

No. 19-30182

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ATLANTIC SPECIALTY INSURANCE COMPANY,
EXCESS UNDERWRITERS SUBSCRIBING SEVERALLY TO POLICY
NUMBER TMU - 407387,

PLAINTIFFS - COUNTER DEFENDANTS - APPELLEES

V.

PHILLIPS 66 COMPANY,
DEFENDANT - THIRD PARTY PLAINTIFF –
COUNTER CLAIMANT - APPELLANT

V.

BLANCHARD CONTRACTORS, INCORPORATED,
THIRD PARTY DEFENDANT - APPELLEE

On Appeal from the United States District Court, Eastern District of
Louisiana, No. 2:17-CV-9318, Honorable Eldon Fallon, Presiding

**RECORD EXCERPTS OF APPELLANT,
PHILLIPS 66 COMPANY**

Glenn M. Farnet
Michael deBarros
KEAN MILLER LLP
400 Convention St., Suite 700
Baton Rouge, LA 70802
Telephone: 225-387-0999

Counsel for Phillips 66 Company

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**U.S. District Court
Eastern District of Louisiana (New Orleans)
CIVIL DOCKET FOR CASE #: 2:17-cv-09318-EEF-JVM**

Atlantic Specialty Insurance Company et al v. Phillips 66 Company Date Filed: 09/19/2017
Assigned to: Judge Eldon E. Fallon Date Terminated: 02/11/2019
Referred to: Magistrate Judge Janis van Meerveld Jury Demand: None
Case in other court: U.S. Fifth Circuit Court of Appeals, 19-30182 Nature of Suit: 110 Insurance
Cause: 28:2201 Declaratory Judgment (Insurance) Jurisdiction: Diversity

Plaintiff**Atlantic Specialty Insurance Company**

represented by **Alfred Jackson Rufty , III**
Harris & Rufty, LLC
650 Poydras St.
Suite 2710
New Orleans, LA 70130
504-525-7500
Email: ajr@harrisrufty.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cindy Galpin Martin
Harris & Rufty, LLC
650 Poydras St.
Suite 2710
New Orleans, LA 70130
504-525-7500
Email: cgm@harrisrufty.com
TERMINATED: 06/29/2018

Rufus C. Harris , III
Harris & Rufty, LLC
650 Poydras St.
Suite 2710
New Orleans, LA 70130
504-525-7500
Email: rch@harrisrufty.com
ATTORNEY TO BE NOTICED

Plaintiff**Excess Underwriters Subscribing
Severally to Policy No. TMU - 407387**

represented by **Alfred Jackson Rufty , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cindy Galpin Martin
(See above for address)
TERMINATED: 06/29/2018

Rufus C. Harris , III
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Phillips 66 Company

represented by **Glenn Michael Farnet**
Kean Miller (Baton Rouge)
II City Plaza
400 Convention St.
Suite 700
PO Box 3513 (70821-3513)
Baton Rouge, LA 70802
225-387-0999
Email: Glenn.Farnet@keanmiller.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Francis Jakuback
Kean Miller (Baton Rouge)
II City Plaza
400 Convention St.
Suite 700
PO Box 3513 (70821-3513)
Baton Rouge, LA 70802
225-387-0999
Email: john.jakuback@keanmiller.com
ATTORNEY TO BE NOTICED

Michael deBarros
Kean Miller (Baton Rouge)
II City Plaza
400 Convention St.
Suite 700
PO Box 3513 (70821-3513)
Baton Rouge, LA 70802
225-382-3445
Email: michael.debarros@keanmiller.com
ATTORNEY TO BE NOTICED

Third Party Plaintiff

Phillips 66 Company

represented by **Glenn Michael Farnet**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Francis Jakuback
(See above for address)
ATTORNEY TO BE NOTICED

Michael deBarros
(See above for address)
ATTORNEY TO BE NOTICED

V.

Third Party Defendant

Blanchard Contractors, Inc.

represented by **Rufus C. Harris , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alfred Jackson Rufty , III
(See above for address)
ATTORNEY TO BE NOTICED

Cindy Galpin Martin
(See above for address)
TERMINATED: 06/29/2018

Counter Claimant

Phillips 66 Company

represented by **Glenn Michael Farnet**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Francis Jakuback
(See above for address)
ATTORNEY TO BE NOTICED

Michael deBarros
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

Atlantic Specialty Insurance Company

represented by **Alfred Jackson Rufty , III**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Cindy Galpin Martin
(See above for address)
TERMINATED: 06/29/2018

Rufus C. Harris , III
(See above for address)
ATTORNEY TO BE NOTICED

Counter Defendant**Excess Underwriters Subscribing
Severally to Policy No. TMU - 407387**represented by **Alfred Jackson Rufty , III**
(See above for address)
LEAD ATTORNEY
*ATTORNEY TO BE NOTICED***Cindy Galpin Martin**
(See above for address)
*TERMINATED: 06/29/2018***Rufus C. Harris , III**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/19/2017	<u>1 (p.12)</u>	COMPLAINT against Phillips 66 Company (Filing fee \$ 400 receipt number 053L-6367604) filed by Atlantic Specialty Insurance Company, Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1 (p.12)</u> Civil Cover Sheet, # <u>2</u> Summons)Attorney Alfred Jackson Rufty, III added to party Atlantic Specialty Insurance Company(pty:pla), Attorney Alfred Jackson Rufty, III added to party Excess Underwriters Subscribing Severally to Policy No. TMU - 407387(pty:selreq).(Rufty, Alfred) (Entered: 09/19/2017)
09/20/2017	2	Initial Case Assignment to Judge Eldon E. Fallon and Magistrate Judge Janis van Meerveld. (jeg) (Entered: 09/20/2017)
09/22/2017	<u>3 (p.21)</u>	Summons Issued as to Phillips 66 Company. (cms) (Entered: 09/22/2017)
10/20/2017	<u>4 (p.23)</u>	<i>Phillips 66 Company's</i> ANSWER to <u>1 (p.12)</u> Complaint,, with Jury Demand , THIRD PARTY COMPLAINT with Jury Demand against Blanchard Contractors, Inc., COUNTERCLAIM with Jury Demand against Atlantic Specialty Insurance Company, Excess Underwriters Subscribing Severally to Policy No. TMU - 407387 by Phillips 66 Company. (Attachments: # <u>1 (p.12)</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3 (p.21)</u> Exhibit C, # <u>4 (p.23)</u> Exhibit D)Attorney Michael deBarros added to party Phillips 66 Company(pty:dft).(deBarros, Michael) (Entered: 10/20/2017)
11/02/2017	<u>5 (p.137)</u>	Request of Summons Issued as to Blanchard Contractors, Inc. filed by Phillips 66 Company re <u>4 (p.23)</u> Answer to Complaint,, Third Party Complaint,, Counterclaim,, (deBarros, Michael) (Main Document 5 replaced on 11/2/2017) (cms). (Entered: 11/02/2017)
11/02/2017	6	Correction of Docket Entry by Clerk re <u>5 (p.137)</u> Request for Summons Issued; Filing attorney did not properly format the pdf of summons. The pdf should not have the pink header nor the 3 red buttons at the bottom. When using a FORM, fill in the applicable fields then click the red PRINT button at the bottom to print the document to pdf format. Clerk has taken corrective action. (cms) (Entered: 11/02/2017)
11/02/2017	<u>7 (p.139)</u>	Summons Issued as to Blanchard Contractors, Inc.. (cms) (Entered: 11/02/2017)
11/10/2017	<u>8 (p.141)</u>	ANSWER to <u>4 (p.23)</u> Counterclaim by Atlantic Specialty Insurance Company, Excess Underwriters Subscribing Severally to Policy No. TMU - 407387.(Rufty,

