IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U.S. METALS, INC.	§	
	§	
Plaintiff,	§	
	§	
Vs.	§	**CIVIL ACTION NO. H-12-379**
	§	
LIBERTY MUTUAL GROUP, INC.,	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is Defendant's Motion for Summary Judgment **(Instrument No. 52)**. Also pending are Plaintiff's cross Motion for Partial Summary Judgment and Amended Motion for Partial Summary Judgment **(Instrument No. 70; Instrument No. 87)**.

I.

A.

Plaintiff U.S. Metals ("Plaintiff") originally brought suit against Defendant Liberty Insurance Corporation ("Defendant"), on December 8, 2011, in state court, alleging that Defendant had a duty to defend and indemnify Plaintiff in *ExxonMobil Corporation v. U.S. Metals, Inc. et al.* (the "Exxon lawsuit"). (Instrument No. 1-1). Defendant removed Plaintiff's suit to this Court on February 9, 2012, pursuant to 28 U.S.C. § 1332. (Instrument No. 1). Plaintiff's First Amended Complaint asserts claims against Defendant for breach of contract and violations of the Texas Insurance Code § 541.060, § 541.061, § 542.058, the Texas Business & Commerce Code § 17.46, and the *Stowers* duty. (Instrument No. 40).

//

//

B.

Exxon Mobil Corporation ("Exxon") filed suit against Plaintiff and Maass Flange Corporation ("Maass") in Texas state court on June 20, 2011. (Instrument No. 40-2). Exxon's Complaint alleges that in June, 2009, Plaintiff agreed to manufacture and sell approximately 350 custom stainless steel flanges for installation in Exxon's Baytown, Texas and Baton Rouge, Louisiana refineries. (Instrument No. 40-2 at 2). The purchase order provided that the flanges were required to comply with various "ASTM" standards, which imposed requirements that regulated the manner in which the flanges were to be forged and made. (Instrument No. 40-2 at 3). The standards also specify how forging defects will be repaired, including welding procedures and the use of filler material. (Instrument No. 40-2 at 3).

Exxon alleged that Plaintiff did not manufacture the flanges itself but instead subcontracted with Maass to manufacture the flanges. (Instrument No. 40-2 at 3). Maass then subcontracted with a German company, which subcontracted with a Chinese company. (Instrument No. 40-2 at 3).

Exxon further alleged that after the flanges were installed at the Baytown and Baton Rouge refineries, a leak was discovered in June 2010 in one of the flanges sold by Plaintiff and Maass. (Instrument No. 40-2 at 3). An investigation revealed that the flanges were manufactured incorrectly, including improper heat treatment during the forging process, and that repairs made on the flanges had not been completed in compliance with ASTM standards. (Instrument No. 40-2 at 3). The complaint alleged that Plaintiff and Maass failed to detect these defects and disclose them to Exxon. (Instrument No. 40-2 at 3).

Exxon alleged that the only way it could mitigate its damages was to order new flanges from a different manufacturer and remove and replace all the flanges from Plaintiff and Maass.

(Instrument No. 40-2 at 3-4). Ordering new flanges and removing and replacing the old ones caused Exxon to shut down portions of the two refineries for several weeks, causing millions of dollars in damages resulting from loss of use. (Instrument No. 40-2 at 4).

Exxon brought suit against Plaintiff for breach of contract of the purchase order, strict liability, negligent representation, negligence, breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. (Instrument No. 40-2 at 4-10). Exxon sought damages for loss of use of its property and costs of investigating, repairing, and replacing the defective flanges. (Instrument No. 40-2 at 3).

C.

A settlement has been reached between Plaintiff and Exxon. (Instrument No. 70-7 at 3; Instrument No. 61-6 at 2). The parties cite to two exhibits that describe the elements of Exxon's claims against Plaintiff: an August 29, 2011 letter from Exxon to Plaintiff containing an offer to settle all claims (the "settlement letter") and the January 10, 2013 deposition of Bruce Bellingham ("Bellingham"), Exxon's designated corporate representative and project manager of the Baton Rouge "Non-Road Diesel" ("NRD") project. (Instrument Nos. 70-2; 70-6). The settlement letter describes in detail the factual background of Exxon's claim and also itemizes Exxon's claimed damages breakdown. (Instrument No. 70-6). Bellingham's deposition describes the testing, removal, and replacement process of the allegedly defective flanges. (Instrument No. 70-2).

Exxon alleges that it purchased approximately 339 stainless steel flanges for installation at Baytown and Baton Rouge in connection with its NRD project. (Instrument No. 70-6 at 3). The NRD project was a new facility at both sites that aimed to remove sulfur from diesel and make it more environmentally-friendly. (Instrument No. 70-2 at 4). The Baytown site was

slightly ahead of the Baton Rouge facility and had installed the flanges, put pipe together, and put installation around it. (Instrument No. 70-2 at 5). Exxon conducted hydrotesting before putting the system into operation and discovered a leak within the body of one of the flanges. (Instrument No. 70-2 at 5; Instrument No. 70-6 at 3). Exxon determined that the leak resulted from a manufacturing defect in the flange. (Instrument No. 70-6 at 3). Bellingham "would have to assume" that the leak did not damage the welding, but "the insulation and everything around it could have been damaged." (Instrument No. 70-2 at 14). Bellingham does not know if the insulation and surrounding parts were damaged by the leak because the leak occurred at the Baytown site, and he worked at the Baton Rouge site. (Instrument No. 70-2 at 13). Whether or not the insulation was damaged during the hydrotesting, however, Bellingham testified that Exxon would have had to remove it to replace the defective flange. (Instrument No. 70-2 at 13).

Exxon alleges that its initial investigation and inspection of other flanges supplied by U.S. Metals and Maass revealed similar manufacturing defects in the "hub area" of at least six other flanges at the Baytown refinery and thirteen at the Baton Rouge refinery. (Instrument No. 70-6 at 3). Through subsequent testing, it concluded that the flanges were not manufactured to Code and that the flaws made the flanges difficult to inspect and determine their probability of failure. (Instrument No. 70-6 at 7). Bellingham testified that the flanges' defects existed at the time of installation. (Instrument No. 70-2 at 7). Exxon then determined that the "safest, most prudent approach to solving the problem," especially given the potential for catastrophic consequences of a flange failure at the plants, was to replace all the flanges. (Instrument No. 70-6 at 7-8). Bellingham testified that the quickest way to replace the flanges was to place an order with another supplier. (Instrument No. 70-2 at 9).

