United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
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Lyle W. Cayce
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No. 19-20216

BALFOUR BEATTY CONSTRUCTION, L.L.C.; MILESTONE METALS, INCORPORATED,

Plaintiffs — Appellants,

versus

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant — Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-2477

Before BARKSDALE, HIGGINSON, and DUNCAN, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge*

This case involves a dispute between an insurer and insured about whether an insurance policy provides coverage for damage to the exterior glass of a Houston skyscraper. Plaintiffs Balfour Beatty Construction, L.L.C. ("Balfour") and Milestone Metals, Inc. ("Milestone") (collectively, "Appellants") sued defendant Liberty Mutual Fire Insurance Company ("Liberty") in Texas state court claiming breach of contract and violations of Sections 541 and 542 of the Texas Insurance Code. Liberty removed the case to federal court and the parties cross-moved for summary judgment.

The district court granted Liberty's motion for summary judgment and denied Appellants' partial motion for summary judgment. Appellants then filed this appeal.

Because the insurance policy does not provide coverage for Appellants' claim, we agree that summary judgment in Liberty's favor is appropriate. Therefore, we AFFIRM.

I. BACKGROUND

A. Factual Background

TCH Energy Corridor Venture, LLC ("Trammell Crow") was the developer of a commercial office building located in Houston, Texas, known as Energy Center 5 (the "Project"). Trammell Crow selected Balfour as the Project's general contractor. Balfour, in turn, subcontracted with Milestone for the erection of structural steel, stairs, and ornamental steel on the Project. Under Trammell Crow's contract with Balfour, Trammell Crow was required to procure builder's risk insurance for the Project. Accordingly, Trammell Crow obtained an insurance policy from Liberty (the "Policy"), effective from July 10, 2014, to August 10, 2016. The Policy is titled a "Commercial Inland Marine" policy that contains "Builders' Risk Coverage." An "Additional Insured Endorsement" added Appellants as insureds to the "extent required and as their respective interests may appear."[1]

With insurance coverage in place, the Project proceeded. In October 2015, Milestone welded a 2-inch metal plate to external tubing on the eighteenth floor of Energy Center 5. In his affidavit, Milestone's Safety

[1] Before the district court, Liberty argued that Appellants did not appropriately quantify their interests, as required by this provision. The district court did not address this argument because it concluded that the Policy does not cover Appellants' claim. Because we affirm, we also do not address this issue.

Director, Roman Lozano,[2] explained the safety measures that Milestone undertook to avoid damaging the building when installing the plate:

> Milestone implemented measures to protect the building and the glass from slag[3] burns and fires. Because the location of the weld protruded from the vertical face of the building, Milestone draped extra fire blankets beneath the area where its operations occurred. Due to the location of the weld, it was impossible to place a person in a safe position to watch for falling slag. . . . However, at the time of the operations, the winds were very high, a factor that Milestone could not control.

Several months later, on July 12, 2016, Milestone learned that welding slag from the October 2015 welding project had fallen down the side of the building and damaged the exterior of certain glass windows on lower floors. Trammell Crow, Balfour, and Milestone then tendered a claim to Liberty under the Policy. Liberty denied coverage and explained that the loss was excluded. Milestone and Balfour ultimately replaced the windows for Trammell Crow at a cost of approximately $686,976.88.[4]

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[2] Liberty objected to Lozano's affidavit in the district court. The district court did not rule on Liberty's objection and, instead, accepted Lozano's affidavit as true. The district court noted that the admissibility of Lozano's affidavit would not impact its ruling. Liberty does not repeat its objection to Lozano's affidavit on appeal. Therefore, we accept the affidavit.

[3] Slag consists of "the molten metal particles ejected in the process of welding." *See Evanston Ins. Co. v. Adkins*, No. 3:05-CV-2068-L, 2006 WL 2848054, at *7 (N.D. Tex. Oct. 4, 2006).

[4] Balfour and Milestone had to pay Trammell Crow's claim because they lost the benefit of a waiver of subrogation when Liberty denied coverage.

B. The Policy

The Policy contains the following relevant provisions:

PROPERTY COVERED

"We"[5] cover the following property unless the property is excluded or subject to limitations.

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PERILS COVERED

"We" cover risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded.