		Alfred) Modified text on 11/13/2017 (cms). (Entered: 11/10/2017)
12/04/2017	<u>9</u> (p.144)	NOTICE: Scheduling Conference set for 1/11/2018 10:30 AM before case manager by telephone. By Clerk.(lag) (Entered: 12/04/2017)
12/11/2017	<u>10</u> (p.146)	ANSWER to <u>4</u> (p.23) Third Party Complaint by Blanchard Contractors, Inc. Attorney Alfred Jackson Rufty, III added to party Blanchard Contractors, Inc.(pty:3pd).(Rufty, Alfred) Modified text on 12/12/2017 (jls). (Entered: 12/11/2017)
01/08/2018	<u>11</u> (p.150)	Statement of Corporate Disclosure by Phillips 66 Company identifying Corporate Parent Phillips 66 for Phillips 66 Company (deBarros, Michael) (Entered: 01/08/2018)
01/11/2018	<u>12</u> (p.152)	SCHEDULING ORDER: Final Pretrial Conference set for 7/31/2018 08:30 AM before Judge Eldon E. Fallon. Status Conference set for 2/15/2018 03:30 PM before Judge Eldon E. Fallon. Jury Trial set for 8/20/2018 08:30 AM before Judge Eldon E. Fallon. All discovery must be completed by 7/2/2018. Signed by Judge Eldon E. Fallon on 1/11/18. (Attachments: # <u>1</u> (p.12) Pretrial Notice Form)(dno) (Entered: 01/11/2018)
01/16/2018	<u>13</u> (p.165)	ORDER - Plaintiff has informed the Court of a scheduling conflict. IT IS ORDERED that the early status conference currently scheduled for February 15, 2018 at 3:30 p.m. be CONTINUED to March 8, 2018 at 3:30 p.m. Signed by Judge Eldon E. Fallon on 1/16/2018. (cms) (Entered: 01/16/2018)
01/18/2018	<u>14</u> (p.166)	EXPARTE/CONSENT MOTION to Continue by Atlantic Specialty Insurance Company, Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1</u> (p.12) Proposed Order)(Rufty, Alfred) Modified to add exparte to text on 1/19/2018 (cms). (Entered: 01/18/2018)
01/19/2018	15	Correction of Docket Entry by Clerk re <u>14</u> (p.166) MOTION to Continue; Filing attorney should have selected Yes at the question 'Is this an Exparte/Consent Motion Y/N?' before clicking the Next button. Clerk modified docket text to reflect 'Exparte'. (cms) (Entered: 01/19/2018)
02/16/2018	<u>16</u> (p.169)	EXPARTE/CONSENT MOTION to Withdraw Document re <u>14</u> (p.166) MOTION to Continue by Atlantic Specialty Insurance Company, Blanchard Contractors, Inc., Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1</u> (p.12) Proposed Order)(Rufty, Alfred) (Entered: 02/16/2018)
02/21/2018	<u>17</u> (p.172)	ORDER granting <u>16</u> (p.169) Motion to Withdraw <u>14</u> (p.166) MOTION to Continue Trial and the trial date of August 20, 2018 remain in place, along with the Scheduling Order. Signed by Judge Eldon E. Fallon on 2/20/2018. (cms) (Entered: 02/21/2018)
03/08/2018	<u>18</u> (p.173)	Statement of Corporate Disclosure by Atlantic Specialty Insurance Company, Blanchard Contractors, Inc., Excess Underwriters Subscribing Severally to Policy No. TMU - 407387 (Rufty, Alfred) (Entered: 03/08/2018)
03/08/2018	<u>19</u> (p.176)	Minute Entry for proceedings held before Judge Eldon E. Fallon: Status Conference held on 3/8/2018. IT IS ORDERED that a telephone status conference is hereby SCHEDULED on April 24, 2018 at 1:30 p.m. The Court will initiate the call. (cms) (Entered: 03/09/2018)
04/10/2018	<u>20</u> (p.177)	MOTION for Partial Summary Judgment <i>on Applicability of La. R.S. 9:2780.1</i> by Phillips 66 Company. Motion(s) will be submitted on 5/9/2018. (Attachments: # <u>1</u> (p.12) Notice of Submission, # <u>2</u> Statement of Contested/Uncontested Facts, # <u>3</u>

		(p.21) Memorandum in Support, # <u>4</u> (p.23) Exhibit A (Declaration of Todd Denton), # <u>5</u> (p.137) Exhibit A-1 (MSA), # <u>6</u> Exhibit A-2 (Service Order), # <u>7</u> (p.139) Exhibit B (Declaration of Glenn Farnet), # <u>8</u> (p.141) Exhibit B-1 (4/4/17 Letter), # <u>9</u> (p.144) Exhibit B-2 (7/7//17 Letter), # <u>10</u> (p.146) Exhibit B-3 (9/12/17 Letter))(deBarros, Michael) (Entered: 04/10/2018)
04/10/2018	<u>21</u> (p.320)	MOTION for Partial Summary Judgment <i>on Atlantic Specialty Insurance Company's Duty to Defend</i> by Phillips 66 Company. Motion(s) will be submitted on 5/9/2018. (Attachments: # <u>1</u> (p.12) Notice of Submission, # <u>2</u> Statement of Contested/Uncontested Facts, # <u>3</u> (p.21) Memorandum in Support, # <u>4</u> (p.23) Exhibit A (Declaration of Todd Denton), # <u>5</u> (p.137) Exhibit A-1 (MSA), # <u>6</u> Exhibit A-2 (Service Order), # <u>7</u> (p.139) Exhibit B (Atlantic Policy), # <u>8</u> (p.141) Exhibit C (Calloway Petition), # <u>9</u> (p.144) Exhibit D (Jambon Petition))(deBarros, Michael) (Entered: 04/10/2018)
04/24/2018	<u>22</u> (p.518)	Minute Entry for proceedings held before Judge Eldon E. Fallon: Telephone Status Conference held on 4/24/2018. IT IS ORDERED that the submission dates for Defendant's <u>20</u> (p.177) <u>21</u> (p.320) MOTIONS for Partial Summary Judgment are hereby CONTINUED to June 20, 2018. Any other motion for summary judgment on related issues shall also be set for submission on June 20, 2018. IT IS FURTHER ORDERED that oral argument is hereby SCHEDULED on June 20, 2018 on Defendant's <u>20</u> (p.177) <u>21</u> (p.320) MOTIONS for Partial Summary Judgment, as well as for any subsequent motion for summary judgment on related issues. IT IS FURTHER ORDERED that the jury trial is hereby CONVERTED to a bench trial. The trial date is CONTINUED from August 20, 2018 to September 20, 2018 at 9:00 a.m. The pre-trial conference is CONTINUED from July 31, 2018 to September 13, 2018 at 1:30 p.m. (cms) (Entered: 04/25/2018)
04/27/2018	<u>23</u> (p.519)	SCHEDULING ORDER: Final Pretrial Conference set for 9/13/2018 01:30 PM before Judge Eldon E. Fallon. Bench Trial set for 9/20/2018 09:00 AM before Judge Eldon E. Fallon. All discovery must be completed by 8/14/2018. Signed by Judge Eldon E. Fallon on 4/27/18. (Attachments: # <u>1</u> (p.12) Pretrial Notice Form)(dno) (Entered: 04/27/2018)
05/31/2018	<u>24</u> (p.532)	EXPARTE/CONSENT MOTION for Leave to File <i>Supplemental Memorandum in Support of Phillips 66 Company's Motion for Partial Summary Judgment, rec. doc. 20</i> by Phillips 66 Company. (Attachments: # <u>1</u> (p.12) Proposed Order, # <u>2</u> Proposed Pleading, # <u>3</u> (p.21) Exhibit A, # <u>4</u> (p.23) Exhibit B)(Farnet, Glenn) Modified text/removed referral on 6/1/2018 (jls). (Entered: 05/31/2018)
06/01/2018	25	Correction of Docket Entry by Clerk re <u>24</u> (p.532) MOTION for Leave to File <i>Supplemental Memorandum in Support of Phillips 66 Company's Motion for Partial Summary Judgment, rec. doc. 20</i> . **Filing attorney incorrectly changed 'N' to 'Y' at the question 'Is this motion to be decided by the Magistrate Judge Y/N?'. This motion will be decided by the District Judge. Clerk took corrective action.** (jls) (Entered: 06/01/2018)
06/01/2018	<u>26</u> (p.569)	ORDER granting Phillips 66 Company's <u>24</u> (p.532) Motion for Leave to File its Supplemental Memorandum in Support of its Motion for Partial Summary Judgment. Signed by Judge Eldon E. Fallon on 6/1/18. (dno) (Entered: 06/01/2018)
06/01/2018	<u>27</u> (p.570)	SUPPLEMENTAL MEMORANDUM in Support filed by Phillips 66 Company re <u>20</u> (p.177) MOTION for Partial Summary Judgment <i>on Applicability of La. R.S. 9:2780.1</i> . (Attachments: # <u>1</u> (p.12) Exhibit A, # <u>2</u> Exhibit B)(dno) (Entered: 06/01/2018)

