2);

- the trial court erred in allocating Statoil's loss among the applicable primary policies on a pro-rata-by-limits basis when Underwriters presented insufficient evidence from which to determine the costs subject to concurrent coverage (Ironshore Issue 3);

- the trial court erred in holding Ironshore liable for a pro-rata share of the entire $25,700,000 loss when Ironshore's policy "plainly does not cover the entire loss" (Ironshore Issue 4);

- the trial court erred in holding that Underwriters' 2013-2014 OEE policies, and not Underwriters' 2014-2015 EPP, apply to Statoil's loss (Ironshore Issue 5);

- the trial court erred in holding that Underwriters' 2013-2014 EPP is an excess policy (Ironshore Issue 6); and

- the trial court erred in holding that Underwriters' OEE policies cover pollution from the flow from the Well but not pollution from the fire on the surface (Ironshore Issue 7).

The first category further consists of Zurich Issues 1 and 2, in which Zurich contends that:

- the trial court erred in holding Zurich liable for a pro-rata share of Statoil's loss and awarding damages to Underwriters, as Underwriters' stipulation that the loss cannot be allocated by source of pollution precludes Underwriters from recovering against Zurich under the concurrent causation doctrine (Zurich Issue 1.a);

- the trial court erred in holding Zurich liable for a pro-rata share of Statoil's loss and awarding damages to Underwriters, as Underwriters failed to present evidence of the amount of the loss covered by Zurich's policy (Zurich Issue 1.b);

- the trial court erred in holding Zurich liable for a pro-rata share of the Newpark Mats Claim, as Underwriters failed to prove Zurich's policy provided coverage for the claim (Zurich Issue 2.a);

- the trial court erred in holding Zurich liable for a pro-rata share of the Newpark Mats Claim, as the claim was excluded by the Damage to Property Exclusion in Zurich's policy (Zurich Issue 2.b); and

- the trial court erred in holding Zurich liable for a pro-rata share of the Newpark Mats Claim, as the claim was encompassed by the release in the Settlement Agreement (Zurich Issue 2.c).

The second category of issues concerns whether the judgment was procedurally and substantively correct. This category consists of Ironshore Issues 8, 9, and 10, in which Ironshore contends that:

- the trial court erred in awarding Underwriters monetary damages when Underwriters' motions only sought declaratory relief and failed to present sufficient evidence in support of such damages (Ironshore Issue 8);
- the trial court erred in calculating the prejudgment interest for which Ironshore is liable (Ironshore Issue 9); and
- the final summary judgment is procedurally defective (Ironshore Issue 10).

The second category further consists of Zurich Issue 3, in which Zurich contends that the trial court erroneously calculated the damages and prejudgment interest for which Zurich is liable.

A. Standard of review

We review the trial court's grant of summary judgment de novo. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). A traditional motion for summary judgment requires the moving party to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lujan*, 555 S.W.3d at 84. If the movant carries this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan*, 555 S.W.3d at 84. In reviewing the grant of summary judgment, we must credit evidence favoring the nonmovant, indulging every reasonable inference and resolving all doubts in his favor. *Id.*

B. We review the first category of issues in three steps

We begin with the first category of issues. In resolving these issues, we adopt the analytical process proposed by Underwriters and followed by the trial court. It proceeds in three steps. First, we determine as a matter of law which policies apply to Statoil's pollution loss. Second, we determine as a matter of law which of the applicable policies provide primary coverage (attaching immediately) and which provide excess coverage (attaching only after the primary layer is exhausted). Third, we determine whether sufficient evidence exists to allocate the loss, equitably or otherwise, to the various applicable policies as a matter of law.

C. Step 1: Determine as a matter of law which policies apply to Statoil's loss

The first step is to determine which policies provide coverage for the June 28, 2014 fire and pollution event. Zurich's policy and Ironshore's policy (if considered primary) provide at least some coverage. So do Underwriters' policies. But which of Underwriters' policies apply: Underwriters' 2013-14 Primary OEE policy (which listed May 2013-May 2014 coverage dates) or Underwriters' May 2014-May 2015 EPP policy (which listed May 2014-May 2015 coverage dates)? No party contends the OEE policies are ambiguous. Thus, which of the two OEE policies applies is a legal matter for the court.

Given the listed dates of coverage, the 2014-2015 EPP policy would seemingly apply because the fire occurred during its listed term. But the OEE policies contain provisions extending the term of the Primary OEE policy in certain situations present here. The 2013-2014 Primary OEE policy states that a well spudded during the policy year and which was in the course of being completed at policy's end remained covered until the well is completed; the 2014-15 EPP policy contains an exclusion for wells in the course of completion at the policy's inception.

Ironshore contends the Well was not in the process of being completed when the 2013-2014 Primary OEE Policy term expired because physical activity on the actual well site halted for several weeks while Statoil developed its fracking plans and brought forward the fracking equipment. We disagree.

The trial court correctly ruled the 2013-2014 Primary OEE policy was in effect at the time of the fire date under Clause 6 because:

- coverage attached when the well was spudded that year;
- coverage did not terminate because the well was "in the course of being drilled, deepened, serviced, worked over, completed in or reconditioned at the expiry" of the policy, and the policy did not terminate until "final termination of said drilling, deepening, servicing, working over, completing, or reconditioning," even if "said termination" occurred after the specified policy period; and
- Statoil paid premium to insure the Well under the 2013-2014 OEE policies "through drilling and completion" and did not pay a premium to insure the Well under the 2014-2015 EPP.

The Primary OEE's Clause 4 defines "Well(s) Insured" from the time drilling begins ("while being drilled") and while it is being "deepened, serviced, worked over, completed, or reconditioned" until "completion or abandonment."

Here, drilling was completed in January 2014, but other ongoing activities, including Statoil's execution of an April 2014 work order for Halliburton to perform hydraulic fracturing to compete the Well, occurred after expiration of the 2013-2014 Primary OEE's Policy term.

In short, Statoil had neither completed nor abandoned its Well when the policy term ended. In executing this contract, Statoil did more than plan completion operations; it took concrete steps to implement its completion plans. The amount of time Halliburton needed to prepare for fracking operations is irrelevant. Of sole importance is that Statoil neither completed nor abandoned the Well at the expiry of the 2013-2014 Primary OEE policy.