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PERILS EXCLUDED

2. "We" do not pay for loss or damage that is caused by or results from one or more of the following:

c. **Defects, Errors, And Omissions –**

(1) "We" do not pay for loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to:

a) design, specifications, construction, materials, or workmanship; . . .

c) maintenance, installation, renovation, remodeling, or repair.

But if an act, defect, error, or omission as described above results in a covered peril, "we" do cover the loss or damage caused by that covered peril.

(2) This exclusion applies regardless of whether or not the act, defect, error or omission:

a) originated at a covered "building or structure"; or

b) was being performed at "your" request or for "your" benefit.

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[5] "We" refers to Liberty.

In short, the Policy contains a general insuring clause, under which Liberty insures risks of loss or damage, to the extent those losses are not caused by an excluded peril. Under the exclusionary clause, Liberty will not cover losses "caused by" or "resulting from . . . act[s], defect[s], error[s], or omission[s] . . . relating to . . . construction" (the "Exclusion"). However, under the exception to the Exclusion, Liberty will cover any loss caused by "an act, defect, error, or omission" that "results in a covered peril" (the "Exception"). A covered peril is a "risk[] of direct physical loss or damage unless the loss is . . . caused by a peril that is excluded."

Liberty concedes that the window damage was a "direct physical loss or damage" that falls under the general insuring clause. Moreover, the parties agree that, absent the Exception, the Exclusion would bar Appellants' recovery because the window damage resulted from Milestone's construction or installation activity. Therefore, the interpretative dilemma is whether the Exception applies to reinstate coverage for Appellants' claim. Put differently, the question is whether the "an act, defect, error, or omission" "result[ed] in a covered peril."

C. Procedural History

When Liberty denied coverage, Appellants sued Liberty in Harris County, Texas, for breach of contract and violations of Sections 541 and 542 of the Texas Insurance Code. TEX. INS. CODE §§ 541, 542 (prohibiting unfair methods of competition or unfair trade practices in the Texas insurance market). Liberty removed to federal court, invoking diversity jurisdiction. Relevant here, the parties cross-moved for summary judgment solely with respect to the breach of contract claim.[6] After a hearing, the

[6] Appellants moved for partial summary judgment because damages could not be decided on summary judgment. Liberty moved for summary judgment because it seeks no damages.

district court granted Liberty's motion for summary judgment and denied Appellants' motion.

Pursuant to the parties' stipulation, the district court dismissed the Texas Insurance Code claims without prejudice. Appellants then timely appealed to this court on April 5, 2019. While the appeal was pending, Appellants filed an unopposed motion for entry of a Rule 54(b) judgment. On July 3, 2019, the district court entered a Rule 54(b) judgment "direct[ing] entry of a final judgment" on Appellants' breach of contract claim. Following entry of the Rule 54(b) judgment, Appellants timely filed a second amended notice of appeal on July 16, 2019.

D. The District Court Opinion

In relevant part, the district court determined that the Exception to the Exclusion does not reinstate coverage under the circumstances of the loss here and, therefore, granted summary judgment in favor of Liberty. The district court reasoned that (i) Appellants' interpretation of the Exception would render the Exclusion meaningless; and (ii) the Exception's language "suggests" that there must be two loss events that are different in kind in order to reinstate coverage—one initial loss event (an excluded peril) followed by a separate covered peril, with only the latter peril subject to coverage.

II. PRELIMINARY ISSUES

A. Jurisdiction

This court has appellate jurisdiction under 28 U.S.C. § 1291 because Appellants timely appealed the district court's entry of judgment under Federal Rule of Civil Procedure 54(b). *See* FED. R. CIV. P. 56(a); *Williams v. Seidenbach*, 958 F.3d 341, 344 (5th Cir. 2020) (en banc). This court has subject matter jurisdiction because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. In a diversity case, this court must apply state substantive law.

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The parties agree that Texas law applies to interpretation of the Policy.