Bellingham described the process of removing the defective flanges and installing new flanges. The initial welding required temperature coating to allow it to heat to 1,000 degrees Fahrenheit, and this coating was stripped off when the flanges were removed. (Instrument No. 70-2 at 8). Then bolts and gaskets were removed, and the gaskets were damaged in the process. (Instrument No. 70-2 at 8). The pipe next to each flange was ground down "to make a good potential fit for the next weld" of the new flange. (Instrument No. 70-2 at 8). That process means "I've probably lost a certain amount of millimeters of pipe." (Instrument No. 70-2 at 8). To install the new flange, Exxon must make the pipe smooth and weld the new flange to the pipe. (Instrument No. 70-2 at 8). Exxon also replaced gaskets and insulation. (Instrument No. 70-2 at 9). Bellingham confirmed that the damage done to other parts surrounding the defective flanges was all part of the process of removing and replacing the flanges. (Instrument No. 70-2 at 15, 17).

The settlement letter describes Exxon's "costs associated with its efforts to investigate the flange defects and then remove and replace the defective flanges, and the total cost for both refineries was approximately $6,345,824." (Instrument No. 70-6 at 8). For the Baytown refinery, it categorizes its total cost to investigate, remove, and replace the defective flanges as: labor and material furnished by Exxon; and services, materials, and "other" costs furnished by contractors. (Instrument No. 70-6 at 8). For the Baton Rouge refinery, it categorizes its total cost to investigate, remove, and replace the defective flanges as: replacement flanges and pipe fabrication; subcontractors dismantling, installing, and testing various parts of the flanges; subcontractor providing insulation removal and reinstallation; subcontractor providing bolt tensioning services for flanges; subcontractor providing scaffolding for dismantling and reinstalling flanges; engineering services for flange issues; and overhead/consumables for flange

replacement. (Instrument No. 70-6 at 9). Bellingham testified that every cost was a "direct cost . . . of getting the old flange out and the new flange in." (Instrument No. 70-2 at 12). He initially did not know if the "pipe fabrication" was a direct cost of the repair and replacement process, but he later testified that pipe fabrication meant costs for replacing the gaskets, bolts, and insulation surrounding the damaged flanges. (Instrument No. 70-2 at 12).

The settlement letter also describes Exxon's "lost profits due to the inability to operate the affected portions of the Baytown and Baton Rouge refineries" while it was investigating, removing, and replacing the defective flanges. (Instrument No. 70-6 at 10). Exxon alleges that the total lost profits at the Baytown refinery due to the defective flanges is approximately $11,700,000, and the total lost profits at the Baton Rouge refinery due to the defective flanges is approximately $4,956,000. (Instrument No. 70-6 at 10). Exxon estimated its total losses were approximately $23,001,824 and made a settlement demand for $6,000,000, based on its understanding that Plaintiff's primary and excess insurance policies provided it with $6,000,000 in coverage. (Instrument No. 70-6 at 11-12).

D.

Plaintiff submitted the defense and indemnification of the Exxon lawsuit to Defendant, and Defendant denied the request for defense and indemnification on August 24, 2011. (Instrument No. 61-4 at 1). Plaintiff's claim for coverage is based on two policies, Commercial General Liability Policy No. TB7-Z91-443031-029 (Instrument No. 61-10) and Umbrella Policy No. TH2-z91-443031-069 (collectively, the "Policy"), providing coverage from September 1, 2009 to September 1, 2010. (Instrument No. 61-4 at 2).

Defendant claims that it has no duty to defend because the allegations in Exxon's petition are not specific enough to allege covered "property damage." (Instrument No. 52 at 15;

Instrument No. 61-4 at 2). The policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," as well as "loss of use of tangible property that is not physically injured." (Instrument No. 44-2 at 21; Instrument No. 61-4 at 2). Defendant argues that Exxon's complaint, which states in part that it suffered "damage to ExxonMobil's tangible property from the resulting loss of use of Exxonmobil's Baytown and Baton Rouge refineries while the new flanges were being obtained and installed," (Instrument No. 40-2 at 9), does not provide enough detail to allow the court to determine whether the damage is covered property damage. (Instrument No. 52 at 14). Plaintiff claims that Exxon's complaint sets out sufficient facts to allege property damage under the policy. (Instrument No. 61 at 10-11).

Defendant also claims that it has no duty to defend because two[1] policy exclusions preclude coverage.[2] It claims first that Exclusion (k), "Damage to Your Product," bars coverage under the policy because Exclusion (k) negates coverage for "'property damage' to 'your product' arising out of it or any part of it." (Instrument No. 44-2 at 11; Instrument No. 61-4 at 3).

[1] Defendant originally claimed that four exclusions barred coverage in this case in its August 23, 2011 denial of coverage letter. (Instrument No. 61-4 at 2-3). However, it does not address Exclusion (b), "Contractual Liability," anywhere in its briefing, so it appears that Defendant has abandoned this exclusion. (Instrument No. 44-2 at 8). Similarly, although it recites the policy language for Exclusion (l), "Damage to Your Work," in its Motion for Summary Judgment, (Instrument No. 52 at 6-7), it does not argue that this exclusion applies to preclude coverage, so it appears that Defendant has abandoned this exclusion. Furthermore, even if Defendant did raise Exclusion (l), the Court notes that Exclusion (l) does not apply if the damaged work was performed by a subcontractor, which was undeniably the case here. (Instrument No. 40-2). Therefore, the Court will only address the two exclusions Defendant addresses in its briefing, Exclusions (k) and (m).