06/05/2018	<u>28</u> (p.604)	RESPONSE/MEMORANDUM in Opposition filed by Atlantic Specialty Insurance Company re <u>21</u> (p.320) MOTION for Partial Summary Judgment <i>on Atlantic Specialty Insurance Company's Duty to Defend</i> . (Attachments: # <u>1</u> (p.12) Statement of Contested/Uncontested Facts)(Duncan, Elton) (Entered: 06/05/2018)
06/05/2018	<u>29</u> (p.612)	**DEFICIENT** MOTION for Summary Judgment by Atlantic Specialty Insurance Company. Motion(s) will be submitted on 6/20/2018. (Attachments: # <u>1</u> (p.12) Memorandum in Support, # <u>2</u> Notice of Submission)(Rufty, Alfred) Modified on 6/6/2018 (jeg). (Entered: 06/05/2018)
06/06/2018	<u>30</u> (p.623)	MOTION for Summary Judgment by Atlantic Specialty Insurance Company. Motion(s) will be submitted on 6/20/2018. (Attachments: # <u>1</u> (p.12) Memorandum in Support, # <u>2</u> Statement of Contested/Uncontested Facts, # <u>3</u> (p.21) Notice of Submission)(Rufty, Alfred) (Entered: 06/06/2018)
06/07/2018	<u>31</u> (p.636)	RESPONSE/MEMORANDUM in Opposition filed by Blanchard Contractors, Inc. re <u>20</u> (p.177) MOTION for Partial Summary Judgment <i>on Applicability of La. R.S. 9:2780.1</i> . (Attachments: # <u>1</u> (p.12) Statement of Contested/Uncontested Facts)(Rufty, Alfred) (Entered: 06/07/2018)
06/07/2018	<u>32</u> (p.649)	MOTION for Summary Judgment <i>regarding La. R.S. 9:2780.1</i> by Blanchard Contractors, Inc.. Motion(s) will be submitted on 7/11/2018. (Attachments: # <u>1</u> (p.12) Statement of Contested/Uncontested Facts, # <u>2</u> Memorandum in Support, # <u>3</u> (p.21) Notice of Submission)(Rufty, Alfred) (Entered: 06/07/2018)
06/11/2018	<u>33</u> (p.656)	ORDER - At the request of the parties, IT IS ORDERED that the parties shall participate in a telephone status conference with the Court on Wednesday, June 13, 2018 at 9:00 a.m. Signed by Judge Eldon E. Fallon on 6/11/18.(dno) (Entered: 06/11/2018)
06/12/2018	<u>34</u> (p.657)	RESPONSE/MEMORANDUM in Opposition filed by Phillips 66 Company re <u>30</u> (p.623) MOTION for Summary Judgment . (Attachments: # <u>1</u> (p.12) Statement of Contested/Uncontested Facts)(deBarros, Michael) (Entered: 06/12/2018)
06/13/2018	<u>35</u> (p.666)	Minute Entry for proceedings held before Judge Eldon E. Fallon: A Telephone Status Conference was held on 6/13/2018. IT IS ORDERED that oral argument on the <u>30</u> (p.623) MOTION for Summary Judgment , <u>21</u> (p.320) MOTION for Partial Summary Judgment <i>on Atlantic Specialty Insurance Company's Duty to Defend</i> and <u>20</u> (p.177) MOTION for Partial Summary Judgment <i>on Applicability of La. R.S. 9:2780.1</i> is CONTINUED from 6/20/18 to 7/3/2018 at 9:00 AM before Judge Eldon E. Fallon. (dno) (Entered: 06/13/2018)
06/25/2018	<u>36</u> (p.668)	EXPARTE/CONSENT MOTION for Leave to File <i>Reply in Support of Rec Doc. 21</i> by Phillips 66 Company. (Attachments: # <u>1</u> (p.12) Proposed Pleading - Reply, # <u>2</u> Proposed Order - Motion for Leave)(deBarros, Michael) (Entered: 06/25/2018)
06/25/2018	<u>37</u> (p.677)	RESPONSE/MEMORANDUM in Opposition filed by Phillips 66 Company re <u>32</u> (p.649) MOTION for Summary Judgment <i>regarding La. R.S. 9:2780.1</i> . (Attachments: # <u>1</u> (p.12) Statement of Contested/Uncontested Facts)(deBarros, Michael) (Entered: 06/25/2018)
06/26/2018	<u>38</u> (p.689)	ORDER GRANTING <u>36</u> (p.668) Motion for Leave to File Reply Memorandum in Support of its Motion for Partial Summary Judgment. Signed by Judge Eldon E. Fallon on 6/26/2018. (mmv) (Entered: 06/26/2018)
06/26/2018		

