IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

LGS TECHNOLOGIES, LP, as successor in interest to LGS Technologies, Inc. f/k/a LONGHORN GASKET AND SUPPLY COMPANY, and LOMA ALTA CORPORATION	§	
Plaintiffs,[1]	§	**CAUSE NO. 2:07-CV-399**
v.	§	
UNITED STATES FIRE INSURANCE COMPANY,	§	
Defendant.	§	

SECOND REPORT AND RECOMMENDATION
OF THE COURT-APPOINTED SPECIAL MASTER[2]

Before the Court are the following:

1. The Fourth Motion for Partial Summary Judgment filed by Intervenors Trinity Lloyd's Insurance Company and Trinity Universal Insurance Company (collectively, "Trinity"); the Response and Cross Motion filed by Defendant United States Fire Insurance Company ("US Fire"); and Trinity's Reply (Dkt. 461, 465, 468);
2. US Fire's Motion for Partial Summary Judgment against Trinity on Subrogation; and Trinity's Response (Dkt. 462, 463)[3]; and

[1] This case caption reflects the corrected names of the Plaintiffs in this case as ordered by the Court on August 18, 2014. (Dkt. 402).
[2] This Report and Recommendation is submitted pursuant to the Court's Order Appointing Special Master (Dkt. 424), wherein the Court assigned the Special Master the duty of, *inter alia,* assisting the Court with legal analysis of the parties' submissions. *Id.* at p. 2.
[3] No reply brief was filed by US Fire.

3. US Fire's Objections to the documents supporting Trinity's Fourth Motion for Partial Summary Judgment; and Trinity's Response to US Fire's Objections (Dkt. 464, 469).

No oral argument was held.

For the following reasons, the Special Master recommends that the Court (i) GRANT IN PART Trinity's Fourth Motion for Partial Summary Judgment, and (ii) DENY IN PART Trinity's Fourth Motion for Partial Summary Judgment; (iii) GRANT IN PART and DENY IN PART US Fire's cross motion; (iv) DENY US Fire's Motion for Partial Summary Judgment on Subrogation; and (v) OVERRULE US Fire's objections to the documents supporting Trinity's Fourth Motion for Partial Summary Judgment.

I.

BACKGROUND

A. Procedural Posture of the Litigation

This lawsuit was originally brought on September 12, 2007, by Plaintiffs LGS Technologies, LP, as successor in interest to LGS Technologies, Inc. f/k/a Longhorn Gasket and Supply Company, and Loma Alta Corporation (collectively, "LGS"). Trinity moved to intervene in November 2008. Neither side opposed the intervention. The Court granted Trinity's motion on December 5, 2008. Three days later, Trinity filed its Complaint in Intervention.[4]

All parties moved for summary judgment in 2010. The Court issued an Order on September 2, 2010, granting in part and denying in part several of the motions. The Court issued an Order on a motion for clarification and reconsideration thereafter.[5] Approximately one year later, LGS and Trinity filed second (and in Trinity's case, third) motions for summary judgment.[6]

[4] Dkt. 25
[5] Dkt. 91, 103
[6] Dkt. 368, 369, 370

The case was then stayed and administratively closed for pursuit of an interlocutory appeal, which was denied by the United States Court of Appeals for the Fifth Circuit. Thereafter, the LGS second and Trinity second and third motions for partial summary judgment were reinstated.[7]

On October 20, 2014, the Court entered its Order Appointing Special Master. In performance of his duties, the Special Master issued a Report and Recommendation on the LGS second and Trinity second and third motions for partial summary judgment.[8] Following the Special Master's Report, LGS and US Fire settled, and LGS dismissed its claims with prejudice.[9] LGS had made no claims against Trinity, nor Trinity against LGS in this litigation. Therefore, LGS is now out of this lawsuit altogether. Trinity's claims against US Fire survived the settlement, as did US Fire's counterclaim for reimbursement against Trinity. In essence, each seeks money from the other for the same set of settlement and defense costs attributable to claims made against their mutual insured – LGS.

With LGS' dismissal of its claims, US Fire objected to the Special Master's Report and Recommendation on the grounds, *inter alia*, of mootness.[10] As reflected in the Court's Order of July 31, 2015,[11] the issues are not moot. In Trinity's now-pending Fourth Motion for Partial Summary Judgment, Trinity relies upon and adopts the arguments made and evidence submitted in LGS's prior motion.[12] Therefore, the Court's ruling adopting the Special Master's recommendation on the exhaustion of the 1983/84 Trinity primary policy is incorporated by reference herein, and this Second Report and Recommendation of the Special Master begins with

[7] Dkt. 374, 378, 383, 387
[8] Dkt. 455
[9] Dkt. 472
[10] Dkt. 471 at 2, 4-6
[11] Dkt. 476
[12] Dkt. 461 at 3

the now-adjudicated premise that the Trinity 1983/84 primary policy has been exhausted by payments Trinity made to settle and defend asbestos lawsuits against LGS.

This report and recommendation on the pending motions, if accepted by the Court, will be dispositive of this long and protracted dispute.

B. Factual Background

The LGS companies were and are defendants in numerous asbestos and mixed dust cases in state district courts located in the Eastern District of Texas. These cases involve damages occurring over many years. *See* Order on Summary Judgment at Dkt 91. Many of the asbestos lawsuits have been settled, though some are pending and yet others continue to be filed.

LGS was insured by a succession of primary and excess/umbrella policies from at least February 1, 1979 through May 15, 1993. In the later years some of those policies contained asbestos exclusions and are not at issue in this litigation.[13] LGS was insured by a primary policy issued by American Lloyds ("ACE") from 1980-1983. The ACE policy was a three-year policy with annual terms, with a yearly per-occurrence and aggregate limit of $500,000. Thereafter, LGS was insured by primary policies issued annually by Trinity from 1983-1993.

US Fire provided annual umbrella policies effective from February 1, 1979 to February 1, 1986. Thereafter, excess coverage was provided by Trinity. The US Fire policies from February 1, 1981, through February 1, 1986, provided per-occurrence and aggregate limits of $5 million. A coverage chart depicting these various coverage periods, amounts and applicable policies, the accuracy of which is uncontested by the parties, was submitted by US Fire,[14] is part of the record, and is attached hereto as Special Master Exhibit 1 for reference.