[2] Because both parties brief the indemnification issue first and in far greater detail, it is difficult to determine which claims the parties raise at each stage of the case. However, the arguments Defendant raises in its "duty to defend" briefing incorporates the exclusion arguments from the indemnification briefing. *See* (Instrument No. 52 at 14-15; Instrument No. 62 at 5-8; Instrument No. 72 at 6-11). Furthermore, Plaintiff's briefing on the issue of the exclusions similarly applies to both the duty to defend and the duty to indemnify. *See* (Instrument No. 61 at 13-20; Instrument No. 64 at 4-6; 70 at 14-19). It is also clear that Plaintiff understands that Defendant's exclusion arguments apply to both defense and indemnification. (Instrument No. 61 at 11) ("As discussed below, Liberty Mutual only contends that the [property] damage is subject to a Policy exclusion.") Finally, Defendant raises the policy exclusions in its denial of coverage letter on August 24, 2011. (Instrument No. 61-4). The Court therefore finds that the policy exclusions are properly before the Court on both Defendant's duty to defend and duty to indemnify, and the Court will address the exclusions as they apply to both issues.

The policy defines "your product" as, in part, "[a]ny goods or products . . . manufactured, sold, handled, distributed or disposed of by . . . . [y]ou." (Instrument No. 44-2 at 21; Instrument No. 61-4 at 2). Because the flanges are Plaintiff's product, Defendant claims there is no coverage under the policy for damage to or failure of the flanges themselves. (Instrument No. 61-4 at 3). Although Plaintiff concedes that the replacement costs of the flanges themselves are excluded by Exclusion (k), Plaintiff claims that Exxon alleges other damages in addition to the flanges which are not covered by the exclusion. (Instrument No. 61 at 13-14).

Second, Defendant claims that Exclusion (m), "Damage to Impaired Property or Property Not Physically Injured," bars coverage under the policy. Exclusion (m) negates coverage for:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by your or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your property" or "your work" after it has been put to its intended use.

(Instrument No. 44-2 at 11). Impaired property is defined by the policy as:

> tangible property, other than "your product" or "your work," that cannot be used or is less useful because:
>
> (a) It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> (b) You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

(Instrument No. 44-2 at 19). "Your work" means "[w]ork or operations performed by you or on your behalf" and "[m]aterials, parts or equipment furnished in connection with such work or operations." (Instrument No. 44-2 at 22).

Defendant claims that Exclusion (m) applies to preclude coverage for any aspect of Exxon's claim for property damage involving the removal and replacement of the flanges or for loss of use of the refineries while the flanges were replaced. (Instrument No. 61-4 at 4). It further claims that the exception to the exclusion does not apply because there is no allegation that the flanges were put to their intended use and there was no sudden and accidental physical injury, but rather an allegation of defective manufacturing. (Instrument No. 61-4 at 4). Plaintiff claims that the exclusion cannot apply because Exxon had to remove and replace other portions of the NRD units in order to restore the units to use. (Instrument No. 61 at 15). It further claims that the exception to the exclusion does apply because "the loss of use resulted from the flange suddenly and accidently failing during pressure testing." (Instrument No. 64 at 6).

Defendant also claims that it has no duty to indemnify. It claims that the damages alleged in the Bellingham deposition and the August 29, 2011 demand letter from Exxon to Plaintiff seek recovery of non-covered damages. (Instrument No. 72 at 11-12). Defendant applies the same policy exclusions as described above to argue that it has no duty to indemnify Plaintiff in the Exxon lawsuit. Plaintiff, also citing the Bellingham deposition and August 29, 2011 demand letter, claims that the underlying evidence establishes a duty to indemnify. (Instrument No. 70).

Defendant has filed a motion for summary judgment (Instrument No. 52), and Plaintiff has filed a response (Instrument No. 61). Defendant has filed a reply (Instrument No. 62) and Plaintiff has filed a surreply (Instrument No. 64). Plaintiff has filed a cross partial motion for summary judgment on the issue of liability (Instrument No. 70) and Defendant has filed a response. (Instrument No. 72). Plaintiff has also recently filed an amended cross partial motion for summary judgment on the issue of liability. (Instrument No. 87).[3]

[3] Plaintiff notes that this amended motion is "based on new information," including the depositions of both parties' corporate representatives and a correction of the interest calculation. (Instrument No. 87 at 5). The Court has

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006).

The "movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc*., 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25(1986)). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex*., 560 F.3d 316, 326 (5th Cir. 2009). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by "showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (citation omitted). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)).

---

reviewed the amended motion and the new evidence and finds that the amended motion does not change the outcome of the case.

After the moving party has met its burden, in order to "avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). The party opposing summary judgment cannot merely rely on the contentions contained in the pleadings. *Little*, 37 F.3d at 1075. Rather, the "party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim," *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 457, 458 (5th Cir. 1998); *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007). Although the court draws all reasonable inferences in the light most favorable to the nonmoving party, *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir. 2008), the nonmovant's "burden will not be satisfied by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Boudreaux*, 402 F.3d at 540 (*quoting Little*, 37 F.3d at 1075). Similarly, "unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment." *Clark v. Am's Favorite Chicken*, 110 F.3d 295, 297 (5th Cir. 1997).

In deciding a summary judgment motion, the district court does not make credibility determinations or weigh evidence. *Chevron Phillips*, 570 F.3d 606, 612 n.3 (5th Cir. 2009). Nor does the court "sift through the record in search of evidence to support a party's opposition to summary judgment." *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 379-80 (5th Cir. 2010); *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003); *Ragas*, 136 F.3d at 458; *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988) (it is not necessary "that the entire record in the case . . . be searched and found bereft of a genuine issue of material fact

before summary judgment may be properly entered"). Therefore, "[w]hen evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court." *Malacara*, 353 F.3d at 405.

III.

