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Mid-Continent v. Liberty Mutual: The Ever-Complicated Relationship between Carriers and Their Insureds Gets Even More Complicated

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I. INTRODUCTION

Over the last year, the Supreme Court of Texas has issued a number of opinions regarding insurance coverage issues. The cases have spanned the spectrum from whether "faulty workmanship" can result in "property damage" caused by an "occurrence"—it can[1]—to whether standard CGL policies are "triggered" by the mere existence of "property damage" even if such damage is not "manifest"—they are.[2] Some of the recent decisions have been good for insureds while other have been bad. In the midst of the many cases decided by the Court in the past year, however, one stands out as particularly unfortunate for both insureds and insurers—*Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W.3d 765 (Tex. 2007) ("*Mid-Continent*"). As will be discussed, at least in this author's view, *Mid-Continent* can be termed the "anti-settlement" case in that it has had a chilling effect on settlements in situations involving multiple insurers that owe settlement duties to an insured. Moreover, the broad language used by the Supreme Court in *Mid-Continent* has been seized on by other courts to extend its holding to the duty to defend.

II. *MID-CONTINENT V. LIBERTY MUTUAL*

A. Background Facts

Liberty Mutual Insurance Company ("Liberty Mutual") insured Kinsel Industries ("Kinsel"), the general contractor on a highway project being completed for the State of Texas (the "State"). Crabtree Barricades ("Crabtree") was one of Kinsel's subcontractors and was responsible for the signs and dividers on the highway project. Liberty Mutual's policy had a $1 million limit and the company also provided a $10 million excess policy. Mid-Continent Insurance Company ("Mid-Continent") insured Crabtree under a nearly identical $1 million policy under which Kinsel was an additional insured. As such, Kinsel was a concurrent insured under two $1 million policies, each having identical "other insurance" clauses providing equal or pro rata sharing. In addition, each policy contained a "voluntary payment" clause, a subrogation clause, and a version of the standard "no action" clause.

During construction of the highway, a driver crossed over the center barrier into oncoming traffic and hit another car head-on. In the second car was the Boutin family, which suffered substantial injuries. The Boutins filed a lawsuit against several parties, including Kinsel. Liberty Mutual and Mid-Continent both assumed the defense of Kinsel and did not dispute that they owed the defense, as well as indemnification. At the outset of the underlying lawsuit, the insurers agreed that the total verdict against all defendants would be between $2 and $3 million. At first, they agreed that Kinsel's liability was for ten to fifteen percent of that amount. As the case progressed, however, Liberty Mutual increased its estimate to sixty percent while Mid-Continent refused to increase its estimate at all.

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[1] *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007) (holding that, among other things, faulty workmanship can result in "property damage" caused by an "occurrence").

[2] *See Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 2008 WL 3991187, 51 Tex. Sup. Ct. J. 1367 (Tex. Aug. 29, 2008) (rejecting the manifestation trigger theory under a standard CGL insurance policy and adopting an "injury-in-fact" or "actual injury" trigger in its place).

When Mid-Continent would not increase its contribution to settlement, Liberty Mutual agreed at mediation with the Boutins to settle on behalf of Kinsel for $1.5 million (sixty percent of a $2.5 million anticipated verdict). Liberty Mutual demanded that Mid-Continent contribute half, but Mid-Continent refused to pay more than $150,000. Thus, Liberty Mutual contributed the other $1.35 million, paying $350,000 more than its primary policy limits, but it retained the right to seek recovery against Mid-Continent for its portion of the settlement. Liberty Mutual sought $600,000 from Mid-Continent, but, in light of Mid-Continent's settlement with the Boutins for $300,000 on behalf of Crabtree, the District Court awarded only $550,000 (the remaining portion of Mid-Continent's $1 million policy limit).

B. The Certified Questions

The Fifth Circuit certified the following issues to the Supreme Court of Texas:

1. Two insurers, providing the same insured applicable primary insurance liability coverage under policies with $1 million limits and standard provisions (one insurer also providing the insured coverage under a $10 million excess policy), cooperatively assume defense of the suit against their common insured, admitting coverage. The insurer also issuing the excess policy procures an offer to settle for the reasonable amount of $1.5 million and demands that the other insurer contribute its proportionate part of that settlement, but the other insurer, unreasonably valuing the case at no more than $300,000, contributes only $150,000, although it could contribute as much as $700,000 without exceeding its remaining available policy limits. As a result, the case settles (without an actual trial) for $1.5 million funded $1.35 million by the insurer which also issued the excess policy and $150,000 by the other insurer.

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

2. If there is potentially such a duty, does it depend on the underpaying insurer having been negligent in its ultimate evaluation of the case as worth no more than $300,000, or does the duty depend on the underpaying insured's evaluation having been sufficiently wrongful to justify an action for breach of the duty of good faith and fair dealing for denial of a first party claim, or is the existence of the duty measured by some other standard?

3. If there is potentially such a duty, is it limited to a duty owed the overpaying insurer respecting the $350,000 it paid on the settlement under its excess policy?

Liberty Mutual Ins. Co. v. Mid-Continent Ins. Co., 405 F.3d 296, 310 (5th Cir. 2005).

C. The Supreme Court of Texas Sides with Mid-Continent

On October 12, 2007, the Supreme Court of Texas delivered its opinion, which was nearly unanimous with only Justice Willett issuing a concurring opinion. *Mid-Continent*, 236 S.W.3d at 777 ("[W]e conclude there is no right of reimbursement in the context presented.").

Because the Court answered the first question in the negative, it did not reach the other questions.