[13] *E.g.*, Dkt. 462, p. 2, n. 6
[14] Dkt. 462-1

In its second motion for partial summary judgment now adopted and incorporated by Trinity, LGS argued that the limits for the ACE policy years were exhausted by settlement of claims on or about October 13, 2000, and that it provided notice to US Fire on October 27, 2000.[15] For seven years, US Fire refused to accept notice of exhaustion and refused to acknowledge coverage. Trinity provided defense to LGS during that time and after, and paid settlements to asbestos claimants.[16]

It is uncontested that Trinity, beginning in June 2006, also provided notice it had exhausted the policies scheduled as underlying insurance under the US Fire policies. Thereafter, on September 15, 2006, and again on December 29, 2006, and November 5, 2007, Trinity again provided notice it had exhausted five years of its own primary coverage.[17] And while US Fire has had the opportunity to audit the files of LGS' longtime asbestos defense counsel Marcus Carroll, get documents and ask questions,[18] until the Special Master's first Report and Recommendation which led to a settlement with LGS, US Fire had steadfastly refused to participate in the indemnification of settlement payments or defense costs. Thus far, US Fire has continued to refuse to participate vis-à-vis the Trinity payments, and indeed seeks reimbursement from Trinity for any amounts it might ultimately be ordered to pay.[19]

C. <u>The Law of this Case</u>

As noted, earlier in this litigation all parties including LGS moved for summary judgment, resulting in the Court's Order on September 2, 2010, and Order on motion for clarification and reconsideration. Several conclusions already reached by the Court are the law of this case and

[15] Dkt. 126 at 2; Dkt. 66-9 (under seal)
[16] Dkt. 461-1, 461-2
[17] Dkt. 465-6, 7, 8, 9. These documents were submitted by US Fire.
[18] Dkt. 66-8; Dkt. 316 Ex. F at pp. 258-260
[19] Dkt. 389, 462

bear repeating. First, the cause of the injuries to the claimants in the underlying litigation is their exposure to LGS' asbestos-containing gaskets. As a corollary, asbestos claimants exposed to LGS gaskets at the same time and location are a single "occurrence."[20] And further, injury-in-fact in these cases is the various claimants' exposure(s) to asbestos. Second, LGS is not required to exhaust horizontally all primary coverage before excess coverage is in play. Vertical exhaustion is the rule in Texas, per the Court's *Erie* guess. Dkt. 91 at 18 (citing *Am. Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842, 855 (Tex. 1994)).[21] *See also Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750 (Tex. 2013) (refusing excess insurer's argument that it should only have to share total remediation expenses on a *pro rata* basis with other insurers); *Trammell Crow Residential Co. v. St. Paul Fire and Marine Ins. Co.*, No. 3:11-cv-2853-N (N.D. Tex., order of Godbey, J., Jan. 12, 2014) (holding Texas law requires vertical exhaustion). Accordingly, US Fire's obligations under a specific umbrella policy attach upon exhaustion of the underlying primary policy. The primary insurer's payment of its policy limits (as defined by its policy) triggers US Fire's duties.

D. <u>The Parties' Prior Motions</u>

In its original motion for summary judgment, Trinity contended that it had paid on behalf of LGS $2,586,266.40 after exhaustion of the ACE policy years. However, Trinity had not tied claims to any specific occurrence or policy so as to show that any primary policy was exhausted. Similarly, LGS in its own motion had provided payment histories but had not correlated payments

[20] Noting "[n]o Texas court has squarely addressed the issue of what constitutes an 'occurrence' in asbestos-related injury claims," the Court reviewed the policy language and Texas case law and made an *Erie* guess. Dkt. 91 at 12-13. The Court's *Erie* guess is consistent with the policy language in the Trinity policies and the US Fire policies and in accordance with the Texas Supreme Court's adoption of an injury-in-fact trigger for property damage cases in *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). The Court's conclusion is also consistent with factually analogous case law. Dkt. 91 at 14-15.

[21] The Court's thorough discussion addressed public interest factors also favoring vertical exhaustion (Dkt. 91 at 21-22), most notably the fact that vertical exhaustion "respects the distinction between primary and excess insurers *while precluding excess insurers from avoiding coverage in long-term, continuous trigger cases*." *Id.* at 22 (emphasis added).

with occurrences. The Court suggested that in order to demonstrate exhaustion, LGS and/or Trinity must group claimants into occurrences by, for example, establishing which claimants were exposed to the gaskets at the same time and location, and then which policy or policies were triggered by such occurrence(s).[22]

LGS subsequently filed its second motion. Based on the evidence LGS submitted, in particular Exhibits 1, 2 and 5 to the Marcus Carroll affidavit, and Exhibits C and D, the Special Master recommended that the LGS motion be granted and the Court find exhaustion proven as to one year of the ACE primary policy, and as to the 1983/84 Trinity primary policy.[23]

Trinity's own second motion once again asserted Trinity had paid $2,586,266.40 to settle claims. But unlike LGS, Trinity had not followed the Court's instructions to group the claims payments into discernible occurrences and demonstrate the policy year(s) to which those occurrences applied. The Special Master recommended that Trinity's motion on the duty to indemnify claims payments be denied.

The same issue dogged Trinity's third motion—its claim for reimbursement of defense costs under a theory that US Fire had a duty to defend. The Special Master recommended based on the language of the US Fire policy that if the US Fire policy entails a duty to defend, such duty would only exist for a different "occurrence" than the occurrence(s) which exhausted the primary coverage. Since Trinity had failed to demonstrate any occurrences at all, summary judgment was unavailable.[24]

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[22] Dkt. 91 at 25-26

[23] US Fire filed objections to the Special Master's Report and Recommendation. Dkt. 471. Trinity filed no objections but responded to the objections of US Fire. Dkt. 473. The Court has ruled on those objections and adopted the Special Master's Report and Recommendation. Dkt. 476.

[24] US Fire argued and continues to argue it had no duty to defend in any event, and that any duty it might owe is a duty to indemnify paid defense costs. Among the operative differences: a duty to defend would not erode policy limits, whereas indemnification of defense costs would; and a duty to defend is actualized based upon the "eight corners" rule, essentially a liberal construction of the operative pleadings, whereas the indemnification of defense costs requires the insured to incur the defense costs and then claim reimbursement from the carrier based upon the

E. Trinity's Pending Motion

In its now-pending Fourth Motion for Partial Summary Judgment, Trinity adopts the LGS motion and supporting evidence as a starting point, then contends all amounts (defense costs and settlements) which Trinity paid over and above the $500,000 which exhausted its 1983/84 primary policy should be reimbursed by US Fire, as the US Fire excess layer above that policy is now in play. The total amount currently in controversy is $5,103,335.05—$1,932,306.44 in settlement payments above the $500,000 primary per-occurrence and aggregate limit; and $3,171,028.61 in defense costs.