The parties agree that the Court must apply Texas law to the facts of the case because federal jurisdiction was based on the parties' diversity. *See Gen. Accident Ins. Co. v. Unity/Waterford-Fair Oaks Ltd. P'ship*, 288 F.3d 651, 653 (5th Cir. 2002). Under Texas law, an insurer's duty to defend an insured is determined by examining the allegations in the petition filed against the insured and the relevant insurance policy. *Guideone Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006); *National Union Fire Ins. Co. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). This standard is referred to as the "eight corners" rule. *Merchs. Fast Motor Lines*, 939 S.W.2d at 141. When applying the eight corners rule, courts are to give the allegations in the petition a liberal interpretation in favor of the insured. *Id*. Courts are to consider the allegations in light of the policy provisions without reference to their validity and without reference to what the parties know or believe to be the true facts. *See Argonaut S.W. Ins. Co. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973). The Court cannot read facts into the pleadings, look outside of the pleadings, or "imagine factual scenarios which might trigger coverage." *Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d at 142.

To establish a duty to defend, the pleadings must allege a claim that is potentially covered by the policy. *Fidelity & Guar. Ins. Underwriters v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982). Under Texas law, the insured party bears the initial burden of showing that a claim is potentially within the scope of coverage. *Great Amer. Ins. Co. v. Calli Homes, Inc.*, 236 F.Supp.

2d 693, 697 (S.D. Tex. 2002). If the insurer relies on policy exclusions in denying coverage, the burden is on the insurer to prove that one or more of the exclusions apply. *Id*. Once the insurer has proven that an exclusion applies, the burden shifts back to the insured, who must show that the claim falls within an exception to the exclusion. *See Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 723 (5th Cir. 1999).

The interpretation of an insurance policy is a question of law for this Court. *See New York Life Ins. Co. v. Travelers Inc. Co.*, 92 F.3d 336, 338 (5th Cir. 1996). Under Texas law, a court shall apply the same rules of interpretation to insurance contracts as to contracts in general. *See id*. The Court's primary concern in interpreting a contract is to "ascertain and to give effect to the intentions of the parties as expressed in the instrument." *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980). This effect can be achieved by reading all parts of a contract together. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). Courts should be particularly wary of isolating one clause from its surroundings or considering a clause, phrase, sentence, or section of a contract apart from other provisions. *Id*.; *see also Carrizales v. State Farm Lloyds*, 518 F.3d 343, 346 (5th Cir. 2008).

When terms are defined in an insurance contract, those definitions control. *See Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997). When terms are not defined in an insurance contract, they are to be given their plain, ordinary, and generally accepted meaning, unless the contract indicates that the terms were used in a technical or different sense. *See Ramsay v. Maryland American General Ins. Co.*, 533 S.W.2d 344, 346 (Tex. 1976).

If the contract is worded so that it can be given only one reasonable construction, it is enforced as written. *See Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). But if an insurance contract is susceptible to more than one reasonable

interpretation, uncertainty must be resolved by adopting the construction that most favors the insured party. *Hudson*, 811 S.W.2d at 555. The Court must adopt the construction of an exclusionary clause urged by the insured party, so long as that construction is not unreasonable, and regardless of whether or not the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent. *See Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977). In other words, ambiguously worded exceptions or limitations on liability shall be strictly construed against the insurer and in favor of the insured. *See Hudson*, 811 S.W.2d at 555.

This rule applies, however, only if the terms of the contract are deemed to be ambiguous. *See Great Amer*., 236 F. Supp. 2d at 690. Whether or not an insurance contract is ambiguous is a question of law that the Court must decide. *Id*. The fact that the parties disagree as to coverage does not create an ambiguity. *Id*. Extrinsic evidence is not admissible for the purpose of creating an ambiguity. *Id*.; *see also Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). If the language of the insurance contract is subject to more than one reasonable interpretation, the contract is ambiguous. *See Glover*, 545 S.W.2d at 761.

A.

To establish a duty to defend, the pleadings must allege a claim that is potentially covered by the policy. *McManus*, 633 S.W.2d at 788. The parties do not dispute that the policy in question was valid and that the events discussed in Exxon's complaint took place while the policy was in place. (Instrument Nos. 52 at 13-14; 70 at 20).

However, Defendant does argue that Exxon's complaint did not trigger Defendant's duty to defend because Exxon's petition does not allege covered property damage. (Instrument No. 52 at 13-14). Plaintiff contends that the duty to defend is clear from the pleadings in the Exxon

petition. (Instrument No. 61 at 11-12). Defendant has analyzed Plaintiff's allegations about the Exxon petition and asserts that, because the claim for damage is related to the removal and replacement process, it is not covered property damage and does not trigger a duty to defend. (Instrument No. 52 at 14). The Exxon petition alleges, among other factual allegations, that Plaintiff "caused the damages sustained by ExxonMobil, including the cost to purchase replacement flanges and remove and replace the defective flanges, but also damage to ExxonMobil's tangible property from the resulting loss of use." (Instrument No. 40-2 at 8). The insurance policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and "loss of use of tangible property that is not physically injured." (Instrument No. 44-2 at 21). Because property damage under the policy includes loss of use, the Court holds that Exxon's petition sufficiently alleges a claim potentially covered by the policy.

Alternately, Defendant argues that Exxon's petition does not contain sufficiently detailed allegations to adequately invoke coverage. (Instrument No. 52 at 15). In support of this proposition, Defendant cites to *PPI Tech. Servs., L.P. v. Liberty Mut. Ins. Co.*, 701 F.3d 1070 (5th Cir. 2012), *opinion withdrawn and superseded on reh'g*, 12-40189, 2013 WL 829040 (5th Cir. Mar. 1, 2013). (Instrument No. 52 at 15). The original Fifth Circuit opinion stated, "[w]e do not consider mere use of the phrase 'property damage' and parroted Policy language as sufficient factual allegations. None of the assertions of 'property damage' in the underlying lawsuits are accompanied by facts illustrating specific harm or damage to tangible property." *PPI*, 701 F.3d at 1077. Here, however, Exxon has done more than include the term "property damage" in its complaint; it has specifically alleged how its property was damaged through loss of use. (Instrument No. 44-2 at 21). Additionally, the language that Defendant relies on in *PPI* case is

not part of the superseding opinion. *See generally PPI*, 2013 WL 829040. Defendant therefore cannot rely on *PPI* to claim that Exxon's complaint is insufficiently detailed to raise property damage, including loss of use damage.

