2016 IL App (1st) 151606-U

SIXTH DIVISION
June 24, 2016
Modified Upon Denial of Rehearing July 22, 2016

No. 1-15-1606

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREENWICH INSURANCE COMPANY and INDIAN HARBOR INSURANCE COMPANY, Plaintiffs-Appellees,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 10 CH 21805
JOHN SEXTON SAND AND GRAVEL CORPORATION, CONGRESS DEVELOPMENT COMPANY, ALLIED WASTE TRANSPORTATION, INC., ALLIED WASTE INDUSTRIES, INC., and REPUBLIC SERVICES, INC., Defendants-Appellants.	)	Honorable Mary Lane Mikva, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** We reverse the circuit court's decision to grant partial summary judgment in favor of the insurers and deny partial summary judgment against the insureds, a ruling that required the insureds to reimburse one of the insurers for a $1 million self-insured retention. We affirm the circuit court's decision to grant partial summary judgment in favor of the insurers and deny partial summary judgment against the insureds regarding the insurers' ability to seek contribution from other insurers in ongoing litigation in a different forum.

¶ 2 This is the second interlocutory appeal in an insurance dispute between plaintiffs, Greenwich Insurance Company (Greenwich) and Indian Harbor Insurance Company (Indian Harbor) (collectively, the Insurers), and defendants, John Sexton Sand and Gravel Corporation (Sexton), Congress Development Company (Congress), Allied Waste Transportation, Inc. (Allied Transportation), Allied Waste Industries, Inc. (AWI), and Republic Services, Inc. (Republic) (collectively, the Insureds). This appeal involves two Greenwich primary commercial lines policies and one Indian Harbor pollution and remediation legal liability policy (PARLL policy).

¶ 3 The parties' dispute arises out of a December 2009 lawsuit (*Amber v. Allied Waste Transportation, Inc.*, No. 09 L 15741 (*Amber* litigation)) brought by approximately 2,700 individuals living near a landfill in Hillside, Illinois which the Insureds owned and operated. The *Amber* plaintiffs seek damages for bodily injury and property damage allegedly caused by gases, fires, and explosions associated with the landfill over the course of several years. The underlying complaint alleged that air intruded into the landfill's gas collection systems which caused two subsurface fires and one surface fire at the landfill in 2002. The complaint further alleged that the invasion of noxious gases from the landfill, underground and into the air in the neighborhoods surrounding the landfill, in addition to the subsurface fires and resulting underground tremors from explosions at the landfill caused structural damage to the *Amber* plaintiffs' properties, which continued over a period of years. In March 2007, Congress began pumping leachate into a treatment plant built on site at the landfill and allegedly added flares to burn additional gas at the landfill. These flares allegedly caused several explosions sufficient to shake homes in the surrounding neighborhoods.

¶ 4 In December 2009 and February 2010, the Insureds tendered the *Amber* litigation to the Insurers under the Greenwich primary policies and the Indian Harbor PARLL policy. Greenwich issued two primary general liability policies to Sexton for the policy periods of June 1, 2005 to June 1, 2006, and June 1, 2005 to June 1, 2007.[1] The Greenwich policies are "first dollar" policies that provide for the payment of all losses up to the specified limit without any use of up-front deductibles or retentions. The primary policies state:

> "[Greenwich agrees to] pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and the duty to defend the insured against any 'suit' seeking those damages ***."

In addition, pertinent to this appeal, the primary policies contain an "Other Insurance" provision that states in relevant part:

> "If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share all that other insurance by the method described in c. below.
>
> * * *
>
> c. Method of Sharing

[1] The Insureds did not challenge a previous circuit court ruling that other insurance policies covering the period prior to June 1, 2005 did not apply to this case.

> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each Insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first."

Finally, the Greenwich primary policies included an "absolute pollution exclusion" endorsement.

¶ 5 Indian Harbor issued the PARLL policy to Republic for the period from June 30, 2009 to June 30, 2010. The PARLL policy provides coverage for loss and related legal expenses resulting from any "pollution condition" on, at, or migrating from any covered location, including the landfill at issue here. The policy defines a "pollution condition" as "the discharge, dispersal, release, seepage, migration, or escape of POLLUTANTS into or upon land, or structures thereupon, the atmosphere, or any watercourse or body of water including groundwater." The policy defines "pollutants" as "any solid, liquid, gaseous or thermal pollutant, irritant or contaminant including but not limited to smoke, vapors, odors, soot, fumes, acids, alkalis, toxic chemicals, [and] waste materials ***." The PARLL policy provides that Indian Harbor shall have the right and duty to defend an insured against a claim seeking damage for a loss or remediation expense.