	<u>39</u> <u>(p.690)</u>	Reply Memorandum filed by Phillips 66 Company, in Support of <u>21</u> (<u>p.320</u>) MOTION for Partial Summary Judgment <i>on Atlantic Specialty Insurance Company's Duty to Defend</i> . (mmv) (Entered: 06/26/2018)
06/26/2018	<u>40</u> <u>(p.696)</u>	ORDER: IT IS ORDERED that oral argument is hereby CONTINUED from July 3, 2018 to July 5, 2018 at 9:00 a.m. Signed by Judge Eldon E. Fallon on 6/26/2018.(mmv) (Entered: 06/26/2018)
06/27/2018	<u>41</u> <u>(p.697)</u>	EXPARTE/CONSENT MOTION to Withdraw Cindy Galpin Martin as Attorney by Atlantic Specialty Insurance Company, Blanchard Contractors, Inc., Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1</u> (<u>p.12</u>) Proposed Order)(Martin, Cindy) (Entered: 06/27/2018)
06/29/2018	<u>42</u> <u>(p.700)</u>	ORDER granting <u>41</u> (<u>p.697</u>) Motion for Attorney Cindy Galpin Martin to Withdraw as Attorney for Atlantic Specialty Insurance Company and Excess Underwriters Subscribing Severally to Policy No. TMU-407387 and Third Party Defendant Blanchard Contractors, Inc. Signed by Judge Eldon E. Fallon on 6/29/18. (dno) (Entered: 06/29/2018)
07/02/2018	<u>43</u> <u>(p.701)</u>	EXPARTE/CONSENT MOTION for Leave to File <i>Reply in Support of Rec Doc. 20</i> by Phillips 66 Company. (Attachments: # <u>1</u> (<u>p.12</u>) Proposed Order, # <u>2</u> Proposed Pleading)(deBarros, Michael) (Entered: 07/02/2018)
07/05/2018	<u>44</u> <u>(p.707)</u>	ORDER GRANTING <u>43</u> (<u>p.701</u>) Motion for Leave to File Reply Memorandum in Support of its Motion for Partial Summary Judgment. Signed by Judge Eldon E. Fallon on 7/5/2018. (mmv) (Entered: 07/05/2018)
07/05/2018	<u>45</u> <u>(p.708)</u>	Reply Memorandum filed by Phillips 66 Company, in Support of <u>20</u> (<u>p.177</u>) MOTION for Partial Summary Judgment <i>on Applicability of La. R.S. 9:2780.1</i> . (mmv) (Entered: 07/05/2018)
07/05/2018	<u>46</u> <u>(p.711)</u>	Minute Entry for proceedings held before Judge Eldon E. Fallon: Motion Hearing held on 7/5/2018 re <u>20</u> (<u>p.177</u>) MOTION for Partial Summary Judgment on Applicability of La. R.S. 9:2780.1. After argument Motion was taken under submission; re <u>21</u> (<u>p.320</u>) MOTION for Partial Summary Judgment on Atlantic Specialty Insurance Company's Duty to Defend. After argument Motion was taken under submission; re <u>30</u> (<u>p.623</u>) MOTION for Summary Judgment. After argument Motion was taken under submission. IT IS ORDERED that the parties have 10 days from this date to file any additional briefs to all of the motions listed above. (mmv) (Entered: 07/05/2018)
07/16/2018	<u>47</u> <u>(p.712)</u>	Memorandum by Phillips 66 Company re <u>20</u> (<u>p.177</u>) MOTION for Partial Summary Judgment <i>on Applicability of La. R.S. 9:2780.1 Post-Hearing Memorandum Regarding La. R.S. 9:2780.1</i> (Attachments: # <u>1</u> (<u>p.12</u>) Exhibit)(Farnet, Glenn) Modified text on 7/17/2018 (jeg). (Entered: 07/16/2018)
07/16/2018	<u>48</u> <u>(p.722)</u>	MEMORANDUM filed by Phillips 66 Company re <u>21</u> (<u>p.320</u>) MOTION for Partial Summary Judgment <i>on Atlantic Specialty Insurance Company's Duty to Defend - Post-Hearing Memorandum Regarding Atlantic's Duty to Defend</i> . (deBarros, Michael) (Entered: 07/16/2018)
07/16/2018	<u>49</u> <u>(p.729)</u>	Witness and Exhibit List by Phillips 66 Company. (Farnet, Glenn) (Entered: 07/16/2018)
07/16/2018	<u>50</u> <u>(p.733)</u>	Witness and Exhibit List by Atlantic Specialty Insurance Company. (Rufy, Alfred) (Entered: 07/16/2018)

07/16/2018	<u>51</u> (p.737)	Supplemental Memorandum filed by Atlantic Specialty Insurance Company, Blanchard Contractors, Inc., in opposition of <u>20</u> (p.177) MOTION for Partial Summary Judgment <i>on Applicability of La. R.S. 9:2780.1</i> . (Rufty, Alfred) (Entered: 07/16/2018)
07/31/2018	<u>52</u> (p.747)	**DEFICIENT** MOTION for Summary Judgment by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1</u> (p.12) Memorandum in Support)(Rufty, Alfred) Modified on 8/1/2018 (mmv). (Entered: 07/31/2018)
08/03/2018	<u>53</u> (p.752)	**DEFICIENT** MOTION for Summary Judgment by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1</u> (p.12) Memorandum in Support, # <u>2</u> Exhibit, # <u>3</u> (p.21) Notice of Submission)(Rufty, Alfred) Modified on 8/6/2018 (jeg). (Entered: 08/03/2018)
08/06/2018	<u>54</u> (p.797)	**DEFICIENT** MOTION for Summary Judgment by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. Motion(s) will be submitted on 8/29/2018. (Attachments: # <u>1</u> (p.12) Memorandum in Support, # <u>2</u> Exhibit, # <u>3</u> (p.21) Notice of Submission)(Rufty, Alfred) Modified on 8/7/2018 (jeg). (Entered: 08/06/2018)
08/07/2018	<u>55</u> (p.842)	MOTION for Summary Judgment by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. Motion(s) will be submitted on 8/29/2018. (Attachments: # <u>1</u> (p.12) Memorandum in Support, # <u>2</u> Exhibit, # <u>3</u> (p.21) Statement of Contested/Uncontested Facts, # <u>4</u> (p.23) Notice of Submission)(Rufty, Alfred) (Entered: 08/07/2018)
08/20/2018	<u>56</u> (p.889)	RESPONSE/MEMORANDUM in Opposition filed by Phillips 66 Company re <u>55</u> (p.842) MOTION for Summary Judgment . (Attachments: # <u>1</u> (p.12) Statement of Contested/Uncontested Facts, # <u>2</u> Exhibit 1)(deBarros, Michael) (Entered: 08/20/2018)
08/27/2018	<u>57</u> (p.909)	ORDER - At the request of the parties, IT IS ORDERED that the parties shall participate in a telephone status conference with the Court on Monday, August 27, 2018 at 3:30 p.m. Signed by Judge Eldon E. Fallon on 8/27/18.(dno) (Entered: 08/27/2018)
08/27/2018	<u>58</u> (p.910)	Minute Entry for proceedings held before Judge Eldon E. Fallon: A Telephone Status Conference was held on 8/27/2018. IT IS ORDERED that the final pretrial conference set for September 13, 2018 at 1:30 p.m. is hereby CONTINUED. The bench trial scheduled for September 20, 2018 at 9:00 a.m. is hereby CONVERTED to a telephone status conference, and the trial date will be re-set for a later date. (dno) (Entered: 08/27/2018)
09/20/2018	<u>59</u> (p.911)	ORDER - Due to a scheduling conflict, IT IS ORDERED that the telephone status conference set for September 20, 2018 is hereby CONTINUED to October 1, 2018 at 3:30 p.m. Signed by Judge Eldon E. Fallon on 9/19/18.(dno) (Entered: 09/20/2018)
10/01/2018	<u>60</u> (p.912)	ORDER - Due to a scheduling conflict, IT IS ORDERED that the telephone status conference previously set for October 1, 2018 at 3:30 p.m. is hereby CONTINUED, to be re-set at a later date. Signed by Judge Eldon E. Fallon on 10/1/18.(dno) (Entered: 10/01/2018)
10/05/2018	<u>61</u> (p.913)	EXPARTE/CONSENT MOTION for Leave to File <i>supplemental memorandum in support of motion for summary judgment</i> by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1</u> (p.12) Proposed Order, # <u>2</u>