Accordingly, The Court finds that Exxon's petition alleges a claim potentially covered by the policy.

B.

Defendant relies on policy exclusions in refusing to defend Plaintiff. Accordingly, Defendant bears the burden of proving that one or more of the exclusions apply. *See Calli Homes*, 236 F. Supp. 2d at 697. Plaintiff alleges that two exclusions bar coverage of the Exxon lawsuit, the "your product" exclusion and the "impaired property" exclusion.

1.

Defendant claims that the "your product" exclusion applies to exclude the duty to defend against all claims Exxon alleges in its complaint. Under the "your product" exclusion, Plaintiff is not covered for "'property damage' to 'your product' arising out of it or any part of it." (Instrument No. 44-2 at 11; Instrument No. 61-4 at 3). Plaintiff has conceded that there is no coverage for replacement of the flanges themselves. (Instrument No. 61 at 13-14). This exclusion also excludes coverage for the "repair or replacement of [Plaintiff's] own defective work product." *Dal-Tile Corp. v. Zurich Am. Ins. Co.*, 3:02-CV-0751-K, 2004 WL 414900 (N.D. Tex. Feb. 2, 2004). Therefore, the defective flanges and the costs to repair and replace the flanges themselves are excluded under the "your product" exclusion.

However, the exclusion "does provide coverage for the insured's liability for damages to other property resulting from the defective condition of the work even though the injury to the work product itself is excluded." *Id.* Therefore, the Court must determine whether Exxon has

alleged damage to other property in its complaint. Exxon alleges "damage to ExxonMobil's tangible property from the resulting loss of use of ExxonMobil's Baytown and Baton Rouge refineries while the new flanges were being obtained and installed" in its negligence cause of action. (Instrument No. 40-2 at 8). Loss of use is clearly included in the policy's definition of property damage. (Instrument No. 44-2 at 21). Therefore, the exclusion does not bar coverage for Exxon's entire claim, only for "the costs associated with investigating the flange defect, acquiring replacement flanges, [and] removing and replacing the defective flanges." (Instrument No. 40-2 at 17).

In sum, the "your product" exclusion bars coverage for the defective flanges themselves, as well as the cost to repair and replace them. However, the "your product" exclusion does not bar coverage for the loss of use of Exxon's refineries during the repair and replacement process.

2.

Defendant also claims that the "impaired property" exclusion applies to exclude the duty to defend against all claims Exxon alleges in its complaint. The "impaired property" exclusion denies coverage for claims arising out of "'property damage' to 'impaired property' or property that has not been physically injured, arising out of: (1) A defect, deficiency, inadequacy, or dangerous condition in 'your product' or your work.'" (Instrument No. 44-2 at 11). Additionally, the exclusion contains an exception, which states that the "exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to 'your property' or 'your work' after it has been put to its intended use." (Instrument No. 44-2 at 11).

Because the Court has already held that the "your product" exclusion bars coverage for the defective flanges, as well as the cost of replacing and repairing them, the Court need only address whether the exclusion bars coverage for the loss of use of Exxon's refineries during the

repair and replacement process. Exxon does not claim that its property was physically injured, only that it suffered loss of use while it was attempting to remove and replace the defective flanges. (Instrument No. 40-2 at 4). Additionally, Exxon clearly alleges a defect, deficiency, inadequacy, or dangerous condition in Plaintiff's work. (Instrument No. 40-2 at 2-4). Because property damage under the policy includes loss of use (Instrument No. 44-2 at 21), the Court finds that Defendant has met its burden of establishing that the remainder of the claims found in Exxon's complaint are barred by the "impaired property" exclusion.

Plaintiff argues that Defendant has not refuted Plaintiff's claim that an exception applies to the "impaired property" exclusion. (Instrument No. 64 at 6; Instrument No. 61 at 14, n.6). However, Plaintiff has the burden of showing that the claim falls within an exception to the exclusion. *See Grapevine*, 197 F.3d at 723. Plaintiff claims that the exception to the exclusion applies because Exxon's loss of use resulted from the single flange suddenly and accidentally failing during pressure testing. (Instrument No. 64 at 6; Instrument No. 61 at 14, n.6). The Court finds that the exception to the exclusion does not apply. Exxon's complaint cannot be said to allege a sudden and accidental injury. Instead, Exxon's complaint claims that "a leak was discovered in one of the flanges" because "the flanges were manufactured incorrectly, including improper heat treatment during the forging process, and that repairs had been made on the flanges but were not done in compliance with ASTM standards as required." (Instrument No. 40-2 at 3). These allegations simply cannot indicate a sudden and accidental injury to the flange, but rather a manufacturing defect. Plaintiff cannot meet its burden of demonstrating that the exception to the "impaired property" exclusion applies.

The Court finds that Defendant had no duty to defend Plaintiff in the Exxon lawsuit. Accordingly, Defendant's Motion for Summary Judgment on the duty to defend is **GRANTED** and Plaintiff's partial motions for summary judgment on the same issue are **DENIED**.

IV.

"In liability insurance policies generally, an insurer assumes both the duty to indemnify the insured, that is, to pay all covered claims and judgments against an insured, and the duty to defend." *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd.*, 300 S.W.3d 740, 743-44 (Tex. 2009) (quoting 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 200:3 (3d ed. 2009). However, the duty to defend and the duty to indemnify "are distinct and separate duties." *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004). The Texas Supreme Court "noted in *Farmers Texas County Mutual Insurance Co. v. Griffin* that one duty may exist without the other." *Horton-Texas*, 200 S.W.3d at 743 (citing *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997)). "To that extent, the duties to defend and indemnify enjoy a degree of independence from each other." *Horton-Texas*, 300 S.W.3d at 744.

While analysis of the duty to defend has been strictly circumscribed by the eight-corners doctrine, it is well settled in Texas that the "facts actually established in the underlying suit control the duty to indemnify." *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009). "As with any other contract, breach or compliance with the terms of an insurance policy is determined not by pleadings, but by proof." *Horton-Texas*, 300 S.W.3d at 744.