With regard to the first certified question, Liberty Mutual contended that it was entitled to reimbursement through contractual subrogation in its CGL policy, equitable subrogation as applied in *General Agents Insurance Company of America v. Home Insurance Co. of Illinois*, 21 S.W.3d 419 (Tex. App.—San Antonio 2000, pet. dism'd by agr.), or subrogation to Kinsel's common law right to have Mid-Continent act reasonably when handling an insured's defense. *Mid-Continent*, 236 S.W.3d at 771. The latter argument suggested a modification or expansion of Mid-Continent's *Stowers* duty in the circumstances of the case. On the other hand, Mid-Continent argued that Kinsel did not have an enforceable contract right to which Liberty Mutual could be subrogated. Mid-Continent further argued that its only common law duty was its *Stowers* duty to accept a reasonable settlement offer within policy limits, but contended that no such settlement offer was ever made. Finally, Mid-Continent urged that no direct action exists in Texas between co-insurers for a right of reimbursement. *Id.*

Turning to Liberty Mutual's reliance on *General Agents*, the Court found that Liberty Mutual was actually seeking a right of contribution from Mid-Continent. Under *Traders & General Insurance v. Hicks Rubber*, 169 S.W.2d 142 (Tex. 1943), a right of contribution exists when two or more insurers bind themselves to pay an entire loss, but one pays the whole loss. The latter is entitled to a right of contribution in the amount of the ratable proportion of the amount paid. The right of contribution requires that several insurers share a common obligation or burden and that the insurer seeking contribution has made a *compulsory* payment of more than its fair share of that common burden. When "other insurance" and "pro rata" clauses exist, however, then the direct claim for contribution between co-insurers disappears because the "pro rata" clause makes the contracts several and independent from each other. That is, there is no common obligation because each co-insurer contractually agrees with the *insured* to pay its pro rata share of the loss, but does not contractually agree to pay another co-insurer's pro rata share. *Id.* at 772.

As the Liberty Mutual and Mid-Continent CGL policies contained pro rata other insurance clauses, the two insurers agreed with their common insured, Kinsel, to pay a proportionate share of the insured's loss up to $1 million. But the co-insurers did not create a similar contract between themselves. *Id.* at 772–73. The Court said:

> There is no contractual right of contribution between them, and the presence of the pro rata clauses in the CGL policies precludes an equitable contribution claim. In this situation, no contractual obligations exist between co-insurers to apportion between themselves the payment on behalf of the insured, and we are not persuaded to create such an obligation under the common law.

Id. at 773. As such, the Court disapproved of *General Agents* to the extent it recognized any duty between co-insurers to reasonably exercise their rights under an insurance policy. The *General Agents* opinion suggested that a breach of that duty would provide an overpaying co-insurer a right of reimbursement through subrogation, but did not identify the rights of the common insured to which the overpaying insurer could be subrogated. Thus, it seemingly created a direct duty between co-insurers, which the Court refused to accept. *Id.*

As for subrogation, prior case law seemed to indicate that Liberty Mutual had either a contractual or common law right to reimbursement. The Court, however, noted the important distinction between having a right to subrogation and the ability to recover under that right. *Id.* at 774. With regard to the former, Liberty Mutual asserted that it had such a right under the subrogation clause in its own policy. Any such right, however, would stem from the contractual and common law duties Mid-Continent owed Kinsel. The Court found that because Kinsel had been fully indemnified for its $1.5 million loss, it had no right to enforce Mid-Continent's duty to pay its pro rata share of the loss. A pro rata clause "implements [the] principle [of indemnification] by eliminating the potential for double recovery by the insured." *Id.* at 775. Thus, the Court held "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." *Id.* at 775–76. Because the insured has no right to enforce, the co-insurer has nothing to assert against another co-insurer in subrogation. *Id.* at 776.

Looking at Kinsel's potential common law rights, the Court recognized that in the third-party insurance context an insurer's common law duty is limited to that espoused in *Stowers*, which is to protect the insured by accepting a reasonable settlement offer within policy limits. *Id.* Mid-Continent, however, did not breach that duty because the Boutins did not make a settlement offer within Mid-Continent's policy limits. The Court "decline[d] to create rights for Kinsel and therefore, Liberty Mutual, via subrogation." *Id.* Further, the Court noted that Liberty Mutual had paid a debt for which it also was primarily liable and so it did not satisfy the traditional subrogation requirement that the subrogee pay a debt for which another is primarily liable. Finally, the Court distinguished its opinion in *American Centennial Insurance Co. v. Canal Insurance Co.*, 843 S.W.2d 480 (Tex. 1992), as that case recognized equitable subrogation as a basis for an excess insurer's recovery against a primary insurer. *Id.* Here, though, Liberty Mutual was both a primary and an excess insurer and was in position to negotiate a good faith settlement on its insured's behalf. *Id.* Thus, the Court concluded:

> Equity demanded a remedy for the excess insurer in *Canal*, but here equity does not favor such a remedy. A reasonable primary insurer, which did not improperly handle the claim, would not pay more than its primary policy limits. In paying $350,000 more than its $1 million policy limits, Liberty Mutual seems to have been motivated by concern for its excess insurance policy. Mid-Continent cannot be required to agree to a settlement that requires payment in excess of its remaining coverage to protect Liberty Mutual's excess insurance interests.

Id. Finding that Kinsel had no common law cause of action against Mid-Continent and no contractual rights remaining after full indemnification, the Court held that Liberty Mutual had no right of reimbursement through subrogation. *Id.* at 777.

The Court's holding was more succinctly explained by Justice Willet in his concurring opinion. Justice Willett, who began by stating that "[t]his Court frequently finds itself deciding high-stakes insurance law questions, which, for me at least, can be fiendishly difficult," said that because Liberty Mutual had an excess insurance policy, it had its own selfish reasons for wanting Mid-Continent to split the $1.5 million settlement, but he explained that "[i]nsurance companies are not eleemosynary institutions