1. The 2013-2014 OEE policies covered the Well from the time is was spud, past the policies' expiration date, and through the time of the fire.

Ironshore's legal interpretation conflicts with the policy provisions, industry understanding, policy structure, and premiums confirming that the 2013-2014 OEE policies covered the Well at the time of the fire.

Coverage under the 2013-2014 OEE policies attaches to wells spud in 2013-2014 policy year and continues "until completion or abandonment." Here, the Well had been neither completed nor abandoned when incident occurred. Indeed, fracking equipment had been recently moved onto the pad, and fracking was set to begin on

June 22, 2014. Statoil confirmed in sworn testimony that it paid a premium to insure the Well under the 2013-2014 OEE policies "through drilling and completion."

The trial court correctly held that the 2014-2015 EPP does not provide coverage because the 2013-2014 Primary OEE policy covered the Well at the time of the fire.

(a) Coverage attached under the 2013-2014 policies upon spudding in.

The conditions in the 2013-2014 Primary OEE policy govern the policy's beginning and end, including the attachment and termination of coverage for wells insured during the policy period. For wells "spudded in" during the policy period (like the Well here), coverage attaches "at the time of 'spudding in.'" Wells spud before the policy period are not covered unless there is no prior insurance policy:

> 6. ATTACHMENT AND TERMINATION OF COVERAGE
>
> (A) ATTACHMENT OF COVERAGE:
>
> (i) in respect of any Well(s) Insured hereunder coverage shall attach when the Insured acquires an interest in such well(s) unless coverage attaches later by operation of any of Clause 6 (A) (ii), (iii) or (iv) below;
>
> (ii) in respect of any well(s) insured hereunder spudded in during the period of this Policy, coverage shall attach at the time of "spudding in" . . . .

Underwriters' primary and excess 2013-2014 OEE policies cover the period from May 1, 2013, to May 1, 2014. Statoil reported the Well spud on December 29, 2013, within that policy period. Thus, coverage attached for the Well under the 2013-2014 OEE policies on that date.

(b) Coverage continued past the end of the 2013-2014 policy period because the Well was in the course of being completed

For wells awaiting completion when a policy expires, coverage under that policy ends only upon final termination of the completion operations, even if final termination occurs after the policy period's end. Thus, when a well is spud, the well is still insured even if the drilling operations continue past the policy period or operations are delayed.

(i) The plain language and industry understanding confirm that the Well was "in the course of completion" at the end of the 2013-2014 policy period.

The 2013-2014 Primary OEE policy's definition of an insured well is consistent with the attachment and termination provision providing coverage from spudding in until completion. It provides:

> 4. DEFINITIONS:
>
> (A) The term "Well(s) Insured" shall be defined as oil or gas or thermal energy wells:
>
> (i) while being drilled, deepened, serviced, worked over, completed or reconditioned until completion or abandonment as set forth in Clause 6. of these Conditions;
> (ii) while producing;
> (iii) while shut-in;
> (iv) while plugged and abandoned.

This definition establishes that Underwriters "cover the wells whatever the activity taking place, and whatever status exists in terms of drilling, producing or shut-in[.]" David W. Sharp, *Upstream and Offshore Energy Insurance* 136 (2d ed. 2009) (Sharp, *Upstream*).

Each of the activities described above in (A)(i) intends to lead to production, which is the purpose of drilling a well. Statoil paid a drilling premium for the Well to the two 2013-2014 OEE policies. A drilling premium is significantly higher than premiums for wells scheduled as producing or plugged and abandoned because drilling is a significantly riskier operation.

The drilling premium covered the Well through whatever activity or status existed on the Well "*until completion or abandonment*." As a matter of law, the Well was a "Well Insured" under the 2013-2014 OEE policies "while being drilled, deepened, serviced, worked over, completed or reconditioned *until completion or abandonment* as set forth in Clause 6 [the Attachment and Termination provisions]."

The policy's plain language supports this interpretation. First, the policy uses the verb "being," indicating a process underway but unfinished. The verb "being" shows that the policy does not cover static events. A person is "being" helped by a physician or lawyer even though these professionals don't work nonstop.

Second, the policy contrasts this "being completed" process with "completion or abandonment." Neither occurred here. A completed well is defined as "[a] dry hole; or a well capable of producing oil or gas; or a well drilled to such depth that oil and gas is not likely to be encountered at greater depths; or a well drilled to that reasonable depth at which the existence of oil or gas is usually proved or disproved in the locality." Howard R. Williams & Charles J. Meyers, Manual of Oil and Gas Terms 281–82 (3d ed. 2008); *see also Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 211–12 (Tex. 2011) ("The 'completion of a well' can also refer to 'those processes necessary before production occurs [such as] perforating the casing and washing out the drilling mud.'") (citing same definition). The Well after spudding was not a "completed well" under these definitions. "Completion of the well" is defined as something more than mere conclusion or cessation of drilling. At the least it means the cleaning out of the well after reaching a specified depth, or the shooting of the well if there is doubt as to whether it is a producer or nonproducer. Completion of a well involves those processes necessary before production occurs and after drillers have hit the pay sand, namely, perforating the casing and washing out the drilling mud.

"[T]he activities and methods necessary to prepare a well for the production of oil and gas" is a technical definition in the oil and gas industry for "well completion." To "complete a well" means to "finish work on a well and bring it to productive status." DICTIONARY OF PETROLEUM TERMS 167 (3d ed. 1983). Under all definitions, the Well had not been completed.

The termination of coverage provision confirms that coverage extends past the end of the policy period for wells that are "in the course of being completed" when the policy expires:

> 6. ATTACHMENT AND TERMINATION OF COVERAGE
>
> (B) TERMINATION OF COVERAGE:
> (i) in respect of any Well(s) Insured hereunder, coverage shall terminate when the Insured ceases to have an interest in such well(s) unless coverage is terminated sooner by operation of any of Clause 6 (B) (ii) or (iii) below;
> (ii) in respect of any well(s) insured hereunder in the course of being drilled, deepened, serviced, worked over, completed in or reconditioned at the expiry or cancellation of this Policy, coverage shall terminate upon final termination of said drilling, deepening, servicing, working over, completing or reconditioning, notwithstanding the fact that said final termination may occur later than said expiry or cancellation.

The phrase "in the course of" recognizes that well activities do not have to be continuous.

Normally, we interpret the policy's technical words in accordance with their usual understanding by persons in the applicable industry. *Exxon Corp.*, 348 S.W.3d at 211. Therefore, in addition to considering these definitions, the trial court could also consider industry definitions. *N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 834 (Tex. App.—Houston [1st Dist.] 1996, no writ) (courts must "consider the policy as a whole and interpret it to fulfill reasonable expectations of the parties in light of customs and usages of the industry").

Registered professional petroleum engineer Greg Sones testified that it is "well understood" in the oil and gas industry that three phases or stages generally exist for the life of a well: (1) drilling, (2) completion, and (3) production. Fracturing the well is a part of completing the well but is not the first moment when completion operations begin. When the drilling phase ends, the well is either plugged and abandoned as a dry hole or enters the completion phase. The completion phase starts immediately upon setting casing in the well, and operations are suspended to test the productive zone. Generally, completion requires (1) drilling a well, (2) running, installing, and cementing casing into the well, (3) pressure-testing the casing, (4) perforating the casing, (5) running production tubing into the well, (6) (in this case) fracturing operations to stimulate production, (7) actual production from the reservoir (which can be gathered and sold), and (8) the engineering and design work necessary to complete all these operations.

Statoil operated in accord with industry understanding of these definitions. That understanding is confirmed by Statoil's "Well Completion Record," which was submitted to the Ohio Department of Natural Resources for the Well. The completion record asks for four significant dates regarding the well:

(1) "Date drilling commenced" (answer: 12/29/2013);
(2) "Date drilling completed" (answer: 01/18/2014);
(3) Date put into production (answer: N/A); and
(4) Date plugged, if dry (no answer).

No line exists on the Ohio regulatory form asking for the "date completion started" because the completion phase begins the moment drilling is finished and continues until the well is producing or is plugged and abandoned.

Ironshore cites a "completion" definition from a glossary of terms in a nontechnical guide to petroleum *geology*, instead of a technical definition from a completion textbook appropriate for a technical oilfield term. Even that geology textbook acknowledges that after drilling and testing, there are two options: (1) the well is either plugged and abandoned or (2) steps are taken to complete the well. The textbook thereafter explains over thirty pages the decisions, engineering, and activities necessary to complete a well. Completion includes more than mere wellbore operations.

(ii) The evidence proves as a matter of law that the Well was "in the course of completion" at the end of the 2013-2014 policy period.

Ironshore contends that Halliburton did not begin completion work until the first stage of hydraulic fracturing, which began on June 19, 2014. That position contradicts industry custom and practice. Halliburton testified that fracturing is only one of many aspects involved in completion operations of the Well. Even the independent adjuster testified that "completing" a well consists of more than the fracturing operation. It encompasses everything from planning, engineering, requesting materials, mobilizing equipment, hiring crews, and performing the operations necessary to produce the well.

The Well was drilled to depth on January 18, 2014, and temporarily capped pending completion. On April 1, 2014—12 weeks before the fire—Statoil and Halliburton executed a work order to perform hydraulic fracturing to complete the Well. Between April and June 2014, Halliburton and Statoil worked on proposals to develop the 26-stage fracturing plan for completion. Halliburton also prepared the equipment necessary for completion. The fracturing plan was finalized, and Halliburton mobilized its equipment to the well site on June 19, 2014, after the end of the 2013-2014 policy period on May 2, 2014.

We hold that these facts show the Well was in the course being completed when the 2013-2014 policy-year ended.

2. Ironshore's interpretation is contrary to both the parties' intent and the energy industry's understanding.

Clause 6 (Termination of Coverage) terminates coverage for wells "in the course of being completed" upon "final termination" of "completing" the well insured. Ironshore asserts that a well "being drilled, deepened, serviced, worked over, completed or reconditioned" requires active and ongoing *physical* operations at the well. That is, Ironshore argues the policy extends past the end of the 2013-2014 policy period under Clause 6 only if physical operations were active and ongoing at a well on May 1, 2014 (the normal expiration time and date for the 2013-

2014 OEE policies, absent any extension). But the policy does not set out such a requirement and actually includes provisions contrary to that interpretation.

First, Ironshore's interpretation ignores the phrase "in the course of" that precedes "being completed." This phrase is crucial because it modifies the meaning of "being completed." The phrase "in the course of" means a course of steps to complete the activity. Ironshore's interpretation—which reads out this phrase—contradicts the policy's plain language.

Second, instead of applying the policy's wording, Ironshore's interpretation adds words—specifically, that the activities be "active" and "ongoing physical operations" for policy coverage to continue. If, as Ironshore contends, coverage extends past the policy's expiry for wells "in the course of being completed" *only* when active physical operations are taking place when the policy expires, one would expect to see those words in the Termination of Coverage provision. The words "physical operations" and "actively being completed" do not appear in the policy. Ironshore's proposed construction is legally unsupported because it requires the Court to supplement the policy's language. *See Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 469 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) ("If only one party's construction is reasonable, the policy is unambiguous and we will adopt that party's construction.").

Ironshore's interpretation also conflicts with other parts of the policy. *RSUI Indem. Co. v. Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015) (construction is unreasonable if it fails to "give effect to all of the words and provisions so that none is rendered meaningless"). Clause 4 defines the "Well Insured." It provides that wells "being drilled . . . or completed are insured from the time a well is spud "*until completion or abandonmen*t." It does not say, contrary to Ironshore's contention, that a well is insured only while "actively" being drilled or completed or only during physical operations in the wellbore.

Ironshore's interpretation also conflicts with exclusion 2(E), which bars coverage for wells "*in the course of being . . . completed . . . at the inception of th[e] insurance.*" This exclusion accords with the Termination of Coverage provision. Coverage for wells "in the course of being completed" at the end of the 2013-2014 policy period maintain coverage until "final termination" of "completing" activity. And wells "in the course of being completed" at the beginning of the succeeding 2014-2015 policy period are excluded from coverage in the following policy year until "final termination" of the completing activity.