Here, the case has been resolved by a settlement agreement. "Where the liability in the underlying litigation is resolved before trial without an opportunity to develop the facts, 'additional evidence—not relevant to the issue of liability but essential to coverage—may be

introduced during the coverage litigation to establish or refute the duty to indemnify.'" *Mount Vernon Fire Ins. Co. v. Boyd*, H–11–3785, 2012 WL 1610745, *4 (S.D. Tex. May 8, 2012), quoting *Colony Ins. Co.*, 647 F.3d at 254; *see also* Nat'l *Union Fire Ins. of Pittsburgh, Pa. v. Puget Plastics Corp.*, 532 F.3d 398, 404 (5th Cir. 2008) (holding that the trial court can consider evidence regarding facts required to determine coverage that were not adjudicated in the underlying litigation).

The Court first notes that the parties agree that no indemnification is possible for the cost to replace the flanges themselves. (Instrument No. 61 at 13-14). Therefore, the Court's analysis will not address this issue.

The parties allege that the indemnification issue can be resolved by referring to the August 29, 2011 offer of settlement letter from Exxon to Plaintiff and the Bellingham deposition. (Instrument Nos. 70-2; 70-6). Once again, Defendant claims that two policy exclusions apply and preclude its duty to indemnify: the "your product" exclusion and the "impaired property" exclusion. Plaintiff denies that any part of the indemnification is excluded by the policy exclusions beyond the cost of buying new flanges. (Instrument No. 61 at 14).

A.

As discussed above, the "impaired property" exclusion excludes from coverage claims arising out of "'property damage' to 'impaired property' or property that has not been physically injured, arising out of: (1) A defect, deficiency, inadequacy, or dangerous condition in 'your product' or your work.'" (Instrument No. 44-2 at 11). The policy defines "impaired property" as "tangible property . . . that cannot be used or is less useful because:

> (a) It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
> (b) You have failed to fulfill the terms of a contract or agreement;

> if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

(Instrument No. 44-2 at 19).

Defendant claims that this exclusion applies to preclude coverage for any aspect of Exxon's claim for property damage involving the removal and replacement of the flanges or for loss of use of the refineries while the flanges were replaced. (Instrument No. 61-4 at 4). Plaintiff claims that the exclusion cannot apply because Exxon had to remove and replace other portions of the NRD units in order to restore the units to use. (Instrument No. 61 at 15).

In support of its position, Defendant cites *Gentry Mach. Works, Inc. v. Harleysville Mut. Ins. Co.*, 621 F. Supp. 2d 1288, 1298 (M.D. Ga. 2008). There, in applying the "impaired property" exclusion, the court held that

> the Policy does not apply to damages to the boiler or its components directly caused by repairs to the [insured's] pedestals. . . These parts may have been damaged in the process of their removal, and they often had to be replaced entirely after the repair to the pedestals was complete. Although these boilers sustained damage to component parts other than the pedestals themselves, no coverage exists for these damages as they were not caused directly by pedestal failure but rather were incurred during the repair and/or replacement of the faulty pedestals.

Id. at 1298 n.6 (citing references omitted). Plaintiff claims that this case does not apply because the case is not controlling authority, but it does not point to any substantive differences in Georgia law that would make this case inapplicable. (Instrument No. 61 at 18-19). Defendant argues that *Gentry* notes that Georgia, in fact, "follows the majority position" when it comes to analysis of the business risk exclusions. *Id.* at 1294.

Plaintiff directs the Court to *Grapevine*, 197 F.3d at 728, in which the Fifth Circuit found the "impaired property" exclusion inapplicable to the facts of that case. There, the insured was meant to perform excavation, backfilling, and compacting work in connection with the

contractor's construction of a parking lot. *Id.* at 722. However, the "select fill materials provided and installed by [the insured] failed to meet specifications and, as a result, has caused damage to the work of" one of the other subcontractors. *Id.* The Fifth Circuit compared *Grapevine* to a Michigan case where the insured installed gasoline containment systems that leaked and contaminated the surrounding soil. *See Action Auto Stores, Inc. v. United Capitol Ins. Co.*, 845 F.Supp. 417, 419 (W.D. Mich. 1993). The Fifth Circuit reasoned that in *Grapevine*, as in *Action Auto*, the asphalt paving could not be "restored to use" by "the repair, replacement, adjustment or removal" of the insured's defective product or work. *Grapevine*, 197 F.3d at 728.

Defendant argues that *Grapevine* is distinguishable from the facts in this case because there was an allegation that the insured's defective work or product itself caused damage independent of the repair work. (Instrument No. 72 at 3). Defendant claims that in this case, "[t]here is no evidence . . . that there was any 'physical injury' to any part of the non-road diesel units that could be attributed to the defective flanges until such time as measures were taken to remove and replace them." (Instrument No. 72 at 3).

Plaintiff also cites to *Employers Mut. Cas. Co. v. Grayson*, CIV-07-917-C, 2008 WL 2278593 (W.D. Okla. May 30, 2008). There, the insured provided concrete for a new bridge, and other contractors provided the bridge structure, steel rebar, expansion joints, and associated labor. *Id.* at *1-2. After the bridge was determined to be unusable because the insured's concrete was defective, the court found that the "impaired property" exclusion did not preclude coverage for the physical injury to component parts during the removal and repair process. *Id.* at *6.

Bellingham's deposition described in detail the process of removing the defective flanges and installing new flanges. The temperature coating was stripped off when the flanges were removed. (Instrument No. 70-2 at 8). Gaskets were also damaged in the process. (Instrument No.

70-2 at 8). The pipe next to each flange was ground down "to make a good potential fit for the next weld" of the new flange. (Instrument No. 70-2 at 8). Exxon also replaced insulation. (Instrument No. 70-2 at 9). Bellingham confirmed that the damage done to other parts surrounding the defective flanges was all part of the process of removing and replacing the flanges. (Instrument No. 70-2 at 15, 17).