¶ 6 Also relevant here, the Indian Harbor PARLL policy contains an "Other Insurance" provision under "Endorsement #033," which addresses the priority of coverage when more than one policy is available to respond to a loss. The heading on the endorsement states in bold, capital letters, "PRIMARY INSURANCE." The "Other Insurance" provision states:

> "Subject to Section VI. LIMITS OF LIABILITY AND SELF-INSURED RETENTION, this Insurance shall be in excess of the Self-Insured Retention Amount stated in Item 4. of the Declarations and where other valid and

collectable insurance is available to the INSURED for a POLLUTION CONDITION, this insurance shall apply as primary insurance versus any other valid and collectable insurance."

The "Other Insurance" provision includes an explanation regarding the method for contribution "[w]here such other valid and collectable insurance is available to the INSURED for a POLLUTION CONDITION is also primary ***."

¶ 7 Unlike the Greenwich primary policies, the Indian Harbor PARLL policy is a "claims-made" policy, meaning the claim for which coverage is sought must be made during the policy period to trigger coverage. The PARLL policy is subject to a $1 million self-insured retention (SIR) that applies to both defense and indemnity costs. The policy specifically states that if Indian Harbor exercises its right to assume the defense of the claim, the insured "shall promptly reimburse [Indian Harbor] for any element of LOSS, REMEDIATION EXPENSE, LEGAL EXPENSE or any other coverages afforded by endorsement falling within the Self-Insured Retention Amount stated in Item 4. of the Declarations."

¶ 8 The Insureds also obtained policies from certain AIG and Zurich companies. AIG issued three primary general liability and three umbrella policies to Sexton, covering bodily injury and property damage for the policy periods June 1, 2007 to June 1, 2008, June 1, 2008 to June 1, 2009, and June 1, 2009 to June 1, 2010. These policies are subject to a deductible of $250,000 which applies to both defense costs and indemnity payments. AWI purchased a series of primary and umbrella general liability policies from AIG and Zurich for the collective policy period of January 1, 2005 to June 3, 2009. These policies cover bodily injury and property damage that occurred during the policy period and are subject to deductibles of either $2.5 million or $3 million per occurrence. Zurich issued two primary general liability and two umbrella policies to

Republic covering the policy periods November 1, 2008 to June 30, 2009, and June 30, 2009 to June 1, 2010. The Zurich policies cover bodily injury and property damage and are subject to deductibles of $3 million or $5 million per occurrence. In short, the policies AIG and Zurich issued to certain Insureds carry higher deductibles and the policies provided that the Insureds retained a greater portion of up-front financial risk. Although these policies cover the time period alleged in the *Amber* litigation, there is no judicial ruling to date regarding whether AIG and Zurich have a duty to defend the Insureds under these policies. Further, because the Insurers in this case are pursuing their contribution rights against AIG and Zurich in a separate Connecticut lawsuit, AIG and Zurich are not parties to this case.

¶ 9 On May 20, 2010, the Insurers filed the underlying declaratory judgment action seeking a ruling that they had no duty to defend or indemnify the Insureds under nine different policies, including the two Greenwich primary policies and the Indian Harbor PARLL policy. The Insurers moved for judgment on the pleadings on certain counts and the Insureds moved for partial summary judgment regarding the Insurers' duty to defend. The circuit court granted and denied both motions in part, finding that the Insurers had a duty to defend the Insureds under the two Greenwich policies and two Indian Harbor excess and umbrella policies. The court entered no judgment regarding the PARLL policy, as the Insureds did not move for summary judgment on that count. However, the court's March 12, 2012 order granting the Insurers' motion for a ruling under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) included a finding that Indian Harbor had a duty to defend under its PARLL policy.

¶ 10 On March 11, 2013, we issued an unpublished order under Illinois Supreme Court Rule 23 (eff. Jan. 1, 2011) affirming the judgment of the circuit court. Regarding the duty to defend under the PARLL policy, we noted the *Amber* litigation alleges that the plaintiffs suffered bodily

injuries "from inhaling *and otherwise being exposed* to the chemical compounds in the landfill gas, without limitation to contaminants producing odors" and that Congress, Allied Transportation, and Sexton were liable for trespass and property damage simply by allowing the migration of the landfill gas, including underground, onto neighboring properties. (Emphasis in original.) We found the *Amber* litigation alleged facts that fell within, or potentially within, the coverage of the Indian Harbor PARLL policy. *Greenwich Insurance Co. v. John Sexton Sand & Gravel Corp.*, 2013 IL App (1st) 121263-U, ¶ 23 (unpublished order under Supreme Court Rule 23).

¶ 11 We also held that Greenwich had a duty to defend under its two primary policies because "the explosion-related allegations of the Amber lawsuit fall outside the absolute pollution exclusions in [Greenwich's] policies." *Id.* ¶ 25. The *Amber* litigation alleged the flares that exploded were part of the landfill operation's on-site attempt to treat and mitigate the escape of gases. We found the explosions did not qualify as "traditional environmental pollution" that warranted the application of the Greenwich policies' absolute pollution exclusions. We concluded that to extend "but for" causation to encompass the alleged explosions would run contrary to the limitation of the exclusion to traditional environmental pollution adopted by our supreme court in *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 493-94 (1997) and raise the potential for absurd results. *Id.* (citing *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67, 79-80 (2005)). In other words, we found that Greenwich's duty to defend under its two primary policies stemmed from the flares that exploded and not a pollution-related condition.

¶ 12 On June 25, 2013, the parties entered into an agreement in which the Insureds agreed to withdraw their motion for partial summary judgment seeking payment of past defense costs and

statutory penalties under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)). The parties continued negotiating the reasonableness of defense fees and, on October 15, 2013, they executed an agreement requiring the Insurers to reimburse 93% of all defense costs incurred by the Insureds (hereinafter, defense agreement). The defense agreement set forth a protocol under which the Insurers would reimburse the Insureds. The Insurers agreed to waive any and all objections to reimbursement of defense costs based on reasonableness, including, among other things, objections based on vagueness, excessive time, multiple timekeeper attendance, and multiple firm participation. The parties also agreed that the Insurers did not waive any objections to defense costs based on technical errors such as billing for insurance coverage-related activity and double billing. The defense agreement, signed by a representative on behalf of Greenwich and Indian Harbor, made no mention of Greenwich's right to seek contribution or Indian Harbor's right to seek reimbursement of its SIR.

¶ 13 On February 24, 2014, the Insurers sent correspondence to the Insureds stating that the defense agreement did not address how the defense costs would be allocated between Greenwich and Indian Harbor. The correspondence stated that in light of this Court's decision, Indian Harbor acknowledged that it had an obligation under the PARLL policy to contribute to the defense of the Insureds in the *Amber* litigation on a primary basis, subject to a complete reservation of rights. The Insurers sought equitable allocation of the defense costs between Greenwich and Indian Harbor, while also reserving their right to seek contribution from AIG and Zurich. The Insurers stated that upon Indian Harbor's reimbursement of defense costs to Greenwich, Indian Harbor would submit an invoice to the Insureds for reimbursement under the PARLL policy's SIR. In addition, the Insurers stated that they would pursue contribution from AIG and Zurich for other insurance policies issued to the Insureds.

¶ 14 On March 7, 2014, the Insurers filed a lawsuit in Connecticut state court seeking a declaration of their rights to contribution from AIG and Zurich. The Insureds joined the Connecticut litigation and moved for a stay pending the outcome of this action. The Connecticut state court granted the Insureds' motion for a stay on February 23, 2015. *Indian Harbor Insurance Co. v. American Guarantee & Liability Insurance Co.*, No. X04 HHD-CV14-6049335-S (Conn. Super. Ct. Feb. 23, 2015).

¶ 15 After the Insurers filed their claim in Connecticut, the Insureds sought leave from the circuit court here to amend their counterclaim to obtain declarations that: (1) Indian Harbor was not entitled to reimbursement of the $1 million SIR and (2) the Insurers were barred from seeking contribution from AIG and Zurich in Connecticut. They also moved separately to enjoin the Insurers from pursuing the Connecticut litigation.

¶ 16 On June 27, 2014, the circuit court granted the Insureds leave to amend their counterclaim, but denied their motion for an injunction to halt the Connecticut litigation. Thereafter, the parties filed cross-motions for partial summary judgment to determine the issue of Indian Harbor's right to reimbursement of the $1 million SIR from the Insureds and the Insurers' right to pursue their contribution claims in the Connecticut litigation.

¶ 17 On January 20, 2015, the circuit court heard argument on the cross-motions for partial summary judgment. Among other issues, the Insureds argued that the Indian Harbor PARLL policy was not co-primary with the Greenwich policies because the "Other Insurance" provision in the PARLL policy states that "where other valid and collectible insurance is available to the insured for a pollution condition, this insurance shall apply as primary versus any other valid and collectable insurance." The circuit court requested supplemental briefing on the issue of whether the Indian Harbor PARLL policy is only primary in relation to another pollution policy.

¶ 18 In their supplemental brief, the Insureds argued that the "Other Insurance" provision of the Indian Harbor PARLL policy "provides that while that policy can be considered 'primary' as regards *certain* other policies *some of the time*, the PARLL policy *always* provides coverage that is *excess* of the SIR." (Emphasis in original.) The Insureds quoted the provision of the "Other Insurance" clause that states "[T]his insurance shall be in excess of the Self-Insured Retention Amount ***," and for that reason it argued that Indian Harbor's defense duties were not co-extensive with those of Greenwich. In a footnote, the Insureds stated that the "Other Insurance" provision is primary where other insurance is available "*for a POLLUTION CONDITION*," but that this language did not supplant the statement that the PARLL policy is excess of the SIR. (Emphasis in original.) The Insureds argued in the footnote that "this language does not apply here because the Greenwich policies are providing coverage, not for a "pollution condition," but because the *Amber* litigation alleges non-pollution causes of damage (*i.e.*, flare explosions), citing this Court's unpublished order.

¶ 19 The Insurers argued in their supplemental brief that the language in the "Other Insurance" provision of the PARLL policy explicitly states that "this insurance shall apply as primary insurance versus any other valid and collectable insurance." The Insurers also contended that "[b]oth the Greenwich policies and the PARLL policy have been held to have a duty to defend the *Amber* litigation; under Illinois law, that means they have to defend the entire case, not merely the claims that fall within coverage." Finally, the Insurers asserted that the Insureds misread the PARLL policy's "Other Insurance" provision because reading it in the way the Insureds suggested would mean the PARLL policy was excess to all other coverage.

¶ 20 On March 6, 2015, the circuit court issued a detailed written order and opinion granting the Insurers' cross-motion for partial summary judgment and denying the Insureds' cross-

motion. First, the court ruled that the Insurers are entitled to seek reimbursement from the Insureds' other insurers because: (1) the law of the case doctrine did not bar contribution; (2) the Insurers were not barred from seeking contribution on the basis that other policies may insure other risks; (3) the Insurers did not contract away their right to contribution by entering into the defense agreement; (4) laches did not bar contribution; and (5) the targeted tender doctrine did not bar contribution.

¶ 21 Second, the court concluded that the Insurers were entitled to reimbursement of the SIR under the Indian Harbor PARLL policy. Similar to the first ruling, the court found that the law of the case doctrine and laches did not bar reimbursement of the SIR. The court also found that the defense agreement did not waive the right to reimbursement of the SIR. Indian Harbor did not violate the PARLL policy or forego the SIR by seeking a declaratory judgment on the issue of whether Indian Harbor had a duty to defend under the PARLL policy. The court then found that the PARLL policy is a primary liability policy, stating:

> "The Insureds hang their argument on the 'in excess of the Self-Insured Retention Amount' language and misleadingly fail to discuss the rest of the same sentence: 'this insurance shall apply as primary insurance versus any other valid and collectable insurance.' Indeed, the endorsement expressly details how contribution will work with other primary policies: where other applicable insurance is also primary and 'permits contribution by equal shares, [Indian Harbor] will also follow this method'; where other applicable 'insurance does not permit contribution by equal shares, [Indian Harbor] will contribute by limits.' PARLL Endorsement #033. Finally, the endorsement expressly states: 'Notwithstanding the foregoing, this Policy is specifically excess of the following

policies,' and then lists a policy not at issue in this case. PARLL Endorsement #033. The PARLL policy is a primary policy, excess to the SIR amount, not an excess insurance policy."

The court granted the Insurers' motion for partial summary judgment as to count XII (reimbursement of Indian Harbor SIR) and count XIII (contribution of defense costs from other insurers) of the Insureds' amended counterclaim and denied the Insureds' motion on those same counts. The court also ruled that the Insureds' motion for partial summary judgment as to counts IX, X, and XVIII of the Insurers' amended complaint was moot.

¶ 22 On May 6, 2015, the circuit court entered an order granting the Insureds' motion for a Rule 304(a) finding, certifying the March 6, 2015 order for immediate appeal under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). This appeal followed.

¶ 23 ANALYSIS

¶ 24 The Insureds argue that the circuit court erred in denying their cross-motion for partial summary judgment and granting the Insurers' cross-motion. They contend: (1) the "Other Insurance" provision in the Indian Harbor PARLL policy precludes Indian Harbor from seeking reimbursement of its $1 million SIR; (2) the Insurers are not entitled to seek contribution from the Insureds' other insurers; and (3) the targeted tender doctrine prevents Greenwich from seeking contribution from Indian Harbor and the Insureds' other insurers. We address these issues in turn.

¶ 25 Standard of Review

¶ 26 Summary judgment is appropriate "if the pleadings, depositions, 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." 735 ILCS 5/2-1005(c) (West

2012). Since the parties filed cross-motions for summary judgment, they conceded that no material questions of fact exist and that only a question of law is involved that the court may decide based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The mere filing of cross-motions for summary judgment, however, does not establish that there is no issue of material fact, nor is a circuit court obligated to render summary judgment for either party. *Id.* We review the court's decision as to cross-motions for summary judgment *de novo*. *Id.* ¶ 30.

¶ 27 In construing an insurance policy, the court determines the intent of the parties to the contract by construing the policy as a whole, with due regard to the risk undertaken, the subject matter that is insured, and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). Where the words in the policy are clear and unambiguous, "a court must afford them their *plain, ordinary, and popular meaning*." (Emphasis in original.) *Id*. However, if the words in the policy are susceptible to more than one reasonable interpretation, they will be considered ambiguous and will be strictly construed in favor of the insured and against the insurer that drafted the policy. *Id*. Nonetheless, courts will not strain to find an ambiguity where none exists. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law ***." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002).

¶ 28 Reimbursement of the Indian Harbor $1 Million SIR

¶ 29 The Insureds first argue that the circuit court erred in ruling that Indian Harbor could seek reimbursement of its $1 million SIR from the Insureds for contribution of defense costs to Greenwich. The Insureds contend that the "Other Insurance" provision in Indian Harbor's PARLL policy renders that policy excess to Greenwich's primary policies.

¶ 30 The "Other Insurance" provision in the PARLL policy states:

> "Subject to Section VI. LIMITS OF LIABILITY AND SELF-INSURED RETENTION, this Insurance shall be in excess of the Self-Insured Retention Amount stated in Item 4. of the Declarations and where other valid and collectable insurance is available to the INSURED for a POLLUTION CONDITION, this insurance shall apply as primary insurance versus any other valid and collectable insurance."

¶ 31 The language of this provision unambiguously states that where other valid and collectable insurance is available to the Insureds for a *pollution condition*, only then does the PARLL policy apply as primary insurance versus any other valid and collectable insurance. In other words, the "Other Insurance" provision is primary with respect to other available policies that *also* cover pollution and, by necessary inference, becomes *excess* to those other policies that do not cover pollution. Illinois courts have recognized that "excess coverage might arise 'by coincidence' when multiple primary insurance contracts apply to the same loss." *Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Co.*, 227 Ill. 2d 102, 115 (2007); see also *Employers Mutual Cos./Illinois Emcasco Insurance Co. v. Country Cos.*, 211 Ill. App. 3d 586, 590 (1991) ("Excess coverage, however, may arise not only by drafting a policy which, on its face provides excess coverage, but also by 'coincidence' where, as here, the judicial interpretation of two policies renders one policy excess"); 15 Steven Plitt *et al.*, Couch on Insurance § 219:33 (3d ed. rev. 2015) ("An excess 'other insurance' clause purports to make an otherwise primary policy excess insurance should another primary policy cover the loss in question."). With this policy language in mind, we examine whether the Greenwich policies

cover a *pollution condition* to determine the applicability of the Indian Harbor PARLL policy as primary or excess.

¶ 32 The Greenwich primary policies were modified by the following "absolute pollution exclusion" endorsement:

> "This insurance does not apply to:
>
> f. Pollution
>
> > (1) 'Bodily injury' or 'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time.
> >
> > This exclusion does not apply to 'bodily injury' or 'property damage' arising out of heat, smoke or fumes from a 'hostile fire' unless that 'hostile fire' occurred or originated:
> >
> > (a) At any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste ***."

"Pollutants" are defined by the primary policies as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled[,] reconditioned or reclaimed." In short, the Greenwich policies contain absolute pollution exclusions and, therefore, do not cover a "pollution condition" as described in the Indian Harbor PARLL policy.

¶ 33 Furthermore, we held in the first appeal of this case that "the explosion-related allegations of the Amber lawsuit fall outside the absolute pollution exclusions in [Greenwich's] policies." *Greenwich Insurance Co. v. John Sexton Sand & Gravel Corp.*, 2013 IL App (1st)

121263-U, ¶ 25 (unpublished order under Supreme Court Rule 23). Accordingly, Greenwich's coverage obligation was triggered by a non-pollution condition – damage resulting from explosions at the landfill. *Id.*

¶ 34 Based on the Greenwich policies' "absolute pollution exclusions" and our earlier holding, we find the language of the "Other Insurance" provision in the Indian Harbor PARLL policy renders that policy excess to the Greenwich primary policies. We must construe the PARLL policy's "Other Insurance" provision such that none of its terms are rendered meaningless or superfluous. *Cincinnati Insurance Co. v. Gateway Construction Co.*, 372 Ill. App. 3d 148, 152 (2007) (a reviewing court will not interpret an insurance policy in such a way that any of its terms are rendered meaningless or superfluous). To that end, we cannot ignore the language of the "Other Insurance" provision requiring that "other valid and collectable insurance is available to the INSURED for a *POLLUTION CONDITION*." If we did not consider the requirement of a "pollution condition" within that provision, it would render those terms meaningless and superfluous.

¶ 35 In light of our finding that the Indian Harbor PARLL policy is excess to the Greenwich primary policies, Indian Harbor is precluded from seeking reimbursement of its $1 million SIR until the Greenwich primary policies are fully exhausted. See *Kajima*, 227 Ill. 2d at 114 ("Once an excess policy is triggered in a case, the limits of the primary insurance must be exhausted before the excess carrier will be required to contribute to a settlement or judgment."). We reverse the circuit court's finding that Indian Harbor was entitled to reimbursement of its $1 million SIR under its PARLL policy and reverse the court's decision to grant partial summary judgment in favor of the Insurers regarding count XII of the Insureds' amended counterclaim.

¶ 36 The Right to Seek Contribution

¶ 37 The Insureds argue that the circuit court erred in permitting the Insurers to raise coverage defenses that they could have litigated but did not pursue in the first round of litigation, citing *American Service Insurance Co. v. China Ocean Shipping Co. (Americas) Inc.*, 2014 IL App (1st) 121895 (*COSCO*) in support. The Insureds contend the Insurers were precluded from seeking contribution from other insurers AIG and Zurich, or from Insurers themselves (Greenwich seeking reimbursement from Indian Harbor, for example), because their contribution claims relied on defenses – the existence of "other insurance" and defenses to targeted tender – that the Insurers could have developed but failed to pursue when the duty to defend was at issue during the first round of litigation. Essentially, it appears the Insureds are asserting that the law of the case doctrine precludes the Insurers from litigating the issue of contribution because they failed to raise it in an earlier proceeding resolving their duty to defend.

¶ 38 "The law of the case doctrine bars relitigation of an issue that has already been decided in the same case [citation] such that the resolution of an issue presented in a prior appeal is binding and will control upon remand in the circuit court and a subsequent appeal before the appellate court." *COSCO*, 2014 IL App (1st) 121895, ¶ 17. "The doctrine applies to questions of law and fact and encompasses a court's explicit decisions, as well as those decisions made by necessary implication." *Id.* A ruling, however, "will not be binding in a subsequent stage of litigation when different issues are involved, different parties are involved, or the underlying facts have changed." *Id.*

¶ 39 In *COSCO*, the plaintiff insurance company argued in its second appeal that the law of the case doctrine did not apply to a discovery request it made regarding any funds the insureds might have received from entities other than the plaintiff in connection with the defense costs

incurred in the underlying actions. The plaintiff contended that the law of the case doctrine did not apply to the discovery request because the reviewing court did not address the issue of whether the insureds selectively targeted their defense of the underlying actions to the plaintiff and, therefore, made no determination as to whether the insured had received an impermissible double recovery. In the first appeal, the reviewing court found that the plaintiff had a duty to defend the insureds because they were insureds under the relevant insurance policy and the plaintiff had actual notice of the underlying claims. *American Service Insurance Co. v. China Ocean Shipping Co. (Americas) Inc.*, 402 Ill. App. 3d 513, 523-25 (2010). The reviewing court did not address the legal theories of the targeted tender doctrine or double recovery because the plaintiff did not raise or address those issues on appeal.

¶ 40 In the second appeal, the court found the previous holding that the plaintiff owed the insureds a duty to defend was law of the case and the plaintiff was barred from relitigating that issue by claiming that the insureds did not exclusively tender their defense in the underlying actions to the plaintiff and that the insured might have received a double recovery as a result. *COSCO*, 2014 IL App (1st) 121895, ¶ 19. The court further found that the plaintiff sought discovery regarding any insuring agreements issued to the insureds at the time of the underlying accident in response to a motion filed by the insureds. The court determined that "to the extent plaintiff has already requested discovery regarding other insurance policies issued to [the insureds], the circuit court's ruling is law of the case and bars such recovery." *Id.*

¶ 41 Here, the Insureds rely on *COSCO* on a "waiver variant" theory of law of the case mentioned nowhere in the *COSCO* opinion. They point to a footnote in paragraph 19 that stated the plaintiff "has not asserted that the underlying facts have changed as to the manner in which [the insureds] tendered their defense of the underlying actions since the previous appeal and, in

any event, this theory was available to plaintiff during the earlier proceedings in this case as the 'targeted tender' doctrine has been recognized in Illinois since 1992." *Id.* ¶ 19, n.1. The Insureds, quoting *Gallaher v. Hasbrouk*, 2013 IL App (1st) 122969, ¶ 21, argue that that the "waiver variant" theory of law of the case "prevents parties from splitting their claims by 'foreclos[ing] litigation of any claim that was, or could have been raised in an earlier suit between the parties or their privies.' " The *Gallaher* case is inapplicable because it examined the application of *res judicata* and collateral estoppel, which are not at issue here.

¶ 42 The Insureds' reliance on *COSCO* also is misplaced. The law of the case doctrine does not apply here. In our previous appeal, we determined that the Insurers have a duty to defend. Logically, before an insurer can even make a contribution claim, a coverage determination must be made so that the insurer will have a reason to claim contribution from other insurers. *American National Fire Insurance Co. v. National Fire Insurance Co. of Pittsburgh, PA*, 343 Ill. App. 3d 93, 97 (2003) ("The right to equitable contribution arises when one insurer pays money for the benefit of another insurer."). Therefore, the first appeal is not binding on the issue of contribution in this second appeal because it is a different issue that could not have been raised until the determination of the Insurers' duty to defend. Furthermore, the law of the case doctrine does not apply to the other insurers, AIG and Zurich, who are not parties to this case. *COSCO*, 2014 IL App (1st) 121895, ¶ 17 (a ruling is not binding in a subsequent stage of litigation when different parties are involved). We agree with the circuit court that there is simply nothing implicit in the duty to defend finding in the previous appeal that addresses the Insurers' right to contribution. We thus reject the Insurers' law of the case/waiver variant argument.

¶ 43 The Insureds also argue that the Insurers impliedly waived their right to seek reimbursement or contribution when they signed the defense agreement providing that

Greenwich would pay 93% of all defense costs itself. In our original order of June 24, 2016, we found the Insureds forfeited this issue because they raised it for the first time in their reply brief. On July 8, 2016, the Insureds filed a petition for rehearing requesting that this Court consider the issue because they raised it in their opening brief. We will address the issue here, although we note that in their reply brief, the Insureds incorrectly directed this court to the wrong pages of the opening brief with regard to this particular argument, which led us to the forfeiture.[2]

¶ 44 "A waiver may be either expressed or implied, arising from acts, words, conduct, or knowledge of the insurer." *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 326 (2004). "An implied waiver arises when conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it." *Id.* "Where there is no dispute as to the material facts and only one reasonable inference can be drawn, it is a question of law as to whether waiver has been established." *Id.*

¶ 45 In *Home*, the plaintiff insurance company (Home Insurance Company) waived its subrogation claim by not reserving its rights in a letter to its policyholder when it accepted defense of the underlying lawsuit and by not raising the effect of its being an excess insurer sooner than when it filed a declaratory judgment action. *Id.* The supreme court stated, "Home claims that it did not know the contents of Cincinnati's policy and whether it also contained an excess clause. However, this should not have stopped Home from informing Cincinnati during the Fisher litigation that it would seek full reimbursement from Cincinnati if its policy did not contain an excess clause. The totality of Home's conduct was inconsistent with any claim that it

[2] On page 22 of the Insureds' reply brief, the Insureds stated, "[a]s discussed in the opening brief (AOB 27-28), the XL insurers impliedly waived their right to seek payment of defense costs from the Insureds when they agreed that Greenwich would reimburse or pay 93% of the Insureds' defense costs in the *Amber* lawsuit." Only in their petition for rehearing did the Insureds accurately argue that they raised this issue on page 38 of their opening brief.

would seek full reimbursement for the Fisher settlement from Cincinnati." *Id.* at 327. In short, Home accepted its policyholder's defense without a specific reservation of rights and without asserting that it was an excess insurer. *Id.*

¶ 46 In this case, we agree with the circuit court that the defense agreement's silence regarding contribution, subrogation, and reimbursement rights was not "inconsistent with any intention other than to waive" contribution, subrogation, and reimbursement rights. The Insureds have pointed to no evidentiary or legal basis for inferring that, by agreeing to certain protocols for meeting their duty to defend in the defense agreement, the Insurers intended to agree to waive their contribution, subrogation, or reimbursement claims. Unlike *Home*, the totality of Greenwich's conduct was not inconsistent with any claim that it would seek reimbursement of defense costs from other insurers. On rehearing, we reject the Insureds' implied waiver argument.

¶ 47 Turning to the issue of whether the Insurers are entitled to seek contribution from each other (Greenwich from Indian Harbor) and from other insurers (AIG and Zurich), we look to Illinois law regarding contribution in the context of multiple insurers. "Contribution as it pertains to insurance law is an equitable principle arising among coinsurers which permits one insurer who has paid the entire loss, or greater than its share of the loss, to be reimbursed from other insurers who are also liable for the same loss." *Home Insurance*, 213 Ill. 2d at 316. "Contribution applies to multiple, concurrent insurance situations and is only available where the concurrent policies insure the same entities, the same interests, and the same risks." *Id.*

¶ 48 Equitable contribution does not apply to primary/excess insurance issues because they cover different risk by their very definitions. *Id.* We already ruled that the "Other Insurance" provision in the Indian Harbor PARLL policy rendered the policy excess to the Greenwich

primary policies. Therefore, Greenwich is not entitled to contribution from Indian Harbor under the PARLL policy until the Greenwich primary policies are fully exhausted. See *Kajima*, 227 Ill. 2d at 114 (requiring exhaustion of primary policy before the excess carrier is required to contribute to a settlement or judgment).

¶ 49 We agree with the circuit court the Insurers may *seek* contribution from AIG and Zurich but make no ruling on whether the Insurers are entitled to contribution from those insurers. *Home Insurance*, 213 Ill. 2d at 316. AIG and Zurich are not parties to this case and to date, there is no ruling regarding whether the policies from those insurers have been triggered. The ongoing litigation in Connecticut will determine AIG's and Zurich's liability for the losses under the *Amber* litigation and whether the Insurers are entitled to contribution to recoup the defense costs Greenwich has already paid to the Insureds. We affirm the circuit court's decision to grant the Insurers' motion for partial summary judgment as to count XIII of the Insureds' amended counterclaim.

¶ 50 Targeted Tender Doctrine

¶ 51 The Insureds argue that the circuit court erred in ruling that the Insurers may seek contribution from the Insureds' other insurers based on a finding that the targeted tender doctrine does not apply to this case. They contend that the targeted tender doctrine applies because they specifically targeted Greenwich and no other insurers.

¶ 52 The targeted tender doctrine "allows an insured covered by multiple insurance policies to select or target which insurer will defend and indemnify it with regard to a specific claim." *Kajima*, 227 Ill. 2d at 107. " 'Where an insured makes such a designation, the duty to defend falls solely on the selected insurer. That insurer may not in turn seek equitable contribution from the other insurers who were not designated by the insured.' " *John Burns Construction Co. v.*

Indian Insurance Co., 189 Ill. 2d 570, 574 (2000) (quoting *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 324 (1998)).

¶ 53 Our supreme court has refused to extend the targeted tender doctrine to require an excess insurer to pay damages before all the primary insurance available to the insured has been exhausted. *Kajima*, 227 Ill. 2d at 116. "Extending the targeted tender rule to require an excess policy to pay before a primary policy would eviscerate the distinction between primary and excess insurance." *Id.* For this reason, the supreme court ruled that "targeted tender can be applied to circumstances where concurrent primary coverage exists for additional insureds, but to the extent that defense and indemnity costs exceed the primary limits of the targeted insurer, the deselected insurer or insurers' primary policy must answer for the loss before the insured can seek coverage under an excess policy." *Id.* at 117.

¶ 54 We found earlier that the Indian Harbor PARLL policy is excess to the Greenwich primary policies. Therefore, the targeted tender doctrine does not apply between Greenwich and Indian Harbor. Even if the Indian Harbor PARLL policy was not excess to the Greenwich primary policies, the PARLL policy is not concurrent with the Greenwich primary policies and, for that reason as well, the targeted tender doctrine would not apply between Indian Harbor and Greenwich. *Kajima*, 227 Ill. 2d at 117; see also *Illinois School District Agency v. St. Charles Community Unit School District 303*, 2012 IL App (1st) 100088, ¶¶ 39-45 (holding that the insured could not selectively tender the defense of the underlying lawsuits to the insurer as a consecutive insurer).

¶ 55 We also make no finding regarding whether the targeted tender doctrine applies to the other insurance providers in this case. The Insureds have not provided a reason why we should address their argument in this Court without the participation of AIG and Zurich. Rather,

arguments about the scope and nature of the additional policies and which other insurers, if any, have a duty to defend and reimburse the Insurers are best made with input from those other insurers in the ongoing Connecticut litigation or any other forum in which contribution may be sought by the Insurers.

¶ 56 Ruling on Counts IX, X, and XVIII of Insurers' Amended Complaint

¶ 57 The circuit court ruled that the Insureds' amended motion for partial summary judgment regarding contribution, subrogation, and reimbursement as to counts IX, X, and XVIII of the Insurers' amended complaint was moot. The Insureds did not address this ruling in this appeal and, therefore, we affirm the circuit court's ruling on this issue.

¶ 58 CONCLUSION

¶ 59 We reverse the judgment of the circuit court granting the Insurers' partial summary judgment motion as to count XII of the Insureds' amended counterclaim and denying the Insureds' motion for partial summary judgment as to count XII of their amended counterclaim. The Indian Harbor PARLL policy is excess to the Greenwich primary policies and, therefore, Greenwich is not entitled to contribution from Indian Harbor for the PARLL policy until Greenwich's primary policies have been exhausted. We affirm the judgment of the circuit court granting the Insurers partial summary judgment as to count XIII of the Insureds' amended counterclaim and denying the Insureds' motion for partial summary judgment as to count XIII of their amended counterclaim. The Insurers are entitled to seek contribution from the other insurers who provided insurance policies to the Insureds. Finally, we affirm the circuit court's decision to find as moot the Insureds' motion for partial summary judgment regarding contribution, subrogation, and reimbursement as to counts IX, X, and XVIII of the Insurers' amended complaint.

¶ 60 We remand for further proceedings consistent with this order.

¶ 61 Affirmed in part, reversed in part, and remanded.