		Proposed Pleading)(Rufty, Alfred) (Entered: 10/05/2018)
10/09/2018	<u>62</u> <u>(p.924)</u>	ORDER granting <u>61</u> <u>(p.913)</u> Motion for Leave to File Supplemental Memorandum. Signed by Judge Eldon E. Fallon on 10/09/2018. (am) (Entered: 10/09/2018)
10/09/2018	<u>63</u> <u>(p.925)</u>	REPLY to Response to Motion filed by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387 re <u>55</u> <u>(p.842)</u> MOTION for Summary Judgment . (am) (Entered: 10/09/2018)
10/09/2018	<u>64</u> <u>(p.933)</u>	EXPARTE/CONSENT MOTION for Leave to File <i>Supplemental Memorandum in Opposition to Underwriters' Motion for Partial Summary Judgment [Rec. Doc. 55]</i> by Phillips 66 Company. (Attachments: # <u>1</u> <u>(p.12)</u> Proposed Pleading, # <u>2</u> Proposed Order)(deBarros, Michael) (Entered: 10/09/2018)
10/11/2018	<u>65</u> <u>(p.941)</u>	ORDER granting <u>64</u> <u>(p.933)</u> Defendant Phillips 66 Company's Motion for Leave to File a Supplemental Memorandum in Opposition to Underwriters' Motion for Partial Summary Judgment. Signed by Judge Eldon E. Fallon on 10/10/18. (dno) (Entered: 10/11/2018)
10/11/2018	<u>66</u> <u>(p.942)</u>	Supplemental Memorandum filed by Phillips 66 Company, in opposition to <u>55</u> <u>(p.842)</u> MOTION for Partial Summary Judgment . (dno) (Entered: 10/11/2018)
10/25/2018	<u>67</u> <u>(p.947)</u>	EXPARTE/CONSENT MOTION for Leave to File <i>sur reply</i> by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387. (Attachments: # <u>1</u> <u>(p.12)</u> Proposed Order, # <u>2</u> Proposed Pleading)(Rufty, Alfred) (Entered: 10/25/2018)
11/01/2018	<u>68</u> <u>(p.953)</u>	ORDER granting <u>67</u> <u>(p.947)</u> Motion for Leave to File Sur Reply. Signed by Judge Eldon E. Fallon on 11/1/2018. (jeg) (Entered: 11/01/2018)
11/01/2018	<u>69</u> <u>(p.954)</u>	REPLY to Response to Motion filed by Excess Underwriters Subscribing Severally to Policy No. TMU - 407387 re <u>55</u> <u>(p.842)</u> MOTION for Summary Judgment . (jeg) (Entered: 11/01/2018)
02/05/2019	<u>70</u> <u>(p.957)</u>	ORDER & REASONS that P66's motion for partial summary judgment that LAIA does not apply, R. Doc. <u>20</u> <u>(p.177)</u> , and motion for partial summary judgment on Atlantic's duty to defend, R. Doc. <u>21</u> <u>(p.320)</u> , are hereby DENIED. Blanchard's motion for summary judgment on LAIA, R. Doc. <u>32</u> <u>(p.649)</u> , Atlantic's motion for summary judgment on the duty to defend, R. Doc. <u>30</u> <u>(p.623)</u> , and Excess Underwriters' motion for summary judgment that P66 is not owed coverage, R. Doc. <u>55</u> <u>(p.842)</u> , are GRANTED. Signed by Judge Eldon E. Fallon on 2/5/19. (dno) (Entered: 02/05/2019)
02/11/2019	<u>71</u> <u>(p.968)</u>	JUDGMENT entered in favor of Plaintiffs Atlantic Specialty Insurance Company & Excess Underwriters Subscribing Severally to Policy No. TMU - 407387 against Phillips 66 Company; in favor of 3rd-pty defendant Blanchard Contractors, Inc. against 3rd-pty plaintiff Phillips 66 Company; in favor of counter-defendants Atlantic Specialty Insurance Company & Excess Underwriters Subscribing Severally to Policy No. TMU - 407387 against counter-claimant Phillips 66 Company. Signed by Judge Eldon E. Fallon on 2/11/19.(dno) (Entered: 02/11/2019)
03/07/2019	<u>72</u> <u>(p.969)</u>	NOTICE OF APPEAL by Phillips 66 Company as to <u>71</u> <u>(p.968)</u> Judgment, <u>70</u> <u>(p.957)</u> Order on Motion for Summary Judgment. (Filing fee \$ 505, receipt number 053L-7465453.) (deBarros, Michael) Modified text on 3/8/2019 (jeg). (Entered: 03/07/2019)
03/11/2019	<u>73</u>	APPEAL TRANSCRIPT REQUEST by Phillips 66 Company for proceedings held on

	<u>(p.971)</u>	07/05/2018 re <u>72 (p.969)</u> Notice of Appeal. (Transcript(s) ordered) (Court Reporter Nichelle Drake noticed) (Farnet, Glenn) (Entered: 03/11/2019)
03/19/2019	74	USCA Case Number 19-30182 appealed to U.S. Fifth Circuit Court of Appeals for <u>72 (p.969)</u> Notice of Appeal filed by Phillips 66 Company. (clc) (Entered: 03/19/2019)
04/08/2019	<u>75 (p.972)</u>	APPEAL TRANSCRIPT of Motion Hearing held on July 5, 2018 before Judge Eldon E. Fallon. Court Reporter/Recorder Nichelle Drake, Telephone number 504-589-7775. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Parties have 21 days from the filing of this transcript to file with the Court a Redaction Request. Release of Transcript Restriction set for 7/8/2019. (rsg) (Entered: 04/08/2019)

Atlantic Specialty Insurance Company et al v. Phillips 66 Company (2:17-cv-09318-EEF-JVM)

Tab 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ATLANTIC SPECIALTY INSURANCE
CO. AND EXCESS UNDERWRITERS
SUBSCRIBING SEVERALLY TO
POLICY NO. TMU-407387

Plaintiff,

v.

PHILLIPS 66 COMPANY

Defendant.

CIVIL ACTION NO. 17-cv-9318

JUDGE ELDON E. FALLON

MAGISTRATE JANIS VAN
MEERVELD

PHILLIPS 66 COMPANY'S NOTICE OF APPEAL

Notice is hereby given that Defendant, Phillips 66 Company, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the Final Judgment entered into this action on February 11, 2019 (Doc. 71) entering judgment on the Court's Order and Reasons entered on February 5, 2019 (Doc. 70); and all interlocutory orders, rulings, decrees, decisions, opinions, memoranda, conclusions, or findings preceding or leading to, following, merging or subsumed, impacting, identified, or included within them.

SUBMITTED, this 7th day of March, 2019.

By Attorneys:

/s/ Michael deBarros
Glenn M. Farnet (#20185) [Lead Attorney]
glenn.farnet@keanmiller.com
John F. Jakuback (#21643)
john.jakuback@keanmiller.com
Michael deBarros (#32422)
michael.debarros@keanmiller.com
KEAN MILLER LLP
400 Convention St., Suite 700
Baton Rouge, LA 70802
Telephone: 225-387-0999
Facsimile: 225-388-9133

Counsel for Phillips 66 Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 7th day of March, 2019.

/s/ Michael J. deBarros
Michael J. deBarros

Tab 3

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ATLANTIC SPECIALTY INSURANCE
COMPANY, ET AL

CIVIL ACTION

VERSUS

NO. 17-9318

PHILLIPS 66 COMPANY


SECTION: L (1)

J U D G M E N T

Considering the Court's Order & Reasons entered herein on February 5, 2019,
accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor
Plaintiffs, Atlantic Specialty Insurance Company and Excess Underwriters Subscribing Severally
to Policy No. TMU-40787, and against Defendant Phillips 66 Company. IT IS FURTHER
ORDERED that there be judgment in favor of Third-Party Defendant, Blanchard Contractors,
Inc., and against Third-Party Plaintiff, Phillips 66 Company, dismissing the Third-Party
Complaint of Phillips 66 Company, with prejudice. IT IS FURTHER ORDERED that there be
judgment in favor of Counter-Defendants Atlantic Special Insurance Company and Excess
Underwriters Subscribing to Policy No. TMU-407387, and against Counter-Claimant Phillips 66
Company, dismissing the Counterclaim of Phillips 66 Company, with prejudice.

New Orleans, Louisiana, this 11th day of February, 2019.


ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

Tab 4

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ATLANTIC SPECIALTY INSURANCE CO., ET AL.

VERSUS

PHILLIPS 66 CO.