The Court must therefore determine whether the "impaired property" exclusion precludes coverage for damage that occurs during the repair and replacement process to property other than the insured's product—in this case, the temperature coating, the gaskets, the piping, and the insulation—when there is no allegation that the product's defect caused independent damage.[4] As an initial matter, the Court finds that *Grapevine* does not control the facts of this case. In *Grapevine*, the Fifth Circuit explicitly noted that the insured's defective work caused direct damage to the work of another subcontractor, requiring the general contractor to "correct the deficiency by installing an asphalt overlay on the lot." *Grapevine*, 197 F.3d at 722. Therefore, both in *Grapevine* and in *Action Auto*, the Michigan case that guided the Fifth Circuit's analysis, the insured's work caused damage before—and independent of—the repair and replacement process. *Grapevine*, 197 F.3d at 728; *Action Auto*, 845 F.Supp. 417, 426. Furthermore, the *Grapevine* court specifically noted that the parties' proposed solution, to add an asphalt overlay to the lot, would not repair, replace, adjust, or remove the insured's underlying work or allow the insured to fulfill the terms of its contract, as required by the policy. *Grapevine*, 197 F.3d at 728.

[4] The Court notes that Bellingham did testify that he did not know if the insulation surrounded the single leaking flange was damaged initially. (Instrument No. 70-2 at 13). However, there is no evidence that this damage in fact occurred. The Court will not find an issue of material fact based on a deponent's testimony that damage may have occurred, without any basis for personal knowledge. Furthermore, Plaintiff does not even argue that this is sufficient property damage, independent of the repair and replacement process, for the Court to find that the "impaired property" exclusion does not apply. Accordingly, the Court finds that Bellingham's testimony is insufficient to establish that any property beside the flanges was damaged outside the repair and replacement process.

None of the *Grapevine* court's reasoning holds true in this case, however. Plaintiff's work did no damage to Exxon's property until the repair and replacement work began. The proposed solution—removing the flanges and replacing them—clearly fits within the policy definition of "impaired property," which requires that Exxon's property be able to "be restored to use by the repair, replacement, adjustment or removal of" the flanges. (Instrument No. 44-2 at 19). This case is distinguishable from *Grapevine*, and therefore the impaired property exclusion is not inapplicable under Fifth Circuit precedent.

The Court notes that there is precedent within this district, albeit not applying the impaired property exclusion, for finding that repair and replacement work that damages other property should be considered part of the cost of the repair itself. In *Bldg. Specialties, Inc. v. Liberty Mut. Fire Ins. Co.*, 712 F. Supp. 2d 628 (S.D. Tex. 2010), where the insured installed faulty duct work and the replacement work required tearing down and replacing the surrounding ceiling, the court held that the "cost of tearing down, then replacing, the ceiling was part of the cost of repairing the duct work." *Id.* at 641.

In considering *Building Specialty*'s reasoning as well as the court's analysis in *Gentry*, both cases involve damage to property outside the insured's product during the repair and replacement process. The distinction, however, is that the costs of replacing those additional products were included in the overall cost of repairing the insured's product. *Bldg. Specialties*, 712 F. Supp. 2d at 641; see *Gentry*, 621 F. Supp. 2d at 1298, 1298 n.6. In *Gentry*, "although the[] boilers sustained damage to component parts other than the pedestals themselves, no coverage exist[ed] for these damages as they were not caused directly by pedestal failure but rather were incurred during the repair and/or replacement of the faulty pedestals." *Gentry*, 621 F. Supp. 2d at 1298 n.6. Here, the work surrounding the flanges sustained damage during the repair and

replacement of the flanges themselves, but no coverage exists for these damages under the "impaired property" exclusion because the damage was not caused by any flange failure but instead occurred during the investigation, repair, and replacement of the flanges. Furthermore, no coverage exists for the loss of use Exxon suffered while the flanges were being replaced because the definition of property damage under the policy includes loss of use. (Instrument No. 44-2 at 21).

Additionally, *Grayson* applies a construction of the policy language that neither party has requested. Neither party has suggested that the language is ambiguous, nor have Texas courts or courts interpreting Texas law found it to be so. *Grayson* defines "impaired property" as "property damaged, because of a loss of use and *not a physical injury*, resulting from its inclusion of the insured's defective product." *Grayson*, 2008 WL 2278593 at *6 (emphasis added). However, there is nothing in the policy definition of "impaired property" that requires that the property not be damaged because of a physical injury. *See* (Instrument No. 44-2 at 19). In fact, that construction would render the "or" in the exclusion itself (excluding "'property damage' to 'impaired property' *or* property that has not been physical injured," (Instrument No. 44-2 at 11)) completely superfluous. That construction would render the analysis in *Grapevine* unnecessary. If the Fifth Circuit had interpreted the policy in the same manner as the *Grayson* court, the Fifth Circuit would have simply held that the parking lot suffered a physical injury because of the insured's faulty product and that the "impaired property" exclusion could not apply. *See Grapevine*, 197 F.3d at 728. This Court declines to follow the *Grayson* construction and, because of this, finds that the *Grayson* court's interpretation of the "impaired property" exclusion should not be followed by Texas courts.

Plaintiff argues that answering a single, "simple" question demonstrates that the exclusion cannot apply. Plaintiff claims that Defendant's position fails when the Court asks, "could ExxonMobil use its units when the defective flanges were installed, but before the commencement of the replacement operations?" (Instrument No. 70 at 19). Plaintiff argues that the answer is no, and that this "means the flanges caused damages and the impaired property exclusion does not apply." (Instrument No. 70 at 19). Plaintiff's argument is faulty, however, because Bellingham's testimony is very clear that the NRD project was a new facility that was just at the testing stage when the leak was discovered; it was not yet operational. (Instrument No. 70-2 at 4-5). In fact, the leak was only discovered through testing conducted before the system was put into operation. (Instrument No. 70-2 at 5). Exxon could not have used its NRD units at any time when the flanges were installed, but not because the flanges were defective. Plaintiff's question does not prove its intended point.