B. Standard of Review

"This court reviews a district court's grant of summary judgment de novo, applying the same legal standards as the district court." *Tradewinds Envtl. Restoration, Inc. v. St. Tammany Park, LLC*, 578 F.3d 255, 258 (5th Cir. 2009) (quoting *Condrey v. SunTrust Bank of Ga.*, 429 F.3d 556, 562 (5th Cir. 2005)). "Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *United States v. Nature's Way Marine, L.L.C.*, 904 F.3d 416, 419 (5th Cir. 2018) (quoting FED. R. CIV. P. 56(a)). In Texas, the construction of a contract presents a question of law. *Delta Seaboard Well Servs. v. Am. Int'l Specialty Lines Ins. Co.*, 602 F.3d 340, 343 (5th Cir. 2010); *Lubbock Cty. Hosp. Dist. v. Nat'l Union Fire Ins. Co.*, 143 F.3d 239, 241–42 (5th Cir. 1998). Further, in Texas, "[w]hether a contract is ambiguous is a question of law." *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 406 (5th Cir. 2006). When, as here, cross-motions for summary judgment have been ruled upon, we examine "each party's motion independently." *Springboards To Educ., Inc. v. Houston Indep. Sch. Dist.*, 912 F.3d 805, 811 (5th Cir. 2019) (quoting *JP Morgan Chase Bank, N.A. v. Data Treasury Corp.*, 823 F.3d 1006, 1011 (5th Cir. 2016)).

C. Texas Contract Interpretation Principles

When construing an insurance policy, Texas courts "ascertain the true intentions of the parties as expressed in the instrument." *Am. Tobacco Co.*, 463 F.3d at 407; *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). "When parties disagree over the meaning of an unambiguous contract, 'the intent of the parties must be taken from the agreement itself, not from the parties' present interpretation, and the agreement must be enforced as it is written.'" *Am. Tobacco Co.*, 463 F.3d at 407 (alteration omitted) (quoting

Purvis Oil Corp. v. Hillin, 890 S.W.2d 931, 935 (Tex. App. – El Paso 1994, no writ)). In this context, Texas courts seek to harmonize and give effect to all provisions so that none is rendered meaningless. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). Texas courts construe insurance policies "one policy at a time." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006).

The insured bears the initial burden of showing that its loss is covered, while the insurer bears the burden of establishing that a policy exclusion applies. *VRV Dev. L.P. v. Mid-Continent Cas. Co.*, 630 F.3d 451, 455 (5th Cir. 2011); *Gilbert*, 327 S.W.3d at 124; *see also* TEX. INS. CODE § 554.002 ("[T]he insurer . . . has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed by the insurer . . . constitutes an avoidance or affirmative defense."). As Appellants acknowledge, they bear the burden "to show that an exception to the exclusion" applies. *Gilbert*, 327 S.W.3d at 124; *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 723 (5th Cir. 1999).

III. DISCUSSION

The parties agree that the claim involves "direct physical loss or damage" that falls within the Exclusion because it resulted from an act of construction, workmanship, or installation.[7] Therefore, absent the Exception to the Exclusion, the parties would agree that Appellants are not entitled to coverage. However, the parties dispute whether the Exception to the Exclusion applies. Appellants argue that the Exception reinstates coverage for their claim or, in the alternative, that the Exclusion and the Exception are

[7] Notably, under the Policy, direct physical loss or damage resulting from an act of construction, workmanship, or installation is excluded *even if* the loss was as a result of non-negligent conduct.

ambiguous, and that the language of those clauses should be construed in their favor. We conclude that the claim does not fall within the Exception and that Appellants have forfeited any argument that the Policy is ambiguous. Therefore, we AFFIRM.

A. Issue One: Whether the Claim Falls Within the Exception

Appellants contend that the Exception to the Exclusion reinstates coverage. Appellants acknowledge that they carry the burden of proof on this issue. *Gilbert*, 327 S.W.3d at 124; *Federated Mut. Ins. Co.*, 197 F.3d at 723. Appellants argue that (i) the Policy, as an "all-risks" policy, should be given a capacious reading; (ii) a plain reading of the Exception shows that it applies; (iii) Appellants' interpretation does not render the Exclusion meaningless; and (iv) if the Exception does not apply under the circumstances here, the Policy is illusory because it largely denies coverage. Liberty responds that (i) the Exception does not apply under its plain language; (ii) Appellants' interpretation of the Exception negates the Exclusion[8]; and (iii) Liberty's interpretation does not render the Policy illusory.

i. All-Risks Policy

As an initial matter, the parties dispute whether the Policy is an "all-risks" policy and, if so, whether that matters. An all-risks policy "creates a special type of coverage in which the insurer undertakes the risk for all losses of a fortuitous nature that, in the absence of the insured's fraud or other intentional misconduct, is not expressly excluded in the agreement." *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 604 (Tex. 2015) (quoting *SMI Realty Mgmt. Corp. v. Underwriters at Lloyd's, London*, 179 S.W.3d 619, 627 n.3 (Tex. App. – Houston 2005, pet. denied)). We need not determine whether this Policy is an "all-risks" policy because we construe

[8] Because we conclude the Policy's plain language does not cover Appellants' claim, we need not reach this argument.

insurance policies "one . . . at a time." *Fiess*, 202 S.W.3d at 747; *Gilbert*, 327 S.W.3d at 129 n.7 ("[E]ach policy must be interpreted according to its own specific provisions and coverages."). As Appellants acknowledge, an "all-risks" policy, just like a regular insurance policy, can exclude coverage for certain claims. *JAW The Pointe, L.L.C.*, 460 S.W.3d at 604; *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 208 (5th Cir. 2007); *Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, 221 Cal. App. 3d 170, 179–80 (Cal. App. Dep't 1990) (unpublished) (concluding an ensuing loss clause, like that presented in the instant case, did not reinstate coverage, even in an "all-risks" policy).

ii. Ensuing Loss Provisions

The Exception states that: "[I]f an act, defect, error, or omission as described above resulted in a covered peril, 'we' do cover the loss or damage caused by that covered peril." This clause is often described as an "ensuing loss" provision.[9] *See, e.g.*, *Viking Constr., Inc. v. 777 Residential, LLC*, 210 A.3d 654, 664–65 & n.9 (Conn. App. Ct. 2019). Such provisions "act as exceptions to property insurance exclusions and operate to provide coverage when, as a result of an excluded peril, a covered peril arises and causes damage." OSTRANGER AND NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 21.04(g) (16th ed. 2013); *see also Fiess*, 202 S.W.3d at 752. Although the Exception does not use the word "ensuing," the Exception parallels the structure of ensuing loss clauses.[10] *See Fiess*, 202

[9] We recognize that the district court decided "not to refer to the exception as an 'ensuing loss' clause . . . or treat the exception and other clauses containing the words 'ensuing loss' interchangeably."

[10] Appellants state that *Fiess* distinguished ensuing loss clauses from resulting damage clauses. We disagree. *Fiess* pointed out that "[t]o 'ensue' means 'to follow as a consequence or in chronological succession; *to result*, as an ensuing conclusion or effect.'" *Fiess*, 202 S.W.3d at 749 (quoting *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138, 141 (Tex. Civ. App. – San Antonio 1975, writ ref'd)) (emphasis added).

S.W.3d at 748; *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138, 141 (Tex. Civ. App. – San Antonio 1975, writ ref'd) ("If we give to the language of the exception its ordinary meaning, we must conclude that an ensuing loss caused by water damage is a loss caused by water damage where the water damage itself is the *result* of a preceding cause." (emphasis added)). Further, numerous courts have recognized that "resulting loss clauses and ensuing loss clauses are one and the same." *Viking Constr.*, 210 A.3d at 664–65 & n.9; *see also Erie Ins. Prop. & Cas. Co. v. Chaber*, 239 W. Va. 329, 337 n.8 (2017).

The Supreme Court of Washington has offered the useful illustration below to explain how ensuing loss clauses operate:

> An example helps illustrate how the ensuing loss clause works. Suppose a contractor miswires a home's electrical system, resulting in a fire and significant damage to the home. And suppose the homeowner's policy excludes losses caused by faulty workmanship, but the exclusion contains an ensuing loss clause. In this situation, the ensuing loss clause would preserve coverage for damages caused by the fire. But it would not cover losses caused by the miswiring that the policy otherwise excludes. Nor would the ensuing loss clause provide coverage for the cost of correcting the faulty wiring.

Vision One, LLC v. Philadelphia Indem. Ins. Co., 276 P.3d 300, 307 (Wash. 2012).

iii. By Its Terms, The Policy Does Not Provide Coverage

A plain reading of the Exception shows that it does not reinstate coverage over Appellants' claim. As the cases below demonstrate, an ensuing loss provision like the one presented here is only triggered when one (excluded) peril results in a distinct (covered) peril, meaning there must be two separate events for the Exception to trigger. *See, e.g.*, *Viking Constr.*, 210 A.3d at 664–65. Put simply, Appellants' welding operation involved falling slag, which damaged the exterior glass of Energy Center 5. The welding operation is inseparable from the falling slag; they are not two separate

events. The falling slag is not an independent event that "resulted in a covered peril." Instead, the falling slag during the welding operation constituted damage, caused by an act of construction or installation, to the exterior glass. Further, even if the falling slag is separable from the welding operation, it is not a "covered peril." Under the Policy, Appellants' claim is not covered because it falls within the Exclusion.

The Supreme Court of Texas in *Fiess*, discussed by both parties, reached a similar conclusion. In *Fiess*, an insurance policy contained an exclusion stating "[w]e do not cover loss caused by . . . mold," but also contained an exception stating "[w]e do cover ensuing loss caused by . . . water damage." 202 S.W.3d at 746. Policyholders had argued that the policy covered mold damage and contamination resulting from a flood and pre-flood leaks, and we certified that issue to the Supreme Court of Texas. *See Fiess v. State Farm Lloyds*, 392 F.3d 802, 804 (5th Cir. 2004). The Supreme Court of Texas rejected the policyholders' argument, holding that the ensuing loss provision could not reinstate coverage over a claim explicitly excluded by the exclusion. *Fiess*, 202 S.W.3d at 749–51. "Instead, the ensuing-loss clause provides coverage only if . . . relatively common and usually minor risks lead to a relatively uncommon and perhaps major loss: building collapse, glass breakage, or water damage." *Id.* at 750. Finally, the Court noted that the policy at issue contained a clause clarifying that it would cover ensuing losses caused by water damage "if the loss would otherwise be covered under" the policy. *Id.* at 751–53. The Court concluded that this clause limited the ensuing loss clause "whenever it conflicts with anything else in the policy." *Id.* at 751. Therefore, the only reasonable interpretation of the policy was that the ensuing loss clause must yield to the mold exclusion. *Id.*

Similar to the policyholders in *Fiess*, Appellants ask us to disregard the Exclusion in favor of the Exception. *Id.* at 748 ("The Fiess's argue that we must disregard how this policy provision starts . . . because of how it ends.").

Appellants would have us read the Exception as follows: "If an act relating to construction results in a covered peril we do cover the loss or damage caused by that covered peril."[11]

Appellants' proposed reading is unpersuasive. The Exception is triggered if an excluded peril "results in a covered peril." Put differently, to trigger this provision, there must be some distinct peril that arises as a result of the excluded peril, and that subsequent peril must be a covered peril. *See id.* at 750; *cf. Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co.*, 219 F.3d 501, 505–06 (5th Cir. 2000) (resulting damage exception not triggered unless the excluded peril results in "damage that is different in kind" from the excluded peril). Here, the damage to the exterior glass was caused by Appellants' construction and installation activities, specifically, the falling slag occurring during Appellants' welding project. Therefore, the associated damage is excluded from coverage unless the welding project "result[ed] in a covered peril." But damage caused by an act of construction is not a "covered peril" because it falls within the Exclusion. Indeed, the Policy excludes coverage for "loss or damage . . . caused by . . . or resulting from an act . . . relating to" construction or installation. Even if the damage caused by the falling slag were a "covered peril," the welding project did not "result in" a separate covered peril; the welding project and attendant falling slag was *itself* the peril. *See Alton Ochsner Med. Found.*, 219 F.3d at 505–06.

Appellants point out that the ensuing loss clause in *Fiess* only reinstated coverage to the extent "the loss would otherwise be covered under" the policy. 202 S.W.3d at 751. Although this language differs from the language in the instant Policy, it accomplishes the same goal as the

[11] The Policy actually states that "if an act, defect, error, or omission as described above results in a covered peril, 'we' do cover the loss or damage caused by that covered peril."

Policy's ensuing loss clause, which only reinstates coverage where an excluded peril "results in a covered peril." Appellants' effort to distinguish *Fiess* is unavailing.

More broadly, Appellants argue that any case involving an "ensuing loss" provision is inapplicable because the Policy does not use the word "ensue." As noted above, *supra* Section III.A.ii., we disagree. We cannot find, and Appellants do not identify, any significant difference applicable here between resulting loss provisions and ensuing loss provisions. *See Viking Constr.*, 210 A.3d at 665 & n.9 ("A resulting loss clause [is] also known as an ensuing loss clause.").

Beyond *Fiess*, another case, *Viking Construction, Inc. v. 777 Residential, LLC*, is persuasive because it interpreted an identical provision to that presented in this case. *Id.* at 658; *see also RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015) (noting that Texas courts "are mindful of other courts' interpretations of policy language that is identical or very similar to the policy language at issue"). In *Viking Construction*, the Appellate Court of Connecticut concluded that the ensuing loss clause in Liberty's policy did not reinstate coverage over a claim arising from damage to windows caused by the insured's power washing of the concrete façade of a building. *Viking Constr.*, 210 A.3d at 657–58, 664. The court held that the "damage to the windows . . . was a direct result of" the power washing, not a separate event that would trigger the ensuing loss provision. *Id.* at 661. The court went on to hold that the ensuing loss clause would be triggered if a "loss caused by an act during a renovation . . . causes a covered peril, such as a fire, and that *latter peril* damages the building." *Id.* at 665 (emphasis added). Because "there was only one cause" of the loss—the spraying of the building and its attendant damage to the windows—the ensuing loss clause did not apply. *Id.* The court also held that spraying of the building was not a covered peril. *Id.*

Like the spraying in *Viking Construction*, there was only one cause for the loss in this case—Appellants' welding operation.[12] Those welding operations were accompanied by damage to the exterior glass of Energy Center 5. Welding operations, an act of construction or installation, are not covered perils under the Policy. The damage to the exterior glass at Energy Center 5 was concomitant with Appellants' welding operations, much like the damage to the windows in *Viking Construction* was concomitant with the power washing, and much like the mold in *Fiess* was concomitant with the water damage. Though Appellants argue that the slag is separable from the welding operation, "[w]e do not think that a single phenomenon that is clearly an excluded risk under the policy was meant to become compensable because in a philosophical sense it can also be" characterized as a distinct peril. *Fiess*, 202 S.W.3d at 750 (quoting *Aetna Cas. & Surety Co. v. Yates*, 344 F.2d 939, 941 (5th Cir. 1965) (Friendly, J., sitting by designation)).

The parties refer to many additional cases from other jurisdictions to support their respective positions.[13] In the context of this *Erie* guess, and in the face of a persuasive decision from the highest court in Texas and a case interpreting identical policy language, we need not parse these cases in detail.

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[12] Although Appellants state that "the winds were high" during the welding operation and characterize the slag as "blowing slag," Appellants do not directly contend that wind caused the damage to the exterior windows.

[13] These cases include *TMW Enters. v. Fed. Ins. Co.*, 619 F.3d 574, 578 (6th Cir. 2010); *Alton Ochsner Med. Found.*, 219 F.3d at 505–06; *Leep v. Trinity Universal Ins. Co.*, 261 F. Supp. 3d 1071, 1083–85 (D. Mont. 2017); *James McHugh Constr. Co. v. Travelers Prop. & Cas. Co.*, 223 F. Supp. 3d 462, 473–74 (D. Md. 2016); *Selective Way Ins. Co. v. Nat'l Fire Ins. Co. of Hartford*, 988 F. Supp. 2d 530 (D. Md. 2013); *Bartram, LLC v. Landmark Am. Ins. Co.*, 864 F. Supp. 2d 1229, 1234 (N.D. Fla. 2012); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1382 (S.D. Fla. 2001); *Eckstein v. Cincinnati Ins. Co.*, 469 F. Supp. 2d 444, 454 (W.D. Ky. 2007); *Viking Constr.*, 210 A.3d at 658; *Vision One*, 276 P.3d at 308–09; *Arnold v. Cincinnati Ins. Co.*, 688 N.W.2d 708, 718 (Wis. Ct. App. 2004); *Acme Galvanizing*, 221 Cal. App. 3d at 179.

See Boyett v. Redland Ins. Co., 741 F.3d 604, 607 (5th Cir. 2014). We simply recognize that the cases cited by the parties fall into two categories: those finding that an ensuing loss provision reinstated a particular claim[14] and those finding that an ensuing loss provision did not reinstate a particular claim[15]—conclusions largely dependent on the particular facts presented.