CIVIL ACTION

NO. 17-9318

SECTION “L” (1)

ORDER AND REASONS

There are five motions before the Court: Phillips 66 Company’s Motion for Partial Summary Judgment on La. R.S. 9:2780.1 (R. Doc. 20) and Motion for Partial Summary Judgment on Atlantic Specialty Insurance Company’s Duty to Defend (R. Doc. 21); Blanchard Contractors’ Motion for Summary Judgment on La. R.S. 9:2780.1 (R. Doc. 32), Atlantic Specialty Insurance Company’s Motion for Summary Judgment on Insurance Coverage (R. Doc. 30); and Excess Underwriters’ Motion for Summary Judgment (R. Doc. 55). Having considered the parties’ briefs and the applicable law, the Court now issues this Order and Reasons.

I. BACKGROUND

This insurance coverage dispute arises out of a natural gas pipeline explosion. A master services agreement (“MSA”) between Blanchard Contractors, Inc. (“Blanchard”) and Phillips 66 Company (“P66”) governed the work on the pipeline and included a “knock-for-knock” indemnity agreement, whereby Blanchard agreed to indemnify P66 for personal injury claims of Blanchard employees, regardless of fault, and vice versa. The MSA also required Blanchard to procure general liability insurance naming P66 as an additional insured.

Employees of P66 and Blanchard were performing a “pigging” operation on a segment of the pipeline when the explosion occurred. The pipeline was carrying commingled, raw grade

natural gas liquid from a gathering facility in Venice, Louisiana to the Enterprise Norco Fractionation Plant in Norco, Louisiana, where it would be fractionated and processed. R. Doc. 20-3 at 2. Blanchard employees Desmond Calloway and Jacob Jambon sued P66 for personal injuries stemming from the explosion, and P66 demanded defense and indemnity from Blanchard. Blanchard presented P66's claims to its insurer, Atlantic Specialty ("Atlantic"), and Atlantic filed this declaratory judgment suit seeking a declaration that the indemnity and insurance provisions in the MSA are void and unenforceable under the Louisiana Anti-Indemnity Act, La. R.S. 9:2780.1. In response, P66 filed a counterclaim against Atlantic and a third-party demand against Blanchard, seeking a declaration that the indemnity and additional insured provisions of the MSA are valid and enforceable. Finally, Excess Underwriters subscribing severally to Policy No. TMU-407387 ("Excess Underwriters") move for summary judgment that P66 is not an additional insured under their policy and is owed no coverage. R. Doc. 55.

II. PRESENT MOTIONS

1. Applicability of the Louisiana Anti-Indemnity Act

P66 moves for partial summary judgment on its counterclaim and third party demand. P66 asks the Court to issue a judgment (1) declaring that the Louisiana Anti-Indemnity Act does not invalidate the indemnity and insurance provisions in the MSA and (2) dismissing with prejudice Plaintiffs' claims seeking a declaration that the indemnity and insurance provisions are unenforceable.

Blanchard opposes and moves for summary judgment that the Louisiana Anti-Indemnity Act voids any duty to defend or indemnify P66 for personal injury claims of Blanchard employees.

2. Atlantic Specialty's Duty to Defend

P66 moves for partial summary judgment that Atlantic owes a duty to defend P66 in the

underlying *Calloway* and *Jambon* suits. Atlantic opposes and moves for summary judgment holding that any duty to defend P66 is void under the Louisiana Anti-Indemnity Act.

III. LAW AND ANALYSIS

Summary judgment is proper “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 a judgment as a matter of law.” *Celotex Corp. v. Catrett*, [477 U.S. 317, 322](#) (1986) (citing [Fed. R. Civ. P. 56\(c\)](#)). “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which the party will bear the burden of proof at trial.” *Id.* A party moving for summary judgment bears the initial burden of demonstrating the basis for summary judgment and identifying those portions of the record, discovery, and any affidavits supporting the conclusion that there is no genuine issue of material fact. *Id.* at 323. If the moving party meets that burden, then the nonmoving party must use evidence cognizable under Rule 56 to demonstrate the existence of a genuine issue of material fact. *Id.* at 324.

A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 248](#) (1996). “[U]nsubstantiated assertions,” “conclusory allegations,” and merely colorable factual bases are insufficient to defeat a motion for summary judgment. *See Hopper v. Frank*, [16 F.3d 92, 97](#) (5th Cir. 1994); *Anderson*, [477 U.S. at 249-50](#). In ruling on a summary judgment motion, a court may not resolve credibility issues or weigh evidence. *See Int’l Shortstop, Inc. v. Rally’s Inc.*, [939 F.2d 1257, 1263](#) (5th Cir. 1991). Furthermore, a court must assess the evidence, review the facts and draw any appropriate inferences based on the evidence in the light most favorable to the party

opposing summary judgment. See *Daniels v. City of Arlington, Tex.*, [246 F.3d 500, 502](#) (5th Cir. 2001); *Reid v. State Farm Mut. Auto. Ins. Co.*, [784 F.2d 577, 578](#) (5th Cir. 1986).

1. Applicability of the Louisiana Anti-Indemnity Act

The Louisiana Anti-Indemnity Act (“LAIA”) invalidates indemnity and insurance provisions in construction contracts:

[A]ny provision, clause, covenant, or agreement contained in, collateral to, or affecting a ... construction contract which **purports to indemnify, defend, or hold harmless**, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control is contrary to the public policy of this state and is **null, void, and unenforceable**.

[A]ny provision, clause, covenant, or agreement contained in, collateral to, or affecting a ... construction contract which **purports to require an indemnitor to procure liability insurance** covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control is **null, void, and unenforceable**.

[LA. REV. STAT. § 2780.1](#) (emphasis added).

“Construction contract” is defined as:

Any agreement for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, highway, road, bridge, water line, sewer line, oil line, **gas line**, appurtenance, or other improvement to real property[.]

[LA. REV. STAT. § 2780.1\(A\)\(2\)\(a\)](#) (emphasis added).

P66 first argues that the MSA does not fit within this definition because it governed work on a “hazardous liquids” pipeline, not a “gas” pipeline. P66 makes this argument despite initially referring to the pipeline as a “gas” line – R. Doc. 20-3 at 2 (“Employees of P66 and Blanchard were performing a pigging operation on a segment of a natural gas liquid pipeline”); R. Doc. 20-3 at 11 (“It is undisputed that the work being performed on the Pipeline occurred at a point after gas was comingled”); R. Doc. 4 at 17 (“The *Calloway* suit alleges various causes of action against Phillips 66 for bodily injury sustained by Desmond Calloway while performing maintenance on

the natural-gas pipeline”) – and later arguing that the pipeline is removed from the scope of LAIA under the exception for gas gathering lines and oil flow lines carrying commingled gas. The pipeline is a “gas line” under the ordinary meaning of the term and, in any event, qualifies as a “structure” or “improvement to real property.”

P66 next argues that the MSA is removed from the scope of LAIA by two of its provisions.

The first is Subpart (E):

The provisions of this Section are not intended to, nor shall they be judicially interpreted, to alter, add to, subtract from, amend, overlap, or affect the provisions of [the Louisiana Oilfield Anti-Indemnity Act].

LA. REV. STAT. § 2780.1(E).

The Louisiana Oilfield Anti-Indemnity Act (LOAIA) voids indemnity and insurance provisions in contracts that “pertain to a well.” Its applicability is determined under a two-part test:

First, there must be an agreement that “pertains to” an oil, gas or water well. If the contract does not pertain to a well, the inquiry ends. Only if we determine that the contract has the required nexus to a well may we proceed to the second step of the process, examination of the contract’s involvement with “operations related to the exploration, development, production, or transportation of oil, gas, or water.” ... Therefore, if (but only if) the agreement (1) pertains to a well, and (2) is related to exploration, development, production, or transportation of oil, gas, or water, will the Act invalidate any indemnity provision contained in or collateral to that agreement.