Finally, the Court addresses whether Plaintiff has met its burden of establishing that the exception to the "impaired property" exclusion applies. As described above, the exception to the "impaired property" exclusion states that the "exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to 'your product' or 'your work' after it has been put to its intended use." (Instrument No. 44-2 at 11). The Court finds that the exception to the exclusion does not apply. Bellingham testified that the leaky flange was discovered during hydrotesting and that the NRD units were not yet operational, which indicates the flanges had not been put to their intended use. *See* (Instrument No. 70-2 at 5). Furthermore, Exxon's investigation revealed manufacturing defects in the flanges and a failure to comply with contract specifications; there is no indication that the hydrotesting caused the leak suddenly or accidentally. (Instrument No. 70-6 at 3-7). Read in favor of Plaintiff, the most Exxon's

allegations can state is that the hydrotesting revealed the already-existing defects in the flanges. Plaintiff cannot meet its burden of demonstrating that the exception to the "impaired property" exclusion applies.

The Court finds that Defendant had no duty to indemnify Plaintiff in the Exxon lawsuit. Accordingly, Defendant's Motion for Summary Judgment on the duty to indemnify is **GRANTED** and Plaintiff's partial motions for summary judgment on the same issue are **DENIED**.

B.

Defendant also claims that the "your product" exclusion applies. However, because the Court has already determined that the "impaired property" exclusion bars coverage, the Court need not decide whether the "your product" exclusion also applies.

C.

In Plaintiff's partial motions for summary judgment, it seeks liquidated damages in the form of defense costs, indemnification, statutory interest, and attorney's fees. (Instrument No. 87 at 21-24). However, because the Court has held that Defendant is not liable to Plaintiff for breach of the duty to defend or indemnify, Defendant is not liable to Plaintiff for damages, costs, or fees.

V.

Plaintiff has also asserted claims against Defendant for violations of the Texas Insurance Code § 541.060, § 541.061, § 542.058, the Deceptive Trade Practices Act under Texas Business & Commerce Code § 17.46, and the *Stowers* duty. (Instrument No. 40). Defendant argues that summary judgment is proper on all claims because there was no policy coverage. (Instrument

No. 52 at 15-18). Plaintiff responds that, because the policy did provide coverage for the damages Exxon sought, summary judgment must be denied. (Instrument No. 61 at 22-23).

Plaintiff's allegations under the Texas Insurance Code, Deceptive Trade Practice Act, and *Stowers* duty all stem from Plaintiff's allegation that Defendant "knew that the type of damages arising from repair operations incurred by Exxon were covered 'property damage' and the exclusions asserted by them in the letters denying coverage to [Plaintiff] were not applicable." (Instrument No. 40 at 15). The Court has already held that Defendant had no duty to defend or indemnify Plaintiff in the Exxon lawsuit. Therefore, Defendant's position, that there was no policy coverage, is correct.

The good-faith duty under § 541.060 *et seq.* is triggered only where "(1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it." *Pride Transp. v. Cont'l Cas. Co.*, 11-10892, 2013 WL 586791 (5th Cir. Feb. 6, 2013) (citing *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 255 (Tex. 2002) (interpreting a previous version of the statute)). Because the policy did not cover Plaintiff's claim, Plaintiff's claim under § 541.060 fails as a matter of law.

Plaintiff also claims that Defendant violated Texas Insurance Code §§ 541.061(1)-(3), which holds that:

> It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to misrepresent an insurance policy by:
>
> (1) making an untrue statement of material fact;
>
> (2) failing to state a material fact necessary to make other statements made not misleading, considering the circumstances under which the statements were made; [or]
>
> (3) making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact.

Id. Again, however, these allegations would require the Court to accept Plaintiff's allegation that Defendant "knew" that the policy covered the damages at issue, and the Court has already held that the damages alleged by Exxon were not covered by the insurance policy. Therefore, Plaintiff's claim under § 541.061 fails as a matter of law.

Next, Plaintiff alleges that Defendant failed to comply with Texas Insurance Code § 542.001 *et seq.*, which requires an insurer to promptly pay an insurance claim and follow certain procedures and deadlines. However, the Insurance Code requires that the insurer be "liable for [the] claim under an insurance policy" before it will be found to have violated the statute. *See* §§ 542.058(a), 542.060. Because the Court has held that Defendant is not liable for the claim under its policy, Defendant also has not violated §§ 542.001 *et seq*.

Plaintiff does not make explicit which section of § 17.46 its Deceptive Trade Practice Act claim relies on. (Instrument No. 40 at 14-19). However, the success of Plaintiff's claim depends on the validity of its Insurance Code claims, which the Court has determined Plaintiff cannot recover on. Therefore, the Court likewise holds Plaintiff cannot recover on its § 17.46 claim. *See Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 446 (Tex. 2012), reh'g denied (Sept. 21, 2012) (holding that because the plaintiff's Insurance Code claim failed, his resulting DTPA claim must also fail).

Plaintiff also alleges that Defendant violated its *Stowers* duty to exercise ordinary care when settling a third-party claim against its insured. (Instrument No. 40 at 19-20). However, Texas law is clear that "[f]or the duty to arise, there must be coverage for the third-party's claim." *Phillips v. Bramlett*, 288 S.W.3d 876, 879 (Tex. 2009). Because there was no coverage under the policy, Defendant did not fail to settle within the meaning of the *Stowers* doctrine.

To the extent that Plaintiff alleges a breach of the common law duty of good faith and fair duty, that claim is dismissed as well. The Texas Supreme Court has held that there "can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995). Because Defendant promptly denied Plaintiff's request for coverage, and the Court has held that there is no coverage under the policy, Plaintiff's cause of action fails as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment on Plaintiff's claims for violations of the Texas Insurance Code, Deceptive Trade Practices Act, *Stowers* duty, and breach of good faith and fair dealing is **GRANTED**.

VI.

Based on the foregoing, IT IS HEREBY ORDERED THAT Defendant Liberty Mutual's motion for summary judgment (**Instrument No. 52**) is **GRANTED**. Plaintiff U.S. Metals' partial motions for summary judgment (**Instrument No. 70; Instrument No. 87**) are **DENIED**, and judgment is entered in favor of Defendant.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 2nd day of July, 2013, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE