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

DOWNHOLE NAVIGATOR, L.L.C.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:10-0695
	§	
NAUTILUS INSURANCE COMPANY,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

On June 7, 2010, the parties consented to proceed before a United States magistrate judge for all further proceedings, including trial and entry of a final judgment, under 28 U.S.C. 636(c). (Docket Entry #6). Plaintiff Downhole Navigator, L.L.C. ("Downhole," "Plaintiff") has filed a motion for summary judgment, to which Defendant Nautilus Insurance Company ("Nautilus," "Defendant") has responded in opposition. (Plaintiff's Motion for Partial Summary Judgment ["Plaintiff's Motion"], Docket Entry #13; Nautilus Insurance Company's Response to Downhole Navigator, L.L.C.'s Summary Judgment Motion ["Defendant's Response"], Docket Entry #16).

Plaintiff contends that it was forced to hire attorneys to defend it in a then pending state court lawsuit, because a conflict of interest precluded it from accepting any attorneys hired by Nautilus. (Plaintiff's Motion). Downhole complains that its insurer now refuses to reimburse it for the cost of hiring those attorneys. (*Id.*). Defendant has filed its own motion for summary judgment, which Plaintiff has likewise opposed. (Nautilus Insurance

Company's Summary Judgment Motion ["Defendant's Motion"], Docket Entry #14; Plaintiff's Response to Defendant's Motion for Summary Judgment ["Plaintiff's Response"], Docket Entry #15). Nautilus argues that it provided attorneys to undertake Downhole's defense, but that Plaintiff improperly rejected the chosen attorneys. (Defendant's Motion). For that reason, Defendant insists that Plaintiff is not entitled to reimbursement for hiring independent counsel. (*Id*.). Defendant also contends that it has no duty to indemnify Downhole on the pending claims. (*Id*.). After a review of the motions, the evidence presented, and the applicable law, it is **ORDERED** that Plaintiff's motion is **DENIED**, and that Defendant's motion is **GRANTED**, in part, and **DENIED**, in part. Nautilus is not required to reimburse Downhole hiring its own attorneys, but it is premature to rule on the issue of indemnification at this time.

BACKGROUND

This suit arises out of Downhole's request that its insurer defend it in a pending state court lawsuit. Downhole is a Texas limited liability corporation that provides services to the oil drilling industry. More specifically, Plaintiff "provide[s] guidance systems [and] . . . information for directional drilling." (Ex. I to Defendant's Motion: *Deposition Testimony of Ricardo Ysa* 10:24-12:2). In December 2008, Sedona Oil & Gas Corporation ("Sedona") hired Downhole to help redirect an oil "well towards a better location within the desired reservoir." (Ex. C to Defendant's Motion: Plaintiff's Original Petition, *Sedona Oil & Gas Corp. v. Tri-City Services, Inc., et al.*, Case No. 09-03-21104 [the "Sedona Complaint]). During that process, Downhole allegedly damaged the well. (*Id*.). On March 3, 2009, Sedona sued Downhole in Texas state court to recover its economic damages from

the incident (the "*Sedona* suit"). (*Id.*). Sedona initially brought claims against Downhole for breach of contract, negligence, unjust enrichment, and negligent misrepresentation. (*Id.*). Sedona later amended its complaint against Downhole, and it now alleges only that Plaintiff negligently damaged the well. (*Id.*).

Nautilus is an insurance company incorporated and based in Arizona. In 2008, Nautilus issued Downhole a one year commercial general liability policy, number BK0011645-1 (the "policy"). (Ex. B to Defendant's Motion). The policy year began on June 15, 2008. Under the policy,

> [Nautilus] will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies. [Nautilus] will have the right and duty to defend the insured against any 'suit' seeking those damages.

(*Id.*). But the policy also has three exclusions that are allegedly relevant to the pending dispute. (*Id.*). The first exclusion, entitled "Exclusion – Testing or Consulting Errors and Omissions" (the "Testing Exclusion"), states the following:

> This insurance does not apply to [damages] . . . arising out of:
>
> 1. An error, omission, defect or deficiency in:
>
> a. Any test performed; or
>
> b. An evaluation, a consultation or advice given, by or on behalf of any insured;
>
> 2. The reporting of or reliance upon any such test, evaluation, consultation or advice; or
>
> 3. An error, omission, defect or deficiency in experimental data or the insured's interpretation of that data.

(*Id.*).

The second exclusion, entitled "Exclusion – Engineers, Architects or Surveyors Professional Liability" (the "Professional Liability Exclusion"), provides that,

> . . . [t]he [policy] does not apply to [damages] . . . arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.
>
> Professional services include:
>
> 1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
>
> 2. Supervisory, inspection, architectural or engineering activities.

(*Id.*).

The third purportedly relevant exclusion, entitled "Professional Liability Exclusion – Electronic Data Processing Services and Computer Consulting or Programming Services" (the "Data Processing Exclusion"), bars coverage for damages,

> . . . arising out of the rendering of, or failure to render, electronic data processing, computer consulting or computer programming services, advice or instruction by:
>
> a. The insured; or
>
> b. Any person or organization:
>
> (1) For whose acts, errors or omissions the insured is legally responsible; or
>
> (2) From whom the insured assumed liability by reason of a contract or agreement.

(*Id.*).

The State Court Litigation

On March 3, 2009, Sedona filed its suit against Downhole, and another company, Tri-City Services, Inc. (Sedona Complaint). In its original complaint, Sedona alleged the following:

> This lawsuit revolves around the Kurtz No. 1 well ("the Well") located in Lavaca County, Texas. Sedona is the operator of the Well. On November 10, 2008, the Well was spudded. During the drilling of the Well, the Well deviated from the original plan and Sedona desired to get the Well back on track. Sedona contacted and eventually contracted with Defendants to re-orientate the well towards a better location within the desired reservoir. The Defendants hold themselves out to be "deviation experts" within the drilling industry. Defendants developed the plan to conduct the deviation and also participated directly in the deviation process. By December 19, 2008, the Well had reached a depth of 11,342 feet wherein the incident causing damage to the Well occurred.
>
> On or about December 19, 2008, Defendants' representative caused damage to the well by his actions and inaction. Defendants' representative "slacked off" with over 40,000 pounds over the drill which caused the equipment to fail. Defendants' representative also took other actions on December 19, 2008 which led to the incident. Upon an attempt to remove the equipment from the Well, the lower parts of the motor were left at a depth of 10,652 feet causing damages to the equipment, well and economic damages to Plaintiff.

(*Id.*). Sedona sought "all out-of-pocket losses that it has sustained," all "actual damages including direct and consequential damages," and all "special damages,"

> . . . including but not limited to: loss of profit; loss of business opportunity; loss of investment opportunity; loss in value of lease; loss of minerals; cost of delay in performance, anticipated remedial costs and other damages.

(*Id.*). Sedona also sought exemplary damages, attorneys' fees, prejudgment interest, post judgment interest, and costs. (*Id.*).

After it was served in the *Sedona* lawsuit, Downhole submitted a claim for defense and indemnification to Nautilus. (Ex. D to Defendant's Motion). On March 30, 2009,

Nautilus agreed to defend Downhole in the *Sedona* suit, subject to a reservation of its right to contest coverage. (Ex. E to Defendant's Motion). In fact, Nautilus sent Downhole a letter in which it informed Plaintiff that,

> . . . Nautilus Insurance Company (Nautilus) will provide your company with a defense to these claims. However, Nautilus reserves all rights to disclaim and any duty to indemnify for claims and judgments which fail to seek "damages" under the policy, as further set forth below.

(*Id.*). Nautilus then quoted various provisions from the policy, including the definitions of "occurrence" and "property damage," as well as the Testing Exclusion. (*Id.*). The letter further notified Downhole that the policy did not cover "Expected Or Intended Injur[ies]," or damage to Plaintiff's own property. (*Id.*). Nautilus cautioned Downhole that,

> . . . [t]he foregoing in no way constitutes, nor should it be considered, as a waiver or a relinquishment by Nautilus of any and all other defenses available to it or the terms and provisions of the above referenced policies of insurance and neither anything in this document nor any act of Nautilus is to be construed as a waiver of any known or unknown defense. Additionally, the foregoing in no way restricts or limits Nautilus from relying upon and asserting other facts and grounds that are, or may become, available to it.

(*Id.*). Finally, Nautilus advised Downhole that it would select a law firm to "provide defense and conduct discovery . . . under a full Reservation of Rights." (*Id.*).

On April 27, 2009, Downhole rejected Defendant's offer to defend it in the *Sedona* suit. (Ex. G to Defendant's Motion). Plaintiff informed Defendant that,

> . . . [y]our decision to act under a reservation of rights has created a material conflict with respect to the selection of counsel. . . . [and so] Downhole has been left with no choice but to select its own representation.
>
> Pursuant to Texas law, Downhole expects and demands that you cover all damages related to this claim, including attorneys' fees, up to the applicable limits of its Commercial Lines Policy.

(*Id*.). On May 11, 2009, Nautilus responded that it had simply "reserved [its] rights while investigating this matter," and insisted that "[u]ntil or unless a coverage issue develops, Downhole is not entitled to separate counsel."[1] (Ex. H to Defendant's Motion).

Plaintiff then filed this action against its insurer on March 3, 2010. (Plaintiff's Original Complaint and Request for Declaratory Judgment, Docket Entry #1). It seeks a declaratory judgment that Nautilus has a contractual duty to defend and indemnify it in the *Sedona* lawsuit. (*Id*.). Downhole moves for summary judgment on its claim that Defendant's refusal to reimburse the cost of independent counsel constitutes a breach of its duty under the insurance policy. (Plaintiff's Motion). Defendant has filed its own motion for summary judgment, arguing that Downhole is not entitled to independent counsel, because its offer to defend Downhole, subject to a reservation of rights, did not create a conflict of interest. (Defendant's Motion). The insurer argues further that Plaintiff's decision to retain separate counsel relieves it of its duty to provide a defense in the underlying suit. (*Id*.). Finally, Nautilus contends that it has no duty to indemnify Downhole. (*Id*.). After a review of the motions, the evidence presented, and the applicable law, it is **ORDERED** that Plaintiff's motion is **DENIED**, and that Defendant's motion is **GRANTED**, in part, and **DENIED**, in part.

STANDARD OF REVIEW

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Under Rule 56(c), the moving party bears the initial burden of "informing the district court of the basis

[1] The record shows no further communication between the parties.

for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the non-movant's case. *Duffie v. U.S.*, 600 F.3d 362, 371 (5th Cir. 2010). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the non-movant's response. *Id*. When the moving party has met its Rule 56 burden, the non-movant cannot survive a motion for summary judgment by resting merely on the allegations in its pleadings. *Prejean v. Foster*, 227 F.3d 504, 508 (5th Cir. 2000). If the movant does meet his burden, the non-movant must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006). Further, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288, 295 (5th Cir. 2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

To meet its burden, the nonmoving party must present "significant probative" evidence indicating that there are issues of fact remaining for trial. *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000). If the evidence presented to rebut the summary judgment motion is only colorable or not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). But, in deciding a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id*. at 248.

However, Rule 56 "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 that party will bear the burden of poof at trial." *Celotex Corp.*, 477 U.S. at 322; *Versai Management Corp. v. Clarendon America Ins. Co.*, 597 F.3d 729, 735 (5th Cir. 2010).

DISCUSSION

Duty to Defend

The parties agree that the insurance policy at issue is governed by Texas law. (Plaintiff's Motion p.5; Defendant's Motion p.9). Under Texas law, it is well settled that an insurer owes a duty to defend its insured against any allegations that are covered by the policy. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). Texas law is also well-settled that the duty to defend is a broader one than the duty to indemnify. *St. Paul Fire & Marine Ins. Co. v. Green Tree Financial Corp.-Tex.*, 249 F.3d 389, 391 (5th Cir.2001); *Gulf Chem. & Metallurgical Corp. v. Assoc. Metals & Minerals Corp.*, 1 F .3d 365, 369 (5th Cir.1993); *St. Paul Ins. Co. v. Texas Dept. of Transp.*, 999 S.W.2d 881, 884 (Tex.App.-Austin 1999, no pet.); *Colony Ins. Co. v. H.R.K., Inc.*, 728 S.W.2d 848 (Tex.App.-Dallas 1987, no writ). "[A]n insurer is obligated to defend an insured as long as the complaint alleges at least one cause of action within the policy's coverage." *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 99 F.3d 695, 701 (5th Cir.1996); *and see Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir.1983) (citing *Superior Ins. Co. v. Jenkins*, 358 S.W.2d 243, 244 (Tex.Civ.App.-Eastland 1962, writ ref'd n.r.e.); *Maryland Cas. Co. v. Moritz*, 138

S.W.2d 1095, 1097-98 (Tex.Civ.App.-Austin 1940, writ ref'd)); *American Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 173 (Tex.App.-El Paso 1996, writ denied). Indeed, the obligation to defend arises if there is even "potentially, a case under the complaint within the coverage of the policy." *Rhodes*, 719 F.2d at 119; *Merchants*, 939 S.W.2d at 141; *Heyden Newport Chem. Corp. v. Southern Gen'l Ins. Co.*, 387 S.W.2d 22, 26 (Tex.1965) (quoting 50 A.L.R.2d 458, 504). It is, however, the insured's burden to show "that the claim against it is potentially within the policy's coverage." *Canutillo*, 99 F.3d at 701; *and see Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex.1988), *overruled on other grounds by State Farm Fire and Cas. v. Gandy*, 925 S.W.2d 696 (Tex.1996). On the other hand, "the insurer bears the burden of establishing that an exclusion in the policy constitutes an avoidance of or affirmative defense to coverage." *Canutillo*, 99 F.3d at 701 (citing TEX. INS. CODE art. 21.58(b)).

To determine if a duty to defend exists, a district court must limit its review to the "four corners" of the insurance policy and the "four corners" of the allegations in the underlying complaint. *Merchants*, 939 S.W.2d at 140; *Providence Wash. Ins. Co. v. A & A Coating, Inc.*, 30 S.W.3d 554, 555 (Tex.App.-Texarkana 2000, pet. denied); *Tri-Coastal Contractors, Inc. v. Hartford Underwriters Ins. Co.*, 981 S.W.2d 861 (Tex.App.-Houston [1st Dist.] 1999, pet. denied). This requirement, known as the "eight corners" or "complaint allegation" rule, governs this dispute. *See Merchants*, 939 S.W.2d at 141; *Green Tree Financial*, 249 F.3d at 391; *Canutillo*, 99 F.3d at 701. Under this rule, a court must begin its consideration of the insurer's duty, if any, by examining the insurance policy at issue. *See, e.g., Canutillo*, 99 F.3d at 700. Texas law is clear that the interpretation of an

insurance policy is a question of law subject to the same rules that apply to contracts generally. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex.1994); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991); *Barnett v.. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex.1987); *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex.1983). Further, "in reviewing the underlying pleadings, the court must focus on the actual allegations that show the origin of the damages rather than on the legal theories alleged." *Id.* In other words, "it is not the cause of action alleged which determines coverage but the *facts* giving rise to the alleged actionable conduct." *Id.* (quoting *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673, 676 (Tex.App.-Houston [14th Dist.] 1993, writ denied)). For that reason, "[i]f a petition alleges facts that, *prima facie*, exclude the insured from coverage, [then] the insurer has no duty to defend." *Taylor v. Travelers Ins. Co.*, 40 F.3d 79, 81 (5th Cir.1994) (quoting *Adamo*, 863 S.W.2d at 677); *and see Fidelity & Guar. Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex.1982). On the other hand, if it is unclear whether the third party's factual allegations do, in fact, state a covered cause of action, then the underlying complaint "must be liberally construed in favor of the insured." *St. Paul Fire & Marine Ins. Co. v. Green Tree Financial Corp.-Tex.*, 249 F.3d 389, 392 (5th Cir.2001) (citing *Terra Int'l v. Commonwealth Lloyd's Ins. Co.*, 829 S.W.2d 270, 272 (Tex.App.-Dallas 1992, writ denied); *and see Merchants*, 939 S.W.2d at 141; *Heyden*, 387 S.W.2d at 26.

There is no question that an insurer's "right to defend" a lawsuit encompasses "the authority to select the attorney who will defend that claim and to make other decisions that would normally be vested in the insured as the named party in the case." *North County*

Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 688 (Tex. 2004). "Under certain circumstances, however, an insurer may not insist upon its contractual right to control the defense." *Id*. For example, an insured can conduct its own defense if there is a conflict of interest between the insurer's duty to defend its insured, and its interest in avoiding coverage. *Id*. at 689. The Texas Supreme Court has cautioned, however, that every "disagreement about how the defense should be conducted cannot amount to a conflict of interest," or the insured "could control the defense by merely disagreeing with the insurer's proposed actions." *Id*. If an insured "reject[s] the insurer's defense without a sufficient conflict, [it loses its] right to recover the costs of that defense . . . [and the insurer does] not breach its duty to defend." *Id*. at 690.

In *North County Mut. Ins. Co. v. Davalos*, the Texas Supreme Court considered those conflicts that might entitle an insured to select its own attorneys, stating that, "[o]rdinarily, [a question about] the existence or scope of coverage is the basis for a disqualifying conflict." 140 S.W.3d at 688. "In the typical coverage dispute," the court explained, "an insurer will issue a reservation of rights letter, which creates a potential conflict of interest." *Id*. Under Texas law, "when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends," a reservation of rights creates a "conflict of interest [that] will prevent the insurer from conducting the defense." *Id*. In other words, a "conflict of interest does not arise unless the *outcome* of the coverage issue can be controlled by counsel retained by the insurer for the defense of the underlying claim." *Rx.com Inc. v. Hartford Fire Ins. Co.*, 426 F. Supp. 2d 546 (S.D. Tex. 2006) (*citing*

Davalos, 140 S.W.3d at 689)(emphasis added). This narrow limit on an insurer's contractual right to control the defense allows,

> . . . insurers to control costs while permitting insureds to protect themselves from an insurer-hired attorney who may be tempted to develop facts or legal strategy that could ultimately support the insurer's position that the underlying lawsuit fits within a policy exclusion.

Id.

In *Housing Auth. of Dallas, Tex. v. Northland Ins. Co.*, for example, the insured hired its own lawyers after its insurer agreed, subject to a reservation of rights, to tender a defense in the underlying Title VII lawsuit. 333 F.Supp.2d 595, 601 (N.D.Tex.2004). To determine whether the insured had properly rejected the proffered defense, the court looked at the underlying complaint, in which "the plaintiff . . . alleged violations of Title VII and characterized the [insured's] conduct as willful." *Id*. Because the insurer had "reserved its rights to disclaim coverage on . . . a willful violation of a statute," the court found that it was "undisputed that the facts to be decided in the [underlying] lawsuit are the same facts upon which coverage depends." *Id*. For that reason, it held that a "disqualifying conflict of interest" existed which entitled the insured to choose its own attorney. *Id*. at 601.

The question for this court, then, is whether the "facts to be adjudicated" in the *Sedona* suit are the "same facts upon which coverage depends." *Davalos*, 140 S.W.3d at 688. Sedona alleges that Downhole helped to "develop[] the plan to conduct the deviation [of the oil well] and also participated directly in the deviation process." (Ex. 2 to Plaintiff's Motion: the Sedona Complaint). Downhole's conduct was allegedly negligent, which "caused delays, increased drilling times, and contributed to damage to the well." (*Id*.).

Liability in the Sedona lawsuit, then, turns on whether Plaintiff acted negligently. (*Id*.). In the reservation of rights letter, Nautilus invoked several coverage limitations, including its right to disclaim coverage for any damage to Downhole's own property, for any expected or intended damage, and for any work that triggers the Testing Exclusion. (Ex. E to Defendant's Motion).

Comparing the allegations in the *Sedona* complaint to Defendant's reservation of rights letter, the "facts to be adjudicated" in the *Sedona* suit are not the same facts "upon which coverage depends." *See Davalos*, 140 S.W.3d at 688. At issue in the *Sedona* suit is whether Downhole performed its work negligently. But Nautilus did not reserve its right to disclaim coverage based on whether Plaintiff's work was negligent. Unlike *Northland*, Downhole has not shown that an insurer-hired lawyer in the *Sedona* suit could control the "outcome" of the coverage issue before this court. In that case, the lawyer in underlying suit could control the outcome of the coverage issue by steering the facts toward a finding that the insured acted willfully. *Northland*, 333 F.Supp.2d at 601. In contrast, here, for example, Defendant's reservation of rights letter invoked the Testing Exclusion, which bars coverage for, among other things, an "error, omission, defect or deficiency in . . . a consultation." (Ex. B to Defendant's Motion). Downhole worries that an insurer-hired attorney "could direct the facts to indicate Plaintiff's relationship was that of a consultant rather than a vendor hired to perform specific work." (Plaintiff's Motion pp.13-14). But even if the attorney developed such facts, the underlying fact-finder will not decide whether the type of work Downhole performed constitutes "testing" or "consulting," as those terms are used in the Testing Exclusion. If the state court fact-finder concludes that

Downhole was negligent, Nautilus will still have to convince the fact-finder in this forum that Plaintiff's negligent work constituted an "error, omission, defect or deficiency in . . . a consultation" that triggers the Testing Exclusion. No finding in the *Sedona* suit will control the outcome of the coverage issue in this court.

On this record, then, Plaintiff has not shown that the "facts to be adjudicated" in the *Sedona* suit are the "same facts upon which coverage depends." *Davalos*, 140 S.W.3d at 688; *Rx.com*, 426 F. Supp. 2d at 561 ("reservation of rights letter did not invoke a coverage exclusion that would be established by proof of the same facts to be decided in the underlying lawsuit."). Defendant's reservation of rights letter, when compared to the underlying complaint, did not create a conflict of interest that entitled Downhole to hire independent counsel. *See id*. For that reason, Nautilus is not obligated to reimburse the cost of those attorneys, and its motion for summary judgment on that issue is granted. *See Davalos*, 140 S.W.3d at 690 ("having rejected the insurer's defense without a sufficient conflict, Davalos lost his right to recover the costs of that defense . . . [and the insurer] did not breach its duty to defend").

Duty to Indemnify

Nautilus has also moved for summary judgment on its duty to indemnify Downhole for any damages awarded in the *Sedona* suit. (Defendant's Motion p. 17). The insurer points to deposition testimony from Ricardo Ysa, Downhole's owner and operating manager, to show that Downhole's actions are excluded under the policy. (*Id*.). Ysa testified that Downhole "provide[s] guidance systems or the information for directional drilling," including collecting and translating data during drilling projects. (Ex. I to

Defendant's Motion: *Deposition Testimony of Ricardo Ysa* 10:24-12:2). Ysa also stated that, when the Sedona well was damaged, the only Downhole "representative" on site was "observing . . . on the computer screen . . . the tool information . . . coming up." (*Id.*). Nautilus argues that, based on Ysa's testimony, Downhole's work is precluded by the Testing Exclusion, the Professional Liability Exclusion, or the Data Processing Exclusion. (Defendant's Motion p. 17). In response, Downhole argues that it is premature to rule on the issue of indemnity while the *Sedona* suit is pending. (Plaintiff's Response).

It is well-settled under Texas law that the duty to indemnify "is triggered by the actual facts that establish liability in the underlying lawsuit." *Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239, 243 (5th Cir. 2000). "Accordingly . . . an insurer's duty to indemnify cannot be determined until after the underlying suit has been resolved." *Columbia Cas. Co. v. Georgia & Florida RailNet, Inc.*, 542 F.3d 106, 111 (5th Cir. 2008) (citing *Collier v. Allstate County Mut. Ins. Co.*, 64 S.W.3d 54, 62 (Tex.App.—Fort Worth 2001)). The duty "only arises after an insured has been adjudicated, whether by judgment or settlement to be legally responsible for damages in a lawsuit." *Collier*, 64 S.W.3d at 62. Regardless of the merits of Nautilus' arguments, as the *Sedona* suit is still pending, it is premature to rule on the issue of indemnification at this time. *Id*. Defendant's motion on that issue is denied.

CONCLUSION

Based on the foregoing, it is **ORDERED** that Plaintiff's motion is **DENIED**, and that Defendant's motion is **GRANTED**, in part, and **DENIED**, in part.

The Clerk of the Court shall enter this order and provide a true copy to all counsel of record.

SIGNED at Houston, Texas, this 9th day of May, 2011.

MARY MILLOY
UNITED STATES MAGISTRATE JUDGE