Trinity attaches to its motion five spreadsheets summarizing voluminous documents to show settlement payments to claimants and those claimants' work and exposure histories, along with an affidavit from LGS' longtime asbestos defense counsel Marcus Carroll describing and authenticating the summaries.[25] They indicate Trinity paid a total of $2,432,306.44 in settlement payments (including the first $500,000 which exhausted primary limits). As to defense costs, Trinity submits an affidavit from Marcus Carroll indicating he was paid $3,171,028.61 in total defense costs beginning in 2001 to defend the claims summarized in Trinity spreadsheets 1-5.[26]

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facts established. "The duty to defend is broader than the duty to indemnify. The duty to indemnify is triggered by the actual facts that establish liability in the underlying lawsuit." *Azrock*, 211 F.3d at 243 (citing *St. Paul Ins. Co. v. Texas Dep't of Transp.*, 999 S.W.2d 881, 884 (Tex. App.—Austin 1999, pet. denied).

[25] Dkt. 461-1. US Fire objects to the Trinity submissions as based on hearsay and unauthenticated. Dkt. 464. The objections should be OVERRULED. The records from which Trinity's spreadsheets were created are summaries of voluminous records long-since made available to US Fire. Most, if not all of the information comes from Carroll's business records, of which he is custodian, and which he can and did properly authenticate. *See* FED. R. EVID. 803(6); 1006. Furthermore, the information has circumstantial guarantees of trustworthiness equivalent to the hearsay exceptions in the federal rules, is offered as evidence of a material fact (when and where claimants worked and were therefore exposed to asbestos and how much they received in settlement payments), is more probative on those points than any other evidence obtainable through reasonable efforts, and admitting it will serve the purposes of the federal rules and the best interests of justice. Therefore, the information is also admissible under the residual exception found in FED. R. EVID. 807. Indeed, as to the interests of justice, it would be an unwarranted result indeed for the Court to follow US Fire's strained logic, to wit: to have required Trinity to group claims and settlements into occurrences premised on claimants' work histories and exposures, and then bar the very evidence the Court asked for. Alternatively, Trinity argues the information is not even offered for a hearsay purpose but rather to support its allocations of claimants to particular occurrences, a ground on which the Fifth Circuit has permitted such evidence to be introduced.

[26] Dkt. 461-2. Trinity also objects to the Carroll defense costs affidavit. These objections are addressed *infra*.

F. US Fire's Pending Motions

In its response to Trinity's motion, US Fire's penultimate paragraph is a cross motion for summary judgment seeking a ruling it had no duty to indemnify or defend, and a ruling that Trinity's equitable subrogation claim fails as a matter of law.[27]

US Fire also moves affirmatively for summary judgment in an independent motion premised on other grounds. Specifically, having lost its efforts to invoke a pollution exclusion in its policies,[28] and having lost the horizontal exhaustion issue, US Fire now moves for summary judgment claiming it is entitled to reimbursement from Trinity's other primary and excess policies for any amounts US Fire may be deemed to owe.

II.

LEGAL STANDARDS

The summary judgment procedure is designed to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment should be granted when the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

A movant who bears the burden of proof at trial must establish "beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original). Once the movant meets his initial burden, the non-movant must show that summary judgment is not proper. The non-movant may not rest on mere allegations but must set forth specific facts showing there is a genuine

[27] Trinity objects to US Fire's cross motion as untimely. Dkt. 468 at 11. The objection should be OVERRULED. Given the age of this litigation and US Fire's rationale for including its cross motion in its timely filed response brief, the Special Master recommends the cross motion be considered along with the other (timely) filings in this case.
[28] Dkt. 367

issue for trial. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 323; *Pustejovsky v. Pliva, Inc.*, 623 F.3d 271, 277 (5th Cir. 2010) (citing *Brown v. City of Houston,* 337 F.3d 539, 541 (5th Cir. 2003)).

A party seeking summary judgment who does not have the burden of proof at trial need only point to the absence of a genuine fact issue. *See Duffy v. Leading Edge Prods., Inc*., 44 F.3d 308, 312 (5th Cir. 1995). This may be done by "pointing out 'the absence of evidence supporting the nonmoving party's case.'" *Id.* (quoting *Skotak v. Tenneco Resins, Inc*., 953 F.2d 909, 913 (5th Cir. 1992)). "The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party would bear the burden of proof at trial." *Texas Employers Ins. Ass'n. v. Underwriting Members of Lloyds*, 836 F. Supp. 398 (S.D. Tex. 1993) (citing *Celotex*; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Cases involving the interpretation of insurance policies are particularly appropriate for summary disposition because the interpretation of an insurance policy is a question of law. *See Principal Health Care of Louisiana, Inc. v. Lewer Agency, Inc*., 38 F.3d 240, 242 (5th Cir. 1994); *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 677 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998); *St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276, 284 (Tex. App.—Corpus Christi 1982, no writ) (stating whether or not a coverage duty exists under a given set of facts is a question of law for the court).

III.

ANALYSIS

In the underlying asbestos lawsuits, claims were brought by plaintiffs who alleged exposure to asbestos-containing LGS gaskets, and resulting asbestos illnesses. Settlements were generally made in groups.[29] The issue in this lawsuit, in part, has been where to allocate the settlements and defense costs in terms of the various primary and excess/umbrella insurance policies issued to LGS over the years. *See* Special Master Exhibit 1.

A. Trinity's Motion: Settlement Payments

1. Trinity's Argument

Trinity contends it is entitled to reimbursement for all sums it paid in settlements to asbestos claimants over and above its $500,000 policy limits for the now-exhausted 1983/84 policy. Its contention rests on the Court's vertical exhaustion ruling and the facts establishing exhaustion of the primary policy, coupled with a presentation of the total amount of settlement payments made to asbestos claimants.

Having already determined that "claimants exposed to the gaskets at the same time and location constitute a single occurrence," the Court gave LGS and Trinity a roadmap: group the claimants into occurrences, demonstrate their exposure to asbestos—and therefore their injury-in-fact—during a particular policy year, and demonstrate the payment of claims attributable to occurrences during said policy year so as to prove exhaustion of that year's primary insurance policy. The corollary is: any settlement payments in overage pertaining to that policy year belong in the excess layer under the rule of vertical exhaustion. The Court instructed that Trinity may not "simply allocate every single underlying claim to one underlying policy."

[29] *See* Trinity spreadsheets at Dkt. 461-1.

LGS took the Court's instruction and grouped claimants into occurrences. LGS showed work histories, exposure histories, and settlement payments, all of which taken together demonstrated exhaustion of the Trinity 1983/84 policy. Trinity has now submitted five spreadsheets showing settlement payments to various asbestos claimants, and their work histories, and taken the position that all payments to all of those claimants in excess of the first $500,000 (the primary policy limit) should be the responsibility of US Fire.

2. US Fire's Response

US Fire offers no controverting factual evidence regarding the work histories of the asbestos claimants or the settlement amounts paid to them. US Fire's position, instead, is that Trinity cannot recover any settlement amounts Trinity paid in excess of policy limits because Trinity "voluntarily" paid those claims and is therefore not entitled to relief under the doctrine of equitable subrogation. US Fire also argues Trinity has "unclean hands" due to its shifting allocation of the settlements into different policy years throughout the 7 plus year course of this litigation and the years when Trinity was adjusting claims and defending its insured.