Transcon. Gas Pipe Line Corp. v. Transportation Ins. Co., 953 F.2d 985, 991 (5th Cir. 1992).

As the Fifth Circuit has recognized, “the legislature intended [LOAIA] to apply if (but only if) an agreement pertains to a well.” *Id.* A contract does not “pertain to a well” – and is not subject to LOAIA’s indemnity prohibition – if it pertains to gas that “can no longer be identified with a particular well” or gas that has become “so fundamentally changed [by] processing, commingling, or preparing it for distribution to its ultimate end user” that it cannot be attributed to a particular

well. *Id.* at 994. LOAIA thus does not invalidate indemnity provisions in contracts that pertain to pipelines past the point of commingling. *See Johnson v. Amoco Production Co.*, [5 F.3d 949](#) (5th Cir. 2002).

It is undisputed that the MSA involved in this case covered work on a pipeline past the point of commingling – so the MSA did *not* “pertain to a well” and is not within LOAIA’s anti-indemnity scope. To hold that LAIA invalidates the indemnity provisions of the MSA that are not invalidated by LOAIA, P66 argues, would impermissibly “add to” the scope of LOAIA. But where, as here, a contract does not “pertain to a well” and is never within the scope of LOAIA, it is not altered or overlapped by the application of LAIA, a separate anti-indemnity statute governing a different and broader class of contracts.

P66 next argues that the MSA falls within LAIA’s “co-mingled for transportation” exception to the definition of construction contract:

“Construction contract” shall not include any design, construction, alteration, renovation, repair, or maintenance of ... [o]il flow lines or **gas gathering lines** used in association with the transportation of production **from oil and gas wells from the point that oil and gas becomes co-mingled for transportation** to oil storage facilities or gas transmission lines.

[LA. REV. STAT. § 2780.1\(A\)\(2\)\(b\)\(ii\)](#).

P66 contends that this exception is not limited to “gathering” lines, but that it “begins in the gathering lines and continues through the transportation process” – such that any pipeline carrying commingled gas is exempt. This interpretation, though, runs contrary to the plain text of the statute and principles of statutory interpretation. “Courts should give effect to all parts of a statute and should not adopt a statutory construction that makes any part superfluous or meaningless,” and must presume that “every word, sentence, or provision in a statute was intended to serve some useful purpose, that some effect be given to each such provision, and that the

Legislature used no unnecessary words or provisions.” *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 03-0369, p. 7 (La. 12/3/03); [860 So.2d 1112, 1117](#). “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law should be applied as written and no further interpretation may be made in search of the intent of the legislature.” [La. Civ. Code art. 9](#)

LAIA first states that it applies to contracts for the “design, construction, alteration, renovation, repair, or maintenance” of “oil lines” and “gas lines.” [LA. REV. STAT. § 2780.1\(A\)\(2\)\(a\)](#). It then carves out an exemption for “oil flow lines” and “gas gathering lines” carrying commingled oil or gas. [LA. REV. STAT. § 2780.1\(A\)\(2\)\(b\)\(ii\)](#). Under the clear statutory language, Subpart (A)(2)(b)(ii)’s “co-mingled for transportation” exception applies only to oil flow lines and gas gathering lines.

The MSA thus falls within the scope of LAIA unless the pipeline was a “gas gathering” line. P66 argues there is a material question of fact as to whether the pipeline was a “gathering” line or was functioning in a “gathering” capacity, since it was transporting gas to a further downstream processing facility. Blanchard responds that it cannot be a gathering line because it is a post-processing pipeline.

LAIA does not define “gathering line.” The Code of Federal Regulations, however, defines gathering line as line as “a pipeline that transports gas from a current production facility to a transmission line or main.” [49 C.F.R. § 192.3](#). Although “current production facility” “is not defined in the regulations, it appears to mean ‘gas well.’” *Hamman v. Sw. Gas Pipeline, Inc.*, [721 F.2d 140, 143](#) (5th Cir. 1983), *see also* United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration, <https://primis.phmsa.dot.gov/comm/glossary/index.htm?nocache=1340#GatheringLine>

(“Gathering lines are pipelines that transport oil or natural gas from the wellhead to a transmission

line”).¹

This pipeline was transporting unfractionated raw grade natural gas liquids from a natural gas gathering facility in Venice, Louisiana to the Shell Enterprise Norco facility, where it would be fractionated and processed. R. Doc. 20-4 at 2. The Venice plant is the initial processing facility. (“[T]he first processing facility on the left would be the VESCO plant out in Venice. And then what our pipeline was doing was simply taking that raw make pass through from the VESCO and sending it all over to Shell Norco, but Shell Norco was going to be processed and fractionated.”). The pipeline involved here is a post-processing pipeline, and because it did not come from a “current production facility,” it is not a gas gathering line.²

2. Atlantic Specialty’s Duty to Defend

Under the Atlantic Policy (the “Policy”) issued to Blanchard, Atlantic agreed to defend an “insured” against any suit seeking damages for bodily injury to which the Policy applies. “Insured”

¹ See also *Gathering Pipelines FAQs*, United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration (updated Aug. 20, 2018), <https://www.phmsa.dot.gov/faqs/gathering-pipelines-faqs> (Gathering pipelines transport gases and liquids from the commodity’s source – like rock formations located far below the drilling site – to a processing facility, refinery or a transmission line”); *Fact Sheet: Gathering Pipelines*, United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration (revised November 22, 2018), <https://primis.phmsa.dot.gov/comm/FactSheets/FSGatheringPipelines.htm> (“Plainly speaking, gathering lines are those pipelines that are used to transport crude oil or natural gas from the production site (wellhead) to a central collection point. They generally operate at relatively low pressures and flow, and are smaller in diameter than transmission lines.”)

² The Code of Federal Regulations also instructs operators to use the API Recommended Practice 80 (“RP 80) to determine whether a pipeline meets the “gathering line” definition. RP 80 generally defines a “gathering line” as a pipeline that transports gas from “the furthestmost downstream point in a production operation to the furthestmost downstream” point of the gathering operation, which can be a gas processing plant, gas treatment facility, gas gathering compressor, point of commingling of gas from two or more fields, or point of connection of the gathering line to another pipeline.” RP 80 § 2.2.1.2. The Code of Federal Regulations ‘provides three limitations on these endpoints: (1) the endpoint may not extend beyond the first processing plant; (2) the point of commingling of gas may not be from fields more than 50 miles from one another; and (3) the endpoint may not extend beyond the furthestmost downstream compressor used to increase pressure.” James Curry, *What Producers Need to Know About the Pipeline and Hazardous Materials Safety Administration and the Federal Energy Regulatory Commission – Jurisdiction and Changes Ahead*, Rocky Mountain Mineral Law Foundation Special Institute, 2018; 49 C.F.R. § 192.8. See also 43 La. Admin. Code Pt. XIII, 508 (“The endpoint of gathering, under Section 2.2(a)(1)(A) of API RP 80, may not extend beyond the first downstream natural gas processing plant, unless the operator can demonstrate, using sound engineering principles, that gathering extends to a further downstream processing plant”).

includes any organization Blanchard is obligated by an “insured contract” to include as an additional insured with respect to liability arising out of Blanchard’s work. R. Doc. 21-7 at 32 “Insured contact” includes an agreement pertaining to Blanchard’s business in which Blanchard assumes the tort liability of another party. *Id.* at 26. Because the MSA (1) required Blanchard to obtain general commercial liability insurance including P66 as an additional insured and (2) required Blanchard to assume P66’s liability for suits arising out of personal injury of Blanchard employees in connection with a service order; and (3) a suit was commenced against P66 for bodily injury arising out of Blanchard’s work, P66 argues that Atlantic owes a duty to defend. Atlantic opposes and moves for summary judgment holding that LAIA voids any duty to defend or indemnify P66.

P66 is correct to note that an insurer’s duty to defend is separate from – and broader than – its duty to indemnify. LAIA, however, voids any duty of Atlantic to indemnify or defend P66 in the *Calloway* and *Jambon* suits as a matter of law:

[A]ny provision, clause, covenant, or agreement contained in, **collateral to**, or affecting a ... construction contract which **purports to indemnify, defend, or hold harmless**, or has the effect of indemnifying, defending, or holding harmless, the indemnitee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee, an agent or employee of the indemnitee, or a third party over which the indemnitor has no control is contrary to the public policy of this state and is **null, void, and unenforceable**.

[A]ny provision, clause, covenant, or agreement contained in, collateral to, or affecting a ... construction contract which **purports to require an indemnitor to procure liability insurance** covering the acts or omissions or both of the indemnitee, its employees or agents, or the acts or omissions of a third party over whom the indemnitor has no control is **null, void, and unenforceable**.

LA. REV. STAT. § 2780.1 (emphasis added); *see also Aucoin v. Pelham Marine, Inc.*, 593 F. Supp. 770, 776 (W.D. La. 1984) (“[LOAIA] not only declares null and void indemnity provisions, but also any obligation of Champion and its insurer to defend Chevron”).

Section I of LAIA does provide an exception to LAIA's indemnity and insurance prohibition:

Nothing in this Section shall invalidate or prohibit the enforcement of the following:

- (1) Any clause in a construction contract containing the indemnitor's promise to indemnify, defend, or hold harmless the indemnitee or an agent or employee of the indemnitee if the contract also requires the indemnitor to obtain insurance to insure the obligation to indemnify, defend, or hold harmless and there is **evidence that the indemnitor recovered the cost of the required insurance in the contract price**. However, the indemnitor's liability under such clause shall be limited to the amount of the proceeds that were payable under the insurance policy or policies that the indemnitor was required to obtain.
- (2) Any clause in a construction contract that requires the indemnitor to procure insurance or name the indemnitee as an additional insured on the indemnitor's policy of insurance, but only to the extent that such additional insurance coverage provides coverage for liability due to an obligation to indemnify, defend, or hold harmless authorized to Paragraph (1) of this Subsection, provided that such insurance coverage is provided only when the indemnitor is at least partially at fault or otherwise liable for damages ex delicto or quasi ex delicto.

Section I thus allows indemnity and insurance provisions in construction contracts if (1) the contract requires that the indemnitor obtain insurance to insure its obligation to indemnify, defend, or hold harmless and (2) there is "evidence that the indemnitor recovered the cost of the required insurance in the contract price." [LA. REV. STAT. § 2780.1\(I\)](#). And if those provisions are met, the indemnitor's liability is "limited to the amount of the proceeds that were payable under the insurance policy or policies that the indemnitor was required to obtain." *Id.* Paragraph (2) allows additional insured provisions that are "authorized pursuant to Paragraph (1)" and the indemnitor is at least partially at fault.

Here, the MSA requires Blanchard to maintain insurance "at its expense." R. Doc. 21-5 at 30, and it is undisputed that P66 "at no point paid extra premium to be named as additional insured under Blanchard's policy." R. Doc. 34-1. Accordingly, the exception does not apply, and LAIA

voids any duty to defend or indemnify P66 in the *Calloway* and *Jambon* suits.

IV. CONCLUSION

For these reasons, LAIA voids any duty of Blanchard or Atlantic to defend or indemnify P66 in the *Calloway* and *Jambon* suits. Accordingly, P66's motion for partial summary judgment that LAIA does not apply, R. Doc. 20, and motion for partial summary judgment on Atlantic's duty to defend, R. Doc. 21, are hereby **DENIED**. Blanchard's motion for summary judgment on LAIA, R. Doc. 32, Atlantic's motion for summary judgment on the duty to defend, R. Doc. 30, and Excess Underwriters' motion for summary judgment that P66 is not owed coverage, R. Doc. 55, are **GRANTED**.

New Orleans, Louisiana, this 5th day of February, 2019.



ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

Tab 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ATLANTIC SPECIALTY INSURANCE
CO. AND EXCESS UNDERWRITERS
SUBSCRIBING SEVERALLY TO
POLICYNO. TMU-407387

Plaintiff,

v.

PHILLIPS 66 COMPANY

Defendant.

CIVIL ACTION

NO. 17-cv-9318

JUDGE ELDON E. FALLON

MAGISTRATE JANIS VAN
MEERVELD

DECLARATION

My name is Todd Denton. I am General Manager, Midstream Operations, for Phillips 66 Company.

1.

On February 9, 2017, a fire occurred at the Phillips 66 Paradis Pipeline Station located in Paradis, Louisiana (the "incident"). At the time of the incident, Blanchard Contractors, Inc., ("Blanchard") was providing labor and materials for an ILI tool run, which is commonly referred to as a "pigging" operation. The work was being performed pursuant to the November 16, 2016 USA Master Services Agreement CW2291283 between Phillips 66 Company and Blanchard ("MSA") and associated Phillips 66 Carrier, LLC Service Order number 4523432638 ("Service Order") (Phillips 66 Company, its subsidiary, Phillips 66 Pipeline LLC, and Phillips 66 Carrier LLC are collectively referred to here as "Phillips 66"). True and correct copies of the MSA and Service Order are attached to this Declaration.

Exhibit A

2.

The fire resulted in the death of one Phillips 66 employee, injuries to two other P66 employees, and injuries to three employees of Blanchard.

3.

The work being performed at the Phillips 66 Paradis Station involved a segment of pipeline known as the RV-60 Venice-to-Paradis (VP01) natural gas liquid (“NGL”) pipeline (hereafter, the “Pipeline”). The Pipeline was transporting unfractionated raw grade (also known as “Y-grade” or “raw make”) natural gas liquids from a natural gas gathering facility in Venice, Louisiana to the Shell Enterprise Norco facility, where it would be fractionated and processed.

4.

The Pipeline connects to the Venice Energy Services Company LLC (“VESCO”) gas gathering plant located in Venice, Louisiana (“the Venice gas plant”). The Venice gas plant gathers and co-mingles natural gas produced from multiple different offshore production and gathering facilities and the shallow waters of the eastern Gulf of Mexico.¹ The Venice gas plant receives unprocessed gas directly or indirectly from multiple offshore pipelines and gas gathering systems including the VGS system, which is a gathering system from the shallow waters of the eastern Gulf of Mexico.²

¹ VESCO’s public statements describe the gathering process as follows: “[t]he gathering of natural gas consists of aggregating natural gas produced from various wells....”

<http://www.targaresources.com/gathering-processing-division>

² <http://www.targaresources.com/operations/gathering-processing/coastal-segment/coastal-straddles>

5.

The Pipeline receives commingled, unfractionated Raw Product/Y-Grade NGL from VESCO.³ The Pipeline carries commingled NGL originating from different wells or production facilities. The Pipeline transports the unfractionated Raw Product/Y-Grade NGL downstream for processing and fractionation at the Enterprise Norco Fractionation Plant located in Norco, Louisiana (“Norco Fractionation Plant”).

6.

The Paradis station is an intermediate pumping station along the Pipeline in which pressure is added to assist in the transportation of the material further downstream to the Norco Fractionation Plant, where the material is processed and fractionated.

7.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the statements in this Declaration are true and correct to the best of my knowledge and information.



Todd Denton
April 5, 2018

³ “Raw Product” and “Y-Grade” are synonymous terms which refer to an NGL stream before it is processed and fractionated.

Tab 6

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2019, I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Glenn M. Farnet

Glenn M. Farnet