We note that while many of these decisions align with our holding today that an ensuing loss provision is only triggered when the ensuing loss

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[14] *Leep*, 261 F. Supp. 3d at 1083–85 (rejecting proximate causation test and holding that ensuing loss provision reinstated coverage for "any otherwise covered loss that took place afterward or as a consequence or result" of the excluded loss); *Selective Way*, 988 F. Supp. 2d at 530 (involving a contract that clarifed that exclusion for faulty workmanship "should not apply to damage resulting therefrom"); *Bartram*, 864 F. Supp. 2d at 1234 (holding that ensuing loss provision triggered where insured suffered losses "separate from and the result of" the excluded loss); *Eckstein*, 469 F. Supp. 2d at 454; *Vision One*, 276 P.3d at 308–09.

[15] *E.g.*, *TMW Enters.*, 619 F.3d at 578 ("The 'ensuing loss' clause also fairly could be construed as a causation-in-fact breaking link in coverage exclusions, establishing that independent, non-foreseeable losses caused by faulty construction are covered."); *Alton Ochsner Med. Found.*, 219 F.3d at 505–06 ("'Impairment of structural integrity' does not 'result' from cracking or fault construction of the foundation; the cracked foundation *is* the impaired structural integrity . . . . To put it another way, . . . [t]he cracking *is* the impairment; they are synonymous."); *James McHugh*, 223 F. Supp. 3d at 473–74 (concluding the ensuing loss clause was not triggered where the loss was "the initial damage" directly associated with the excluded peril); *Acme Galvanizing*, 221 Cal. App. 3d at 179 (interpreting an ensuing loss clause, even in an "all-risk" policy, to reinstate coverage only "where there is a 'peril', i.e., a hazard or occurrence which causes a loss or injury, *separate* and *independent* but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues"); *see Swire Pac. Holdings*, 139 F. Supp. 2d at 1382; *Viking Constr.*, 210 A.3d at 658; *Arnold*, 688 N.W.2d at 718 (excluding from the ensuing loss analysis any "loss caused by the" excluded peril).

is distinct from the excluded loss,[16] three do not.[17] The great weight of the authority, then, favors the district court's (and Liberty's) interpretation of the Policy.[18] Further, *Fiess* and *Viking Construction* leave little doubt that the district court's summary judgment was correct.

iv. The Policy Is Not Illusory

Appellants argue that accepting Liberty's interpretation of the Policy renders the Policy illusory. Liberty responds that the Policy cannot be illusory because there are various circumstances under which it would provide coverage. We agree that the Policy is not illusory.

"Texas disfavors constructions of insurance contracts that render *all* coverage illusory." *Northfield Ins. Co. v. Herrera*, 751 F. App'x 512, 518 (5th Cir. 2018). "But when an insurance policy will provide coverage for other

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[16] *TMW Enters.*, 619 F.3d at 578; *Alton Ochsner Med. Found.*, 219 F.3d at 505–06; *James McHugh*, 223 F. Supp. 3d at 473–74; *Viking Constr.*, 210 A.3d at 658; *Arnold*, 688 N.W.2d at 718; *Acme Galvanizing*, 221 Cal. App. 3d at 179; *see Swire Pac. Holdings*, 139 F. Supp. 2d at 1382.

[17] *See Leep*, 261 F. Supp. 3d at 1083–85; *Eckstein*, 469 F. Supp. 2d at 454, 457–58; *Vision One*, 276 P.3d at 308–09. *Eckstein* and *Leep* are readily distinguishable because they rely, at least in part, on the reasonable expectations doctrine, which has been rejected by Texas courts. *Leep*, 261 F. Supp. 3d at 1084; *Eckstein*, 469 F. Supp. 2d at 457–58; *see also Constitution State Ins.*, 61 F.3d at 410 n.4 ("Texas law does not recognize coverage because of 'reasonable expectation' of the insured.").

[18] Certain courts have held that ensuing loss clauses are not triggered unless there is a break in proximate cause between the excluded loss and ensuing loss. *See TMW Enters.*, 619 F.3d at 578 ("The 'ensuing loss' clause also fairly could be construed as a causation-in-fact-breaking link in coverage exclusions, establishing that independent, non-foreseeable losses caused by faulty construction are covered."). *But see Leep*, 261 F. Supp. 3d at 1083–85 (rejecting proximate causation test and holding that ensuing loss provision reinstated coverage for "any otherwise covered loss that took place afterward or as a consequence or result" of the excluded loss); *Bartram*, 864 F. Supp. 2d at 1234 (ensuing loss provision triggered where insured suffered losses "separate from and the result of" the excluded loss). We need not determine whether such an exacting test applies because, here, there is no distinction between the excluded loss and the ensuing loss.

claims, Texas courts are unlikely to deem the policy illusory." *Id.*; *see also Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 459 (Tex. 1997).[19] An insurance policy is not illusory merely because it does not provide coverage for a claim the policyholder thought it would cover. *Constitution State Ins. Co. v. Iso-Tex Inc.*, 61 F.3d 405, 410 n.4 (5th Cir. 1995) ("Texas law does not recognize coverage because of 'reasonable expectation' of the insured.").

Here, as the district court noted, the Policy provides coverage under numerous potential factual scenarios. Most clearly, Liberty openly admits that the Policy covers damage caused by acts of nature, a real possibility along the Gulf Coast. Further, there may be coverage in the event of a fire unrelated to construction activities, or if a vehicle backed into a pillar of the building, or even if construction-related damage weakened the building and that weakness was later exacerbated by a separate event. For example, Liberty agrees that if a construction-related act caused holes in the windows, the water damage resulting from a subsequent storm that forced water through those holes would be a covered peril, even though the holes in the windows would not themselves be covered under the Policy. *See Bartram*, 864 F. Supp. 2d at 1233 (ensuing loss clause triggered under similar circumstances). Because the Policy provides coverage under other factual scenarios, the Policy as written is not illusory.[20]

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[19] Appellants contend that they need only show that the Policy is "largely" illusory, citing three decisions. *ATOFINA Petrochems., Inc. v. Continental Cas. Co.*, 185 S.W.3d 440, 444 (Tex. 2005); *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997); *Nay Co. v. Navigators Specialty Ins. Co.*, No. 3:16-CV-02675-N, 2018 WL 4026346, at *4 (N.D. Tex. June 12, 2018) (vacated by agreement of the parties). Even under that slightly more forgiving standard, the Policy is not illusory for the reasons explained.

[20] We recognize that a district court in *Nay Co. v. Navigators Specialty Insurance Co.* found a nearly identical policy "largely illusory." But that holding rested on the particular construction of the policy urged by the insurer in that case. 2018 WL 4026346, at *5 ("[A]dopting *Hanover's proposed construction* of the Ensuing Loss Clause would render coverage under the Policy largely illusory." (emphasis added)). Moreover, *Nay* has since

v. Conclusion

For these reasons, Appellants have not met their burden to show that the Exception to the Exclusion reinstates coverage. Therefore, the Policy does not provide coverage for Appellants' claim.

B. Issue Two: Whether the Policy is Ambiguous

In the alternative, Appellants argue that the Policy is ambiguous and that, therefore, we should construe the Policy in favor of the insured Appellants. Under Texas law, a litigant "who wishes to argue contract ambiguity must affirmatively plead it, or else the argument is waived." *Nichols v. Enterasys Networks, Inc.*, 495 F.3d 185, 190 (5th Cir. 2007); *see also O'Kehie v. Harris Leasing Co.*, 80 S.W.3d 316, 319 (Tex. App. – Texarkana 2002, no pet.). Because Appellants' ambiguity argument "does not appear in [Appellants'] initial pleading," it is forfeited. *Nichols*, 495 F.3d at 190. Even if the argument were not forfeited, because we have concluded that the Policy "as written can be given a clear and definite legal meaning . . . it is not ambiguous as a matter of law." *Gilbert*, 327 S.W.3d at 133. Accordingly, we are not required to interpret the Policy in favor of coverage, as Appellants urge. Instead, we interpret the Policy under its terms. *Nautilus Ins. Co. v. Country Oaks Apartments Ltd.*, 566 F.3d 452, 455 (5th Cir. 2009).

IV. CONCLUSION

We AFFIRM the district court's summary judgment.

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been vacated by agreement of the parties, nullifying any persuasive value. *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012) ("[T]his court has consistently held that vacated opinions are not precedent."), *cert. denied*, 568 U.S. 1249 (2013).