3. Special Master's Analysis and Recommendation Regarding Settlement Payments

The Special Master recommends that US Fire's assertions that Trinity is barred from relief on the grounds of "voluntary payments" and "unclean hands" should fail. Regarding the former, Texas courts interpret the doctrine of equitable subrogation liberally. The doctrine applies "in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable, and which in equity should have been paid by the latter." *Frymire Eng'g Co., Inc. ex rel. Liberty Mut. Ins. Co. v. Jomar Int'l, Ltd.*, 259 S.W.3d 140, 142 (Tex. 2008) (citation omitted). A payment is only voluntary when the payor acts: (i) without an assignment or agreement for subrogation; (ii) without being legally obligated to pay; and (iii) without being

compelled to pay in order to preserve rights or property. *Id.* at 145 (citation omitted). Texas courts similarly construe the "voluntariness" element liberally. *Id.* (citation omitted). *See also Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 702 (Tex. 2000) ("In the context of equitable subrogation, 'Texas courts have been liberal in their determinations that payments were made involuntarily.'") (Citations omitted). Indeed, the Texas Supreme Court has noted that an excess insurer's payment to settle a suit against the insured has been said to be "presumptively involuntary for subrogation purposes." *Id.* (citing *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537, 543 (Tex. App.—Corpus Christi 1993, writ denied)). There is no reason such presumption would be inapplicable by analogy here.

Here, Trinity was not acting "voluntarily" when defending its insured and paying claims. Trinity had a legal duty to LGS. In addition, US Fire knew as far back as 2001 that LGS considered the ACE policy to have been exhausted and US Fire's excess layer in play. Yet US Fire refused to participate in any way in the defense and negotiation of ongoing asbestos claims. US Fire *audited LGS' defense counsel Marcus Carroll's files*, and yet US Fire still refused to participate. Trinity stepped in not because Trinity "volunteered" to do so but because the law was not settled, Trinity had other primary and excess policies potentially on-the-line,[30] and in a vacuum of other paying coverage for its insured. And Trinity did endeavor to preserve its rights. Trinity intervened in this lawsuit. As well, Trinity and LGS were embroiled in litigation over the very issue of payment of claims and defense costs.[31] Thus, the record indicates Trinity settled claims in good faith, preserving its rights, and under a reasonable belief that payments were necessary to its

[30] *See* discussion in US Fire's response at Dkt. 465, pp. 15-17. *See also* Dkt. 465-7, in which Trinity reserved its rights to assert no coverage, withdraw from defense, file a declaratory judgment action, and seek reimbursement for defense and indemnity payments.

[31] Dkt. 465-11. Trinity's Texas Rule of Civil Procedure Rule 11 agreement with LGS specifies its payment of defense and/or indemnity was not to be construed as a waiver of any claim Trinity may have for reimbursement against US Fire. Dkt. 465-3.

protection. *Keck*, 20 S.W.3d at 702. The Court should find that Trinity is not foreclosed from seeking relief under the doctrine of equitable subrogation.

Similarly, Trinity does not come to the court with "unclean hands." First of all, the record does not indicate Trinity did anything "unclean" before intervening in this case. To the contrary, Trinity is the insurer who defended LGS and paid settlements—not US Fire. US Fire's complaints are merely about how Trinity allocated its payments over the years among the various policies and in light of the progress of this litigation. That is not unclean hands nor a bar to equitable relief.

Secondly, to say this litigation is complex would be an understatement. Nearly 500 docket entries and over seven years of litigation ought to demonstrate that. The doctrine of vertical exhaustion as applied to this long-term continuous exposure case, with hundreds of asbestos claimants who worked at any number of facilities over many years, presents challenging issues of application.

It is telling that US Fire cites no case on point proving Trinity's efforts to understand the Court's rulings and allocate claims to policy years falls within the doctrine of unclean hands. Nor does US Fire demonstrate how it was harmed or prejudiced by Trinity's actions. *See Bagby Elevator Co. Inc. v. Schindler Elevator Corp.*, 609 F.3d 768, 774 (5th Cir. 2010) (stating that in Texas the unclean hands doctrine is inapplicable "unless the party asserting it has been seriously harmed and the wrong complained of cannot be corrected without the application of the doctrine.") (quoting *Dunnagan v. Watson*, 204 S.W. 3d 30, 41 (Tex. App.—Fort Worth 2006, pet. denied)); *Bank of Saipan v. CNG Fin. Corp.*, 380 F.3d 836, 842 (5th Cir. 2004) (stating unclean hands is inapplicable where a plaintiff's "sins do not affect or prejudice the defendant") (citation omitted).

While the Special Master recommends US Fire's contentions be deemed unavailing, that is not the end of the analysis. As to the indemnification of settlement payments to asbestos

claimants, for which the total amount Trinity paid over and above its $500,000 policy limit is, according to the uncontroverted evidence, $1,932,306.44, the Special Master recommends that the Court GRANT Trinity's motion IN PART.

Under the doctrine of vertical exhaustion, once a primary policy is exhausted, the excess policy above it is in play. Claims that belong within that same policy period spike into the excess layer, and the settlement of those claims should be indemnified by the excess carrier.[32] But "there still must be some evidence of a link between the policies and the underlying injury."[33] Meaning, Trinity must still prove settlement payments properly belong in that same policy period under the Court's "exposure equals injury-in-fact" ruling.

Trinity is incorrect that all amounts listed in spreadsheets 1-5 either properly belong in the 1983/84 coverage year, or should be thrust into the US Fire excess layer *in toto* (minus $500,000). The problem is twofold: first, there are claimants listed on the spreadsheets who were not working anywhere during the 1983/84 policy year. In other words, the requisite link between the exposure (injury-in-fact) and the policy period is missing. Trinity contends that these claimants belong in the 1983 policy period because that is the Trinity policy "closest in time" to the date of those claimants' last employment. This position is belied by the Court's earlier analysis. Under that analysis, claimants who were not working during the 1983/84 policy year could not have had any *exposure* to LGS' asbestos-containing gaskets during that year. Thus, the Special Master recommends that the Court consider those settlement payments improperly attributed to US Fire's 1983 umbrella policy.

