



The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF



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TEXAS SUPREME COURT REJECTS CONTRIBUTION & SUBROGATION CLAIMS BETWEEN SETTLING CO-INSURERS

Last Friday, the Supreme Court of Texas answered a certified question from the Fifth Circuit to resolve a dispute between two liability insurers, one of which was also an excess carrier, and found that under the facts presented one insurer who paid more than their pro-rata share of settlement proceeds on behalf of the insured had no rights of contribution or subrogation to recover from the other insurer. In *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, No. 05-0261 (Tex. October 12, 2007), Mid-Continent insured a subcontractor under a \$1 million CGL policy which also provided coverage to the general contractor as an additional insured. The general contractor also had its own \$1 million CGL policy with Liberty Mutual and a \$10 million excess policy. An automobile accident occurred in a construction zone and both insureds were sued for the substantial injuries suffered in the accident allegedly due to the insureds' negligence in the manner in which the lanes were narrowed and signs and dividers were placed.

Neither insurer disputed that both owed a portion of the general contractor's defense and indemnity expenses and both agreed that a total verdict for the injured parties would fall in the \$2 to \$3 million range, but they disagreed both on the settlement value of the case and the percentage of liability to be assessed against the general contractor. Both initially assessed liability against the general contractor between ten and fifteen percent but Liberty Mutual later increased the insured's estimated liability to sixty percent. The case was mediated and an agreement was reached to settle the claims against the general contractor for \$1.5 million. Mid-Continent evaluated the general contractor's exposure at \$300,000 and would only agree to pay \$150,000 of that amount. After several refusals from Mid-Continent to increase its contribution to the settlement, Liberty Mutual paid the additional \$1.35 million needed to conclude the settlement and reserved its right to recover the amount in excess of its pro rata share against Mid-Continent. The trial court found that Mid-Continent was liable in subrogation for \$750,000, one-half of the \$1.5 million; but because it also settled the claims against the other insured under its policy, the trial court capped Mid-Continent's liability at the remainder of its \$1 million policy limit.

On appeal, the Fifth Circuit certified three questions to the Supreme Court of Texas seeking their direction on how to address the issues presented. The Supreme Court of Texas only saw the need to answer the first question which, after setting forth the facts summarized above, asked:

In that situation is any actionable duty owed (directly or by subrogation to the insured's rights) to the insurer paying \$1.35 million by the underpaying insurer to reimburse the former respecting its payment of more than its proportionate part of the settlement?

The Court found that they did not.

The Supreme Court of Texas analyzed the respective rights and duties of the co-primary insurers starting with Liberty Mutual's potential direct action for reimbursement under a right of contribution. The Court observed that both policies contained "other insurance" and "pro rata" clauses and concluded that under these circumstances there was no equitable right of contribution between the carriers and nothing in the contract required them to contribute to the settlement. And, to the extent *General Agents Insurance Co. of America v. Home Insurance of Illinois*, 21 S.W.3d 419 (Tex.App.-San Antonio 2000, pet. dism'd by agr.), suggested otherwise, the high court disapproved of that holding.

Next, the Court analyzed Liberty Mutual's potential remedy in equitable or contractual subrogation. The Court observed that "in either case, the insurer stands in the shoes of the insured." The court held, however, that "a fully indemnified insured has no right to recover an *additional* pro rata portion of settlement from an insurer regardless of that insurer's contribution to the settlement. Having fully recovered its loss, an insured has no contractual rights that a co-insurer may assert against another co-insurer in subrogation."

Lastly, the Court examined whether Liberty Mutual was subrogated to the general contractor's alleged common law right to have Mid-Continent act reasonably in handling their defense, including a duty to reasonably handle negotiations and settlement discussions. The Court noted, however, that the *only* duty recognized in this third-party liability context under Texas law is the *Stowers* duty and, under these facts, those legal prerequisites were not met. Specifically, in this case no settlement demand within policy limits was made. Consequently, the Court refused to modify *Stowers* to create rights for the general contractor and its insurer, Liberty Mutual, via subrogation.

Addressing the certified question, the court concluded:

In response to the first certified question, we conclude there is no right of reimbursement in the context presented. Therefore, we do not reach questions two and three. Kinsel (general contractor) has no common law cause of action against Mid-Continent, nor does it have, after being fully indemnified, any contractual rights remaining against Mid-Continent. Because Kinsel has no rights through which Liberty Mutual may be subrogated, Liberty Mutual has no right of reimbursement through subrogation.