Ironshore's proposed interpretation would require the Court to ignore the "until completion or abandonment" in the Well Insured definition and read into Exclusion 2(E) words barring coverage only for wells "*being* [actively operated and physically] completed . . . at the inception of th[e] insurance." Ironshore's interpretation is wrong because it focuses on one phrase in the Termination of Coverage provision in isolation from the rest of the policy's wording and terminology. No provision should be isolated from its setting or considered apart from the other provisions. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994).

Ironshore's interpretation is contrary to commonsense and industry practices; it fails to consider how wells are drilled and completed in the real world and therefore how insurance covers wells at risk for blowout during drilling and completion. Courts construe contracts in accordance with the customs and practices of the industry and locale to which those contracts relate. *Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469–70 (Tex. 2011). Ironshore's position is practically infeasible considering industry custom. Wells are not drilled or completed ceaselessly—operations often pause for various reasons and for indefinite periods of time.

Many reasons exist to explain why no active daily operations may occur at a well that is "in the course of being completed," including, for example: (1) engineering that may be necessary for finishing or altering fracturing plans; (2) equipment that must be unexpectedly ordered in the course of work and then mobilized to a well site; (3) crew unavailability; (4) the presence of multiple wells on a pad site that are being serially drilled and then completed; or (5) market gas prices rendering completion of a well in the course of completion uneconomical. The lead underwriter confirmed that drilled, uncompleted wells during economic downturns do not drop out of coverage; instead, they maintain coverage until completion.

The policy contrasts two different scenarios: was the Well either (1) being completed or (2) terminated or abandoned. One of these two must exist in the real world. Here, it was the former.

That no premium was paid for the Well's coverage under the 2014–2015 EPP policy further impedes Ironshore's assertion regarding that policy's applicability. Paying a premium is a condition precedent to triggering coverage. *In re Tex. Ass'n of Sch. Bds.*, 169 S.W.3d 653, 658 (Tex. 2005) ("'The payment of the premium by the insured and the assumption of a specified risk by the insurer are the essential elements of the contract of insurance. The payment . . . [of] premiums is the consideration for which the insurer agrees to assume the risk specified in the policy.'") (quoting Steven Plitt et al., 5 *Couch on Insurance* § 69:2 (3d ed. 2020)).

In response to a deposition on written questions, Statoil testified premium was paid for the Well under the 2013-2014 OEE policies "through drilling and completion" but not for the Well under the 2014-2015 EPP policy.

By Statoil's admission, the consideration necessary to establish a valid contract to insure the Well under the 2014-2015 policy is lacking. A (necessary) condition precedent to coverage cannot be met. *See Litton v. Hanley*, 823 S.W.2d 428, 430 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("parol evidence is admissible to prove the existence of a condition precedent to a contract"). Also, no evidence exists of intent by the parties to the contract—Statoil and the OEE Underwriters—to insure the Well under the later policy. *Gilbert Tex. Constr., L.P., v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010) (paramount objective in construing contract is to determine parties' intent).

Ironshore argues that Statoil's testimony regarding the absence of premium payment for the Well under the 2014-2015 EPP policy is irrelevant because no evidence supports the assertion that "Statoil didn't pay premium for the Well after the policy was placed." But Underwriters presented affirmative evidence establishing that Statoil paid no premium to insure the Well under the 2014-2015 EPP policy. To raise a genuine issue of material fact, Ironshore had to produce more than a scintilla of evidence, i.e., evidence that a reasonable factfinder could find in favor of the assertion that the 2014-2015 OEE policy applies. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014) (traditional summary judgment); *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003) (no-evidence summary judgment). Ironshore cannot use the absence of evidence regarding possible subsequent events to controvert Underwriters' affirmative evidence.

Regardless, Ironshore is also wrong about the lack of evidence. Statoil did not pay premium to cover the Well under the 2014-2015 EPP policy after the policy's placing and issuance. Any wells or property added to the 2014-2015 EPP policy must have occurred via endorsement because the policy is "scheduled" (i.e., only wells and property identified and declared by Statoil are insured). Evidence exists via endorsement to the 2013-2014 EPP policy that Statoil added the Baldwin No. 2, MacIntyre No. 2, and Owen No. 3 Wells to the 2013-2014 policy coverage. All endorsements issued for the 2014-2015 EPP policy were produced in discovery. None of the endorsements amending the 2014-2015 policy add the Well or show premium paid to cover the Well under the 2014-2015 policy year.

More importantly, adding the Well to the 2014-2015 EPP policy after the loss occurred is impossible as a matter of law. Statoil testified that before the fire, "no premium was paid . . . for the No. 7 Well under the 2014-2015 policy." Under Texas law, "it is contrary to public policy for an insurance company . . . knowingly to assume the burden of a loss that occurred prior to making the contract." *Burch v. Commonwealth Cty. Mut. Ins. Co.*, 450 S.W.2d 838, 840–41 (Tex. 1970).

3. The 2014-2015 EPP policy excludes coverage for wells being completed at the inception of the policy.

Statoil renewed the 2013-2014 EPP coverage for 2014-2015. The same policy terms and conditions are present in that policy, and the same insuring intent is present in the policy language, insuring conditions, definitions, exclusions, and premium structure. The terms and conditions unambiguously demonstrate that the 2014-2015 EPP policy never covered the Well.

(a) Coverage did not attach because the Well was not yet completed when the loss occurred.

The 2014-2015 EPP policy covers the period from May 1, 2014, to May 1, 2015. For wells in the course of drilling or completion at the 2014-2015 policy's inception, coverage attaches only after final termination of drilling or completion.

6. ATTACHMENT AND TERMINATION OF COVERAGE

(A) ATTACHMENT OF COVERAGE:

* * *

> (iii) in respect of any well(s) in the course of being drilled, deepened, serviced, worked over, completed in or reconditioned at the inception of this insurance, and which would have been insured hereunder at inception in the absence of Exclusion 2 (E) of these General Conditions . . ., coverage shall attach upon final termination of said drilling, deepening, servicing, working over, completing or reconditioning . . . .

Because the Well was in the course of being completed on May 1, 2014—when the 2014-2015 EPP policy commenced—coverage did not attach to the Well under the Attachment of Coverage clause's plain meaning.

(b) Coverage is excluded for wells in the course of being completed at the inception of the policy period.

In addition to the attachment provision, which precludes coverage for wells in the course of being completed at policy inception, the 2014-2015 EPP policy also contains an exclusion barring coverage for those wells. Exclusion 2(E) expressly precludes coverage for wells in the course of being drilled or completed at policy inception, unless specifically agreed to by the Insurers.

> CONDITIONS APPLICABLE TO ALL [OEE] SUB-SECTIONS
>
> 2. EXCLUSIONS:
>
> There shall be no indemnity or liability under this Section II for:
>
> * * *
>
> (E) loss, damage or expense as respects any well in the course of being drilled, deepened, serviced, worked over, completed or reconditioned at the inception of this insurance, until final termination of said drilling, deepening, servicing, working over, completing or reconditioning, unless specifically agreed to by Insurers . . . .

The Well was in the course of being completed when the 2014-2015 EPP policy commenced (May 1, 2014) and thus falls within the exclusion. The exclusion bars any coverage for the Well.

We hold that the trial court did not err in ruling that: (1) the 2013-2014 Primary OEE policy applies to Statoil's loss; and (2) the 2014-2015 EPP policy does not.

D. Step 2: Determine as a matter of law which applicable policies are primary and which are excess

We now turn to the second step: determining as a matter of law which policies are primary (attaching immediately) or excess (attaching only after the primary layer's exhaustion). The two policies at issue are Underwriters' 2013-2014 Energy Package policy and Ironshore's policy. We consider each in turn.

1. The 2013-2014 EPP is an excess policy.

The trial court held the coverage in the 2013-2014 EPP is excess to the 2013-2014 Primary OEE policy. Ironshore argues that the 2013-2014 EPP is not a "true excess policy" because it does not identify the Primary OEE policy in a formal schedule of underlying insurance. We disagree.

The trial court properly interpreted the two policies given the following: (1) their structure; (2) the Primary OEE policy being labelled "Primary" on every page; (3) the endorsements to the Primary OEE policy described it as "Primary"; (4) the slip's statement of "overlying policy"; (5) the Primary OEE Policy being titled "primary" on the slip; (6) contemporaneous communications and underwriting notes; and (7) an email showing Statoil intended to purchase primary and excess coverage in the policies.

Ironshore contends the above is inadmissible and irrelevant extrinsic evidence. To the extent Ironshore complains of an opposing party's statements, they are not hearsay. TEX. R. EVID. 801(e)(2). And the record reflects the email traffic between Statoil's insurance broker and Ironshore constitutes a business record; Ironshore's underwriter testified that the traffic summarized Statoil's various pollution coverages for 2014-2015, including that the OEE policies cover pollution "from wells (not facilities or storage)" was established in the course of negotiating the Ironshore policy. *Id.* at 803(6).

Further, email traffic reflecting the course of discussions and negotiations is not hearsay because it was not offered to prove the truth of the matter asserted. *See Marten v. Silva*, 200 S.W.3d 297, 303 (Tex. App.—Dallas 2006, no pet.) (documents evidencing course of communications are not hearsay); *Trencor, Inc. v. Cornech Mach. Co.*, 115 S.W.3d 145, 151 (Tex. App.—Fort Worth 2003, pet. denied) (statements by party's agent or servant concerning matter within scope of employment and made during existence of relationship are not hearsay). Writings offered for the purpose of showing what was said—rather than the truth of the matter stated therein—do not constitute hearsay. *See McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992).

The trial court's consideration of this evidence is also consistent with the Texas Supreme Court's instruction that courts must consider the surrounding circumstances of insurance policies placed in the London market. *Houston Expl. Co.*, 352 S.W.3d at 469–70. In *Houston Exploration*, the Supreme Court explained that the parole evidence rule precludes "enforcement of prior or contemporaneous agreements" but does not "prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text." *Id.* at 469. Those circumstances include the contract's commercial negotiation setting and "other objectively determinable factors that give a context to the transaction between the parties." *Id.* (quoting Richard A. Lord, *Williston on Contracts* § 32.7 (4th ed. 1999)).

Evidence of the parties' negotiations help reveal the parties' intentions and the contract's dominant purpose as embodied in the contract when interpreted as a whole. *Id.* at 469–70.

The Court then turned to the setting of insurance policies negotiated in the London market. "The manner in which the insurance policy in this case was negotiated in the London market is crucial to understanding its terms." *Id.* at 470. The Court also observed that the London market uses only approved brokers who describe "the risk the broker is seeking to insure" in slips. *Id.* at 465 (quoting *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 2d 789, 791–92 (S.D. Tex. 1999), *aff'd*, 252 F.3d 1357 (5th Cir. 2001)). The London market's "age-old customs" are part of this "crucial"—and admissible—evidence. *See Hous Expl.*, 352 SW.3d at 464.

First, the circumstances surrounding this case include the policies' structures. The 2013-2014 EPP and the Primary OEE Policy must be considered together because, as the underwriter who negotiated the policies explained, "they were placed in conjunction with each other. They were underwritten in conjunction with each other." *See Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 327 (Tex. 1984) ("[S]eparate documents executed at the same time, for the same purpose, and in the course of the same transaction are to be construed together."); *Miles v. Martin*, 321 S.W.2d 62, 65 (Tex. 1959) (same). Construing the policies together shows that

Statoil purchased a primary layer of coverage that attached above $2,500,000 with a limit of $10,000,000. Then, upon exhaustion of the $10,000,000 primary limit, the excess layer attaches with a limit of $50,000,000. The two policies reflect the "separate and clearly defined layers of risk" exhibiting the hallmark of primary and excess coverage. *N. Am. Capacity Ins. Co. v. Colony Specialty Ins. Co.*, 273 F. Supp. 3d 711, 717 (S.D. Tex. 2017).

The second surrounding circumstance is language within the Primary OEE Policy itself: the lower left-hand corner of every page is labeled "Primary."

Third, Endorsement No. 1 to the 2013-2014 Primary OEE policy identifies it as "Primary."

Fourth, as the Court has observed, the London market uses a document called the "slip" to embody the agreed terms of insurance transactions prepared by the insured's broker, which is "scratched" (meaning signed off) in agreement by all the subscribing insurers. *Houston Expl. Co.*, 352 S.W.3d at 465. The slip for the 2013-2014 Primary OEE policy confirms it is subject to the "overlying" OEE coverage in the EPP.

Fifth, the slip itself is titled "Onshore Primary OEE Slip."

Sixth, contemporaneous underwriting notes from the placement of the two policies identify the Primary OEE as primary coverage and the 2013-2014 EPP as providing "over-lying" or "excess" coverage. Statoil wanted a primary layer of coverage beneath the coverage in the EPP because Statoil had recently made several onshore acquisitions for which it wanted additional coverage.

Seventh, Statoil's broker specifically requested hierarchical structuring of a separate primary onshore OEE policy and excess onshore OEE coverage in a package policy.

No evidence supports Ironshore's contention that the two 2013-2014 policies (OEE and EPP) were meant to confer duplicative primary onshore OEE coverage. Such an arrangement—requiring Statoil to pay two premiums to cover the same risks—would make no sense.

Ironshore contends this Court must disregard these seven pieces of evidence because the 2013-2014 EPP does not list or schedule any underlying insurance as is standard for a true excess policy. We disagree for two reasons. First, Ironshore cites no evidence that the London market does not rely on the slip to determine coverage. The London market is unique, as discussed above. That evidence shows the Primary OEE Policy is a primary policy and therefore the 2013-2014 EPP is an excess policy. Second, these two policies were placed at the same time. When considering the totality of the circumstances, it becomes clear that the 2013-2014 EPP Policy is excess and that a schedule of underlying policies was unnecessary.

Ironshore also fails to consider the $10,000,000 threshold for coverage under the 2013-2014 EPP—that policy does not pay for any expense until $10,000,000 towards an occurrence has been spent. As a practical matter, the two policies cannot both be "primary," as the $10,000,000 (represented by the underlying Primary OEE policy) must be exhausted before coverage attaches to the EPP. *Hardware Dealers*, 444 S.W2d at 587 ("[T]he excess coverage policy . . . is not available to the insured until the primary policy has been exhausted."). The structure and interplay of the two policies confirm the trial court's ruling that the onshore OEE coverage in the 2013-2014 EPP sits excess of the Primary OEE policy.

Finally, Ironshore argues that the 2013-2014 EPP policy cannot be excess because it includes coverages that the 2013-2014 Primary OEE policy does not. But Underwriters merely argue that the coverage for well-control events at Statoil's onshore oil and gas operations—not the entire EPP—is excess.

We hold that the trial court properly construed the two OEE policies together to establish as a matter of law that the onshore OEE coverage in the 2013-2014 EPP sits excess of the coverage in the Primary OEE policy.

2. The Ironshore SPILLS policy is a primary policy.

Ironshore argues that its policy does not cover Statoil's loss because it is an excess, not a primary, layer.[1] We disagree.

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[1] Ironshore contends that its policy should be construed under New York law, not Texas law. Ironshore waived any opportunity to argue New York law should apply here. Choice-of-law issues can be waived if not properly invoked. *Kubbernus v. ECAL Partners, Ltd.*, 574 S.W.3d 444, 473 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). Ironshore's waiver results from not filing a Texas Rule of Evidence

(a) The Ironshore SPILLS policy provides primary coverage.

Ironshore's policy functions as primary insurance coverage, and the trial court correctly declared it a primary policy.

First, nothing in the policy states or identifies that it functions as an excess policy. As discussed, surrounding circumstances can inform the contract text and provide context. No evidence exists in this record of circumstances supporting a reasonable belief that the policy provides excess coverage. Instead, as discussed below, the evidence further confirms the policy provides primary coverage.

Second, Ironshore's internal documents recognize the policy as primary. Specifically, Ironshore's "claims loss run" identifies the policy as primary; it acknowledges the policy's primary coverage in the "P/E" box (meaning primary or excess policy).

Third, Ironshore's liability under the policy attaches immediately upon an occurrence giving rise to liability. The policy contains a self-insured retention of $500,000 applying to "all Loss arising out of the same, related or continuous

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202 motion to apply or take judicial notice of New York law, not objecting to the trial court's application of Texas law, not requesting a ruling in its Second Traditional and No-Evidence Motion for Partial Summary Judgment, and not performing a Restatement on Conflict of Laws analysis in the trial court or before this Court. Ironshore has neither briefed the choice-of-law issue here nor showed that Statoil's different insurance policies relate to each other under the "most significant relationship" (with New York) test. *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000). Therefore, Ironshore has waived its contention that New York law applies.

Pollution Incident(s).” After reaching the retention threshold, the policy “will pay all Loss in excess” of the self-insured retention.

Fourth, the policy provides stand-alone pollution coverage, which does not overlap with Zurich’s policy or Underwriters’ Primary OEE policy. Thus, if the policy were excess, Statoil would face an uninsured gap in its coverage program.

Zurich’s policy applies standard “Time Element Limited Pollution Liability” coverage to pollution releases caused by a fire that migrates to third-party property. Ironshore’s underwriter acknowledged this construction of Zurich’s Time Element Limited Pollution Liability coverage. Zurich’s policy also excludes coverage for wells out-of-control. Therefore, for pollution coverage, Zurich’s policy covers only pollution released from the fire and chemicals on the pad that migrate off the well pad. The first potential policy, Zurich’s, does not cover this loss on the pad—only Ironshore’s does.

Nor does Underwriters’ 2013-2014 Primary OEE policy cover pollution from the fire on the pad as opposed to fire from well vapors. The Primary OEE policy contains standard control-of-well coverages that protect the insured from the risks of a well going out of control, including pollution from an out-of-control well. *Gemini Ins. Co. v. Drilling Risk Mgmt., Inc.*, 513 S.W.3d 15, 19–20 (Tex. App.—San Antonio 2016, pet. denied); *StarNet Ins. Co. v. Fed. Ins. Co.,* No. A-16-CA-664-SS, 2017 WL 1293578, at *4–5 (W.D. Tex. Apr. 6, 2017) (in “other insurance” clause dispute between insurers for pollution from well blowout, describing control-of-well policy as protecting insured "from risk associated with well control events, including pollution events").

Section C's pollution coverage "is triggered by pollution from wells resulting from blowouts and not pollution from other facilities or causes." Andrew Rees & David Sharp, *Drilling in Extreme Environments: Challenges and implication for the energy insurance industry*, LLOYD'S (Sept. 2011); *see* Sharp, *Upstream*, at 133–34 (Section "C" pollution coverage "must arise as a consequence of . . . a well becoming out of control." It doesn't "cover [] seepage, pollution or contamination arising from leaks or ruptures from any of the [insured's] installed facilities."). The Primary OEE policy coverage does not apply to pollution resulting from the equipment fire.

But Ironshore's policy does; it provides broad coverage for pollution incidents arising from Statoil property or "any onshore exploration and production operations," including pollution from fire hazards or a well out-of-control via the following provisions:

- Third Party Claims for Bodily Injury, Property Damage or Remediation Expenses: loss arising from a pollution incident that is on, under or migrating from a covered property or that results from covered operations, including "remediation expense."

  "Covered property" includes Statoil's "real property or mineral rights … or any wells, platforms, facilities or other equipment or structures ... scheduled to the Policy[.]

> "Remediation expense" are costs "incurred to investigate, remove, dispose of, abate, contain, treat, neutralize, monitor or test soil, surface water, groundwater or other contaminated media … including Restoration Costs[.]"

- First Party Remediation: "remediation expense" that arises from a Pollution Incident.
- Emergency Response Expenses: arising from a Pollution Incident for threat to human health or the environment.
- Evacuation Expenses: for Pollution Incidents on, under or migrating from "Covered Property" or that results from "Covered Operations."

Ironshore's environmental consultant, who estimated the total commingled fire and well pollution costs on the pad alone, did not remove those costs from his SPILLS policy coverage spreadsheet as either "not applicable" or "not covered."

Ironshore's proposed construction would create two gaps in Statoil's coverage. Zurich's policy only covers fire pollution that migrated off the pad. Underwriters' Primary OEE policy does not cover pollution from an equipment fire; it only covers pollution from a fire resulting from well vapors. Ironshore's policy covers both fire pollution migrating off the pad to third-party property and fire pollution on the pad. It is the only policy that covers on-pad pollution caused by the fire. It cannot be an "excess" layer policy because such a construction would render Statoil effectively uninsured for on-pad fire pollution.

Construing Ironshore's policy as an excess policy would create a second uninsured gap in Statoil's coverage. Both Ironshore's policy and the Primary OEE policy apply to pollution from an out-of-control well. But Ironshore's policy applies after Statoil meets a $500,000 retention, where the Primary OEE policy applies upon Statoil's meeting a $2,500,000 retention. If Ironshore's policy were excess, Statoil would have an uninsured gap of $2,500,000 for pollution from the Well.

Courts disfavor leaving insureds with coverage gaps in a structured program. *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 265 (5th Cir. 2003) ("[J]udicial construction of the 'other insurance' clauses to make this determination would have required arbitrarily disregarding one insurer's clause in favor of enforcing that of the other to avoid leaving the insured with a gap in coverage.") Statoil's insurance program, as placed by its broker, demonstrates that Statoil sought broad, primary coverage from multiple policies to cover all potential risks from its oilfield operations. The presence of two potential coverage gaps renders Ironshore's position untenable.

Lastly, while not dispositive, Ironshore's policy does not list any of the underlying insurance policies that must be exhausted before it attaches. Because the Primary OEE policy and the 2013-2014 EPP policy were placed at the same time, it makes sense that the excess coverage in the 2013-2014 EPP would not list the 2013-2014 Primary OEE policy because of the simultaneous placement and circumstances. Ironshore's policy differs in that it was not placed in conjunction with the Primary OEE or Zurich policies. It stands to reason that if Ironshore's policy was meant to be excess of those policies existing when it was placed, it would have said so.

(b) The Ironshore SPILLS policy's "other insurance" exclusion does not transform the policy into "excess" coverage.

Ironshore argues the "Other Insured" clause's location within the policy is special because it is an exclusion that operates as a sort of "super escape-excess clause," while the other policies' "other insurance" clauses are merely "excess" because they constitute conditions. Ironshore's underwriter acknowledged Ironshore's position (that it is excess of all other insurance policies) is based on the policy's "other insurance" clause in Exclusion Q and that this "other insurance" provision is the sole argument as to why it is "excess." We disagree.

First, Ironshore's argument ignores that "exclusions and conditions are in effect two sides of the same coin[.]" *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 635 (Tex. 2008). All three of the "other insurance" clauses limit coverage where appropriate, regardless of their location.

Second, the location of the Ironshore policy's "other insurance" clause does not avoid the "continuing battle of draftsmanship" that the Texas Supreme Court expressly disallowed in *Hardware Dealers*. If other insurance exclusions trump other insurance conditions, the battle of the forms will merely migrate to a new part of the policy.

Third, holding that Ironshore altered the legal effect of its “other insurance” clause by moving its location to its policy exclusions section contradicts *Hardware Dealers* and its underlying public policy rationale. Making Ironshore’s policy excess (and not primary) would result in Statoil being self-insured for well-related pollution and uninsured for fire-related pollution on the pad. In other words, from the perspective of the insured, a significant coverage gap results if all three policies are not primary.

Fourth, Exclusion Q contains two parts: first, an escape clause, and second, an excess clause. The exclusion provides that the excess clause controls over the escape clause: however, this insurance shall apply in excess of any such other valid and collectible insurance. The second clause in the sentence after the word “however” is an exception to the escape clause exclusion. Additionally, “[p]ublic policy disfavors ‘escape’ clauses.” *Travelers Cas. & Sur. Co. v. Century Sur. Co.*, 118 Cal. App. 4th 1156, 1162 (2004, review denied) (quoting *Dart Indus., Inc. v. Commercial Union Ins. Co.*, 52 P.3d 79, 93 (Cal. 2002)).

Finally, Ironshore’s underwriter acknowledged the existence of circumstances in which Ironshore’s policy applies as primary coverage. The underwriter testified that if Statoil’s other insurance policies did not cover a claim, then Ironshore’s policy would apply as “difference-in-conditions” coverage, thus preventing gaps in coverage.

We hold that the location of the "other insurance" provision in Ironshore's policy does not change its purpose.

E. Step 3: Determine whether there is sufficient evidence to allocate the loss among the applicable policies as a matter of law

We now turn to the third and final step of our analysis: determining whether there is sufficient evidence to allocate Statoil's loss as a matter of law. In the proceedings below, Underwriters argued, and the trial court agreed, that the loss should be equitably allocated among the applicable primary policies on a pro-rata-by-limits basis.

In arguing for an equitable allocation, Underwriters called for an extension of the rule set forth by the Texas Supreme Court in *Hardware Dealers*. 444 S.W.2d at 583. Under *Hardware Dealers*, when two insurance policies provide concurrent coverage for an insured's loss and each policy has a so-called "other insurance" provision, the other insurance provisions are disregarded, and the policies share liability pro rata based on their respective limits. *Id.* at 589–90. Underwriters argued that *Hardware Dealers* should be extended to include situations in which two or more insurance policies provide overlapping (but not necessarily wholly concurrent) coverage, and that no legal or factual basis for allocating the loss among the policies exists. Under the proposed extension, when three insurance policies provide overlapping coverage for an unallocable loss, and each policy has an "other insurance" provision, the "other insurance" provisions are disregarded, and the policies share liability on a pro-rata-by-limits basis.

Underwriters argued that their proposed extension of *Hardware Dealers* applies in this case because the record establishes, as a matter of law, four essential facts: (1) two sources of pollution caused Statoil's loss, i.e., the fire on the surface and the subsequent flow from the well; (2) the loss cannot be allocated by source of pollution[2]; (3) the three applicable primary policies provide overlapping (but not wholly concurrent) coverage[3]; and (4) each policy has an "other insurance" provision purporting to make the policy excess of all other insurance. The trial court agreed, ruled that the other insurance provisions of the applicable primary policies conflict and should therefore be disregarded, and ordered that the policies share the entire loss on a pro-rata-by-limits basis.

Assuming Underwriters' proposed extension of *Hardware Dealers* represents a justified development of the law, the trial court nevertheless erred in applying that extension here. That's because Underwriters failed to show the extent to which the

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[2] Underwriters stipulated that they would waive their claim for allocation of the loss by source of pollution. The effect of the stipulation, Underwriters argued, was to negate the remaining fact issue of loss allocation and thereby enable the trial court to rule that such an allocation was not possible.

[3] Specifically, Zurich's policy covers pollution from the fire on the surface, Underwriters' policy covers pollution from the flow from the well, and Ironshore's policy covers both.

policies' coverage actually overlaps, and such a showing must be made before *Hardware Dealers* applies.

Underwriters erroneously assume that because the loss cannot be allocated by source of pollution, the loss cannot be allocated at all. Although the loss cannot be allocated by source of pollution, the loss can still be allocated by applying the applicable policies' exclusions and limitations to the expenses falling within the policies' general coverage. Indeed, such an allocation is necessary to show the extent to which the policies' coverage actually overlaps. It would proceed in two steps.

First, each invoice submitted by Statoil would be analyzed to determine whether the expense falls within the general coverage provided by the three applicable primary policies, i.e., whether the expense is for damage and clean-up costs resulting from pollution from either the fire on the surface or the flow from the Well.

Second, each generally covered expense would be further analyzed to determine whether it is subject to any limitation or exclusion. For example, Ironshore's policy contains a Drilling and Specialty Equipment Exclusion, which excludes coverage for "Property Damage to or Remediation Expenses associated with the remediation of . . . drilling, work-over, servicing or specialty contractors equipment."[4] And Zurich's policy contains a Damage to Property Exclusion, which excludes coverage for various types of property damage, including property the insured "own[s], rent[s], or occup[ies]," and "[p]ersonal property in the [insured's] care, custody, or control."

The analysis would thus yield (1) the percentage of the loss covered pro rata by Ironshore, Zurich, and Underwriters, (2) the percentage of the loss covered pro rata by Ironshore and Zurich, (3) the percentage of the loss covered pro rata by Zurich and Underwriters, (4) the percentage of the loss covered pro rata by Underwriters and Ironshore, (5) the percentage of the loss covered exclusively by Ironshore, (6) the percentage of the loss covered exclusively by Zurich, and (7) the percentage of the loss covered exclusively by Underwriters. These percentages (combined adding to 100%) could then be applied to the settlement amount to determine each insurers' liability.

Underwriters nevertheless argue that such allocation is impossible under these circumstances because the settlement amount was unallocated. We do not understand howww this presents a problem. That the settlement among the insurers and Statoil was unallocated at the time of settlement does not relieve Underwriters

[4] For clarity and guidance, we note that none of the generally covered expenses would be excluded by Ironshore's "other insurance" exclusion for the reasons stated above in part D.2.b of our analysis.

of their burden of proving what portion of the loss was covered by Ironshore's and Zurich's policies covered. The insurers expressly agreed in the settlement agreement to determine in this action which policies cover which parts of the loss. This case does not present an impossible allocation problem; rather, it requires proof of what portion of the loss each policy covers.

* * *

In sum, we hold that the trial court did not err in declaring, as a matter of law, that: (1) Ironshore's SPILLS policy provides primary coverage for Statoil's insurance claim; (2) Underwriters' 2013-2014 Onshore Operator's Extra Expense policy provides primary coverage for Statoil's insurance claim; and (3) Underwriters' 2013-2014 Energy Package policy provides excess coverage for Statoil's insurance claim. Therefore, we overrule the part of Ironshore's first issue that contends the trial court erred in failing to hold that Ironshore's policy's "other insurance" exclusion makes the policy's coverage excess to the coverage provided by the other applicable policies, and we overrule Ironshore's second, fifth, sixth, and seventh issues in their entirety.

We further hold that the trial court did err in ruling that Statoil's loss cannot be allocated as a matter of law and that the loss should therefore be shared on a pro-rata-by-limits basis. Therefore, we sustain Ironshore's third issue and part B of Zurich's first issue. We do not reach the remaining issues.

Conclusion

We affirm, in part, and reverse and remand, in part.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.