The second problem is that spreadsheets 3 and 4 list claimants whose settlements, or a portion of whose settlements, were paid by ACE—not by Trinity—as per Exhibits C and D to the

[32] Appleman on Insurance § 145.4[A][1]. Defense costs are addressed *infra.*
[33] Dkt. 91

LGS motion. Obviously Trinity cannot use ACE's settlement payments to exhaust Trinity's own policy year. In a similar vein, spreadsheets 3 and 4 list claimants whose settlements were indeed paid by Trinity, but whose settlements were already counted toward the exhaustion of the Trinity 1983/84 primary policy. Trinity cannot double-dip. Those settlement payments obviously cannot be US Fire's responsibility either.[34]

For all of these reasons, in order to determine what amount properly belongs in the US Fire layer, the Special Master has undertaken the painstaking and enormously time-consuming task of separating the wheat from the chaff in the way Trinity did not—going through all five Trinity spreadsheets line-by-line, and disregarding any settlement to any claimant who was not working and thereby experiencing some conceivable asbestos exposure during 1983 or 1984. The Special Master has also compared the spreadsheets line-by-line and claimant-by-claimant to LGS' Exhibits C and D and disregarded any settlement to any claimant already listed on those Exhibits.[35] The Special Master has created his own Excel spreadsheet showing the remaining claimants and their settlement amounts. It is attached hereto as Special Master Exhibit 2.

Under the Court's vertical exhaustion ruling, Trinity is entitled to indemnification from US Fire for any settlement payments to claimants who were exposed during the 1983/84 policy year, and which settlements were paid over and above the exhaustion of the Trinity 1983/84 (and ACE 1980/81) primary policy. Per the Special Master's calculations as reflected on Special Master Exhibit 2, the total amount which properly belongs in the US Fire excess layer is $903,638.52. The Special Master therefore recommends that the Court GRANT IN PART Trinity's Fourth

[34] Trinity does seem to acknowledge this particular issue when it adds up the total amounts represented in spreadsheets 1-5 and subtracts $500,000 from the total.

[35] It is important to reiterate that the evidence of claimants' work histories and settlement payments is uncontroverted. US Fire objected on hearsay grounds, but despite having had access to defense counsel's files and voluminous documentation over the years (*see* Dkt. 66 at 2-4) did not submit any evidence to rebut the factual entries.

Motion for Partial Summary Judgment and declare that Trinity is entitled to the sum of $903,638.52 from US Fire. The Special Master recommends that the Court DENY IN PART US Fire's cross motion on this issue contained in its response brief.

B. Trinity Motion: Defense Costs

1. Trinity's Argument

Trinity argues US Fire had an affirmative duty to defend LGS, and all defense costs in excess of Trinity's exhausted primary policy must be reimbursed by US Fire.[36] Trinity submits the affidavit of LGS' longtime asbestos defense counsel Marcus Carroll, who states Trinity paid a total of $3,171,028.61 in defense costs for LGS' defense beginning in 2001.[37] The Carroll affidavit presents the defense costs in yearly lump sum amounts but does not allocate legal fees on any *pro rata* basis to occurrences, nor apportion them by lawsuit, nor assign amounts by claimant or settlement group, nor provide any methodology to permit the Special Master or the Court to do so.

2. US Fire's Response

US Fire argues it had no duty to defend under the language of its policy but has demurred that it did have a duty to indemnify defense costs under the definition of "ultimate net loss" in its

[36] Trinity contends US Fire's "duty to defend the insured, LGS, was triggered upon exhaustion of the first, 1983-84 Trinity primary policy." Dkt. 461 at 2.

[37] US Fire objects to the Carroll defense costs affidavit on the grounds of hearsay and insufficient specificity as to who performed what tasks, and whether the work was necessary and reasonable. This, despite having audited Carroll's files, and having received the benefit of his work as reflected in the record in this case (*e.g.*, negotiated settlements, analysis of claimants' employment and medical histories, motions to dismiss improper claims, etc.) and having never participated in the defense of the asbestos litigation. The Special Master recommends the Court OVERRULE the objection. This is not a traditional fee shifting context such as in the cases upon which US Fire relies. Carroll is not before the Court in the first instance presenting a bill, justifying his work, and asking it be paid. Here, Trinity has already paid him and is seeking indemnification. The only issues here are what amount Trinity paid Carroll's firm, whether it was all attributable to defending LGS in the underlying asbestos litigation and whether/to what extent those amounts belong in the US Fire umbrella layer. There is no question but that Carroll and his firm defended LGS in the ongoing asbestos litigation, that they were paid for their efforts, and that Trinity determined the work was necessary and the rates reasonable. Furthermore, the affidavit makes clear that LGS' asbestos litigation was the only matter for which Trinity engaged Carroll. Finally, the affidavit is based on IRS Form 1099s that were issued to Carroll's firm and reported to the IRS, *i.e.*, paperwork that has sufficient circumstantial guarantees of trustworthiness to overcome any hearsay objection.

policy.[38] If US Fire had an affirmative duty to defend LGS, its obligation would be triggered by the allegations in the underlying pleadings and would not erode policy limits. By contrast, if US Fire had only a duty to indemnify defense costs, those defense costs would have to be incurred by its insured in the first instance, and then reimbursed based on the facts established, which would erode policy limits. *See Columbia Cas. Co. v. Georgia & Florida RailNet, Inc.*, 542 F.3d 106, 110–111 (5th Cir. 2008) (quoting *Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.,* 211 F.3d at 243) ("[W]hereas the duty to defend is based upon the allegations in the pleadings, the duty to indemnify 'is triggered by the actual facts that establish liability in the underlying lawsuit.'"). *See also Allstate Ins. Co. v. Disability Servs. of the Sw. Inc*., 400 F.3d 260, 263 (5th Cir. 2005); *King v. Dallas Fire Ins. Co.,* 85 S.W.3d 185, 187 (Tex. 2002).

3. Special Master's Analysis and Recommendation – Duty to Defend

The Special Master recommends that the Court GRANT IN PART Trinity's motion, and declare US Fire had a duty to defend LGS *for different occurrences*. However, the Special Master recommends that the Court DENY IN PART Trinity's motion and GRANT IN PART US Fire's cross motion and find that as applied to this record, the duty to defend does not entitle Trinity to any relief.

Under Texas law, insurance policies are subject to the same rules of interpretation as other contracts. *Indem. Ins. Co. of N. Am. v. W & T Offshore, Inc.,* 756 F.3d 347, 351 (5th Cir. 2014); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)(citations omitted). If the policy terms are susceptible to only one reasonable construction, they will be enforced as written. If the policy is susceptible to more than one reasonable interpretation, the court must resolve the uncertainty by adopting the construction that most favors

[38] *See* Dkt. 302 at pp. 1-2; Dkt. 465 at p. 6

the insured. *See W & T Offshore,* 756 F.3d at 352 (citing *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997)). *See also St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276, 281-82 (Tex. App.—Corpus Christi 1982, no writ) (noting it is the spirit of the law in Texas that the rights of the insured are favored).

US Fire makes much of the Texas Special Amendatory Endorsements that render its defense obligations optional rather than mandatory. Yet its argument ignores two provisions in the policy: Section V, and Special Condition J. Section V states, "In the event of the reduction or exhaustion of the aggregate limits of liability of the underlying policies listed in Schedule A[39] by reason of losses paid thereunder, the policy, . . . (2) in the event of exhaustion, *shall continue in force as underlying insurance*." *Id.* (emphasis added).[40] Section V also states, "There is *no limit to the number of occurrences* during the policy period for which claims may be made. . ." (Emphasis added). Condition J (as amended by the Texas Amendatory Endorsement) states, "If underlying insurance is exhausted by any occurrence, the company may, at the option of the insurer, assume charge of the settlement or defense of any claim or proceeding against the insured *resulting from the same occurrence*. . ." *Id.* (emphasis added).

"A court construing a contract must read that contract in a manner that confers meaning to all of its terms, rendering the contract's terms consistent with one another. . . . In doing so, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference

[39] Schedule A lists only one primary CGL policy with a per-occurrence and aggregate limit of $500,000.
[40] This language has been interpreted as meaning a duty of defense was owed. *W & T Offshore*, 756 F.3d at 354. *Cf. Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 538-39 (5th Cir. 2002) (determining such language did not automatically require a defense where the excess policy did not incorporate by reference the terms of the primary policy and where other language disclaimed such a duty until the primary policy limits paid out). In any event, the Special Master's recommendation is not premised solely on that language.

to the whole instrument. *Tittle v. Enron Corp.*, 463 F.3d 410, 419 (5th Cir. 2006). US Fire's focus on the optional defense language fails to harmonize these three provisions and essentially renders them a nullity. The Special Master recommends that this be deemed an impermissible construction. The Court should not accept US Fire's invitation to consider policy terms in the abstract. The Court "must consider the policy as a whole and interpret it to fulfill [the] reasonable expectations of the parties in light of the customs and usages of the industry." *Consumers County Mut. Ins. Co. v. P .W. & Sons Trucking, Inc*., 307 F.3d 362, 365 (5th Cir. 2002) (quoting *N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 834 (Tex. App.—Houston [1st Dist.] 1996, no writ)).

The reading that gives effect to all of the policy's provisions is the reading the Special Master previously considered "compelling," to wit: US Fire may optionally defend its insured when what is at issue is the same occurrence that exhausted the primary policy; but US Fire *must* defend its insured when what is at issue is a different occurrence than the one that exhausted primary coverage. This construction not only harmonizes all of the policy terms, it is also the construction that avoids leaving the insured without a defense. In the first occurrence, the primary insurer would be obligated to defend its insured for the entire occurrence, even after exhaustion. *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.,* 592 F.3d 687, 694 (5th Cir. 2010); *Tex. Prop. & Cas. Ins. Guar. Ass'n/Sw. Aggregates, Inc. v. Sw. Aggregates, Inc.,* 982 S.W.2d 600, 606 (Tex. App.—Austin 1998, no pet.); *see also Indian Harbor Ins. Co. v. Valley Forge Ins. Group,* 535 F.3d 359, 363 (5th Cir. 2008). Yet for a different occurrence attributable to the same policy year, the primary insurer that has now exhausted its limits would take the position it owes no defense. *See Inst. of London Underwriters v. First Horizon Ins. Co.*, 972 F.2d 125, 126 (5th Cir. 1992) (stating that once the primary insurer's policy limit was exhausted, the primary insurer's

duty to defend "then ended"). At this point, if the excess insurer only defends at its option, the insured is left with the very real possibility of no defense by its insurers. This result does not effectuate the intent of the parties, particularly in light of the fact that US Fire clearly envisioned the possibility of additional occurrences within the policy year; Section V explicitly says so. *See Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 569 (5th Cir. 2010) (citing *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008)) (stating court's primary concern in interpreting a policy is to effectuate the intent of the parties). *See also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. McMurray*, 342 F. App'x 956, 958 (5th Cir. 2009) (quoting *Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 323 (5th Cir. 2001)) (stating terms used in an insurance policy are given plain, ordinary meaning unless the policy shows the parties intended a different, technical meaning).[41]

This is not the end of the inquiry. The second step is to apply the policy to the facts. The Court must determine whether US Fire's duty to defend for a post-exhaustion, different occurrence within the same policy year entitles Trinity to any relief on this record.

To avail itself of US Fire's duty to defend Trinity must establish that under the "eight corners" rule in Texas, the pleadings on file, liberally construed and accepted as true, facially contain a claim within the policy's coverage; and that the legal fees incurred were for a different occurrence than the occurrence which exhausted Trinity's primary coverage. The Special Master recommends that the Court find these criteria are not and cannot be established on this record.

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[41] US Fire offers an alternative interpretation of the policy terms. Mere disagreement as to coverage does not create an ambiguity. *Sharp v. State Farm Fire and Cas. Ins. Co.*, 115 F.3d 1258, 1261 (5th Cir. 1997); *Columbia Gas Transm. Cop. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). While the Special Master does not deem the policy ambiguous and recommends the Court can and should construe its plain terms on their face, in harmony with one another, if US Fire's alternative reading demonstrates the policy is ambiguous, that would still be unavailing to US Fire. The Court would be required to resolve the uncertainty in favor of a duty to defend. *W&T Offshore,* 756 F.3d at 352; *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997).

Under Texas' eight corners rule US Fire's duty to defend would be triggered by the allegations of the live pleadings in the underlying asbestos litigation. *Zurich Am. Ins.,* 268 S.W.3d at 491 (quoting *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church,* 197 S.W.3d 305, 310 (Tex. 2006)) (under the eight-corners rule "'an insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of those allegations.'").

The allegations of the underlying pleadings must be liberally construed and accepted as true. *Disability Servs*., 400 F.3d at 263 (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines Inc.,* 939 S.W.2d 139, 141 (Tex. 1997)); *see also Gulf Chem. & Metallurgical Corp. v. Assoc. Metals & Minerals Corp*., 1 F.3d 365, 369 (5th Cir. 1993). As well, the "court 'resolve[s] all doubts regarding the duty to defend in favor of the duty. . . .'" *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687, 691 (5th Cir. 2010) (quoting *GuideOne,* 197 S.W.3d at 308 (citations omitted)). Indeed, the insurer must provide a defense if the complaint contains just one claim facially within the policy's coverage. *Disability Servs.*, 400 F.3d at 263; *Primrose Operating Co. v. Nat'l Am. Ins. Co.,* 382 F.3d 546, 552 (5th Cir. 2004).

However, it is equally true that when applying the eight corners rule, the Court may not "(1) read facts into the pleadings, (2) look outside the pleadings, or (3) imagine factual scenarios which might trigger coverage." *Guar. Nat. Ins. Co. v. Azrock*, 211 F.3d 239 (2000) (overruled on other grounds) (citing *St. Paul Ins. Co. v. Texas Dep't of Transp.*, 999 S.W.2d 881, 885 (Tex. App.—Austin 1999, pet. denied)). *See also Rahn*, 641 S.W.2d at 281 (noting the determination of a defense obligation is made without reference to extraneous facts). Trinity has failed to demonstrate how any of the pleadings in the underlying lawsuits would implicate US Fire's duty to defend under the eight corners rule. Based on this record, Trinity cannot.

Over 130 docket entries in this case are state court asbestos petitions,[42] which comprise a cumulative 15,000 plus pages.[43] Not a single one is quoted or cited by Trinity here to demonstrate US Fire's duty to defend is implicated under the eight corners rule. It appears the issue is not that Trinity won't make the requisite showing, but that Trinity cannot. Trinity admits these petitions are "frequently vague and bare on facts."[44] Trinity also admits these petitions "do not provide the clear road to establishing occurrence dates." *Id.* While Trinity then argues it has successfully "connected the dots to show occurrence dates,"[45] the eight corners rule is not satisfied by connecting dots. It is not satisfied by imagined factual scenarios or matters outside the pleadings, or reading facts into them. Thus, Trinity's inability to supplement the record with the requisite showing, and its admission that it cannot because the pleadings—on their own—simply do not satisfy the eight corners rule is the end of the inquiry. Even a liberal construction of the allegations cannot put missing exposure dates into the pleadings.

Nonetheless, mindful that the Court should resolve doubts in favor of the duty and that the potential of a case within coverage obligates a defense, the Special Master has once again undertaken a painstaking and thorough review of the record to glean whether there are occurrence dates alleged—or even implied or fairly inferred—which could conceivably bring the pleadings within US Fire's duty to defend. Very few were found.

Notwithstanding the above, and even if a liberal construction of the pleadings satisfied the eight corners rule, no duty to defend is implicated on this record in any event. Trinity has failed to show what percent of the Marcus Carroll defense costs are attributable to different occurrences than the occurrences which exhausted primary coverage. The Marcus Carroll defense costs are

[42] Attached as exhibits to Trinity's third motion for summary judgment. Dkt. 110
[43] Dkt. 112-125; Dkt. 127-133; Dkt. 135-249
[44] Dkt. 468, p. 5
[45] Dkt. 468 at 5-6

not broken out in any way so as to apportion them to occurrences, or even to claimants or to settlement groups. The defense costs are only listed in lump sum calendar year amounts.

For these reasons, the Special Master recommends the Court DENY Trinity's motion seeking defense costs under a duty to defend, and GRANT US Fire's cross motion on this issue.

4. Special Master's Analysis and Recommendation – Indemnification of Defense Costs

An alternative basis for Trinity's relief on the Marcus Carroll legal fees is US Fire's duty to indemnify defense costs under the definition of "ultimate net loss" in its policy. The policy requires US Fire to "pay on behalf of the insured the ultimate net loss . . . which the insured may sustain by reason of the liability imposed upon the insured by law, arising out of an occurrence…"[46] "Ultimate net loss" is then defined as "All expenses . . . incurred by the insured in the investigation, negotiation, settlement *and defense* of any claim or suit seeking such damages" except for defense costs covered by underlying insurance.[47] Furthermore, unlike the duty to defend, a duty to indemnify defense costs would not be occurrence-dependent but would apply to all defense costs after the exhaustion of the primary policy.

US Fire's duty to indemnify Trinity for the Marcus Carroll defense costs holds some sway, and this is where Trinity's connected dots prove helpful. The facts "actually established" in the underlying lawsuits indicate myriad claimants with exposure during the 1983/84 policy year. *See Zurich Am. Ins. Co. v. Nokia, Inc.,* 268 S.W.3d 487, 490–91 (Tex. 2008) (citing *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church,* 197 S.W.3d 305, 310 (Tex. 2006)) ("An insurer must defend its insured if a plaintiff's factual allegations potentially support a covered claim, while the facts actually established in the underlying suit determine whether the insurer must indemnify its

[46] Dkt. 465-2, p. 13, at "I. Coverage"
[47] Dkt. 465-2, p. 14 at "5. Ultimate Net Loss."

insured."). The facts "actually established" indicate $2,432,306.44 paid in settlement payments to such claimants. The facts "actually established" indicate $3,171,028.61 paid by Trinity, who assumed sole handling of the defense of LGS after October 2000, in defense costs to defend LGS in the asbestos litigation and negotiate the settlements shown in Trinity's spreadsheets.

Nevertheless, the Special Master does not recommend the Court accept wholesale the $3,171,028.61 amount set forth in Marcus Carroll's affidavit and consider it all properly within the excess layer. Approximately half of those fees were paid to Marcus Carroll in the years 2001-2006. While Trinity may have assumed sole handling of the defense of LGS after October of 2000, the record does not indicate its 1983/84 primary policy exhausted at that time.[48] In fact, on this record, the earliest indication that Trinity had exhausted its 1983/84 primary policy is the notice Trinity sent to US Fire's claims manager in June 2006.[49] And Trinity admits US Fire's duty was only triggered upon the exhaustion of the Trinity 1983/84 policy.[50] Trinity would not be entitled to fees incurred before its primary policy exhausted. *E.g., First Horizon*, 972 F.2d at 126 (where all defense costs were incurred before primary insurer exhausted its policy limits, excess insurer had no duty to pay costs of defense); *Keck*, 20 S.W.3d at 700 ("The majority rule is that 'where the insured maintains both primary and excess policies, … the excess liability insurer is not obligated to participate in the defense until the primary policy limits are exhausted.'") (Citations omitted). Thus, since Trinity has not borne its burden of proving that its 1983/84 policy actually exhausted before the end of 2006, and given that Marcus Carroll's affidavit breaks out defense costs on an annual basis, summary judgment is unavailable on any defense cost amounts paid before 2007.

[48] As discussed *supra*, Trinity is not entitled to defense costs paid before its policy exhausted.
[49] Dkt. 465-6. This correspondence was submitted by US Fire.
[50] Dkt. 461, p. 2.

For amounts paid to Marcus Carroll after Trinity's policy exhausted, the affidavit provides yearly totals for the years 2007-2014. These yearly totals are listed on Special Master Exhibit 3. It is undisputed that these amounts were paid to Marcus Carroll post-exhaustion of the Trinity primary policy. It is also undisputed that Marcus Carroll's only engagement by Trinity was the defense of LGS in the underlying asbestos litigation. It is further undisputed that Trinity alone paid these legal fees. Finally, these are the fees paid in connection with the defense and negotiation of the claims charted in Trinity's spreadsheets 1-5. In light of these facts and the Court's prior ruling on vertical exhaustion, there is no genuine issue of fact that the legal fees for 2007-2014 set forth on Special Master Exhibit 3 should be spiked into the US Fire layer and reimbursed by US Fire. The total amount calculated, as set forth on Special Master Exhibit 3, is $1,564,334.47.

The Special Master recommends that Trinity's motion for summary judgment, to the extent it seeks reimbursement of the Carroll defense costs under a duty to indemnify, be GRANTED IN PART and US Fire's cross motion DENIED IN PART, and that the Court order US Fire to reimburse Trinity $1,564,334.47.

C. US Fire's Motion

US Fire moves for summary judgment against Trinity, seeking reimbursement from Trinity's primary and excess insurance policies for any amounts US Fire is ordered to pay. US Fire bases its claim for reimbursement on theories of contractual and equitable subrogation. US Fire claims that "when more than one policy covers an occurrence, all insurers whose policies are triggered must allocate funding of the defense and indemnity limit among themselves according to their subrogation rights"[51] The Special Master recommends that US Fire's motion be DENIED.

[51] Dkt. 462

Equitable subrogation applies when one person, not acting voluntarily, *has paid* a debt for which another person was liable, and which in equity should have been paid by the other.[52] US Fire has paid no debt. US Fire has paid no money whatsoever for either the settlements or the defense costs in LGS' underlying asbestos litigation. Unless and until US Fire *has paid* a debt, no claim for equitable subrogation should lie.

Notwithstanding the above, US Fire has not shown how any of the insurance policies from which it seeks reimbursement (Trinity's other primary and excess policies) is responsible for any of the monies that the Special Master has recommended herein be deemed properly in US Fire's 1983/84 layer of excess coverage. In other words, while LGS, then Trinity adopting LGS' evidence, then the Special Master, have all scrutinized the record to group claims, claimants and settlements into occurrences that belong in the 1983/84 coverage year, the insurance policies from which US Fire seeks reimbursement cover other years. They are not concurrent policies; they are consecutive policies. To maintain a claim for reimbursement from any such policy under equitable subrogation or otherwise, US Fire must demonstrate in similar fashion how any allegedly reimbursable amounts belong in any of those policies' coverage years. US Fire's motion is devoid of such a demonstration.

If a claim for contractual subrogation is available to US Fire despite the Court's vertical exhaustion ruling,[53] it would only be available based on the actual terms of the US Fire policy. In other words, US Fire may not maintain such a claim on a theory that under Texas law it is permitted to pay only a *pro rata* share of settlement and defense costs. Courts interpreting Texas law have

[52] *See* Dkt. 462 at 11 (citing cases)

[53] There appears to be no clear Texas Supreme Court authority directly on point on this issue. While *dicta* language in the *Garcia* and *Lennar* cases could be read to support US Fire's theory, it could just as easily be read to say that only the policies within the vertical (spiked) tower chosen by the insured, are the policies from which contribution may be sought. In light of the Special Master's recommendation herein, it is suggested that the Court need not reach this issue or make an additional *Erie* guess.

routinely rejected such an approach. *See RLI Ins. Co. v. Philadelphia Indem. Ins. Co.*, 421 F. Supp. 2d 956 (N.D. Tex. 2006) (Fitzwater, J.); *Mid-Continent Cas. Co. v. Acad. Dev., Inc.*, No. H-08-21, 2010 WL 3489355, at *7-8 (S.D. Tex. Aug. 24, 2010) (Miller, J.).

The only policy language on which US Fire relies is its "other insurance" clause. This is the same clause on which US Fire relied to argue for horizontal exhaustion. That clause states, "If other collectible insurance . . . is available to the insured covering a loss also covered hereunder . . . the insurance hereunder shall be in excess of and not contribute with such other insurance." This Court has already interpreted US Fire's "other insurance" clause to be inapplicable to consecutive insurance policies, and limited to concurrent insurance policies: the Court has stated that for the "other insurance" clause to relieve US Fire of any liability, it "must generally cover the same property and interest therein against the same risk in favor of the same party."[54] The other policies from which US Fire now seeks reimbursement do not meet this criteria. They are policies that insure different risks, *i.e.*, different time periods. Thus, under the Court's analysis, unless the policies of which US Fire now seeks to avail itself are concurrent policies, the "other insurance" clause entitles US Fire to no relief against them.

However, even if US Fire's "other insurance" clause entitled US Fire to seek reimbursement from non-concurrent policies, US Fire would still be entitled to no such relief at this time. First, as noted, it has yet paid no claims, nor contributed to the defense costs at issue. Second, as noted, US Fire has not borne its burden of proving which other policies would be on the hook, and for which claims or amounts of reimbursement.

Finally, the Special Master notes the circuity of US Fire's claim. Specifically, in this litigation LGS and then Trinity as intervenor sued US Fire seeking to invoke US Fire's excess

[54] Dkt. 91 at 21

coverage and, in Trinity's case, seeking reimbursement for amounts paid after the exhaustion of primary coverage. The parties have litigated this case for years. The Court has ruled in favor of applying vertical exhaustion, and deemed the US Fire excess layer properly in play. LGS and Trinity have since endeavored to show which primary policy(ies) exhausted, which excess policies were spiked and triggered, and what amounts were paid. Now, US Fire seeks to come full-circle by foisting right back on to Trinity any amount US Fire is ordered to pay, which would put the parties in an indiscernible position from the position they were in when this litigation began. Such circuity has been held to bar recovery. *See Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 594 (8th Cir. 2002) ("Generally, courts will not allow parties to engage in circuitous action when the foreseeable end result is to put the parties back in the same position in which they began.") (Citing cases).

For all of these reasons, the Special Master recommends the Court DENY US Fire's motion for summary judgment on subrogation.

RECOMMENDATION

For all of the foregoing reasons, the Special Master recommends the following rulings:

1. The Court should GRANT IN PART Trinity's Fourth Motion for Partial Summary Judgment, Dkt. 461, as to settlement payments and find that Trinity is entitled to $903,638.52 from US Fire;
2. The Court should DENY IN PART Trinity's Fourth Motion for Partial Summary Judgment, Dkt. 461, as to defense costs premised on a duty to defend;
3. The Court should GRANT IN PART Trinity's Fourth Motion for Partial Summary Judgment, Dkt. 461, as to defense costs premised on a duty to indemnify and find that Trinity is entitled to $1,564,334.47 from US Fire;
4. The Court should GRANT IN PART and DENY IN PART US Fire's cross motion for summary judgment asserted in its response brief, Dkt. 465;
5. The Court should DENY US Fire's Motion for Summary Judgment on Subrogation, Dkt. 462.
6. The Court should OVERRULE US Fire's Objections to the Evidence submitted by Trinity in support of Trinity's Fourth Motion, Dkt. 464.

SO RECOMMENDED, August 12, 2015.

JOE KENDALL
COURT APPOINTED SPECIAL MASTER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Second Report and Recommendation of the Court-Appointed Special Master was served on all counsel of record via CM/ECF on August 14, 2015 in accordance with the Federal Rules of Civil Procedure.

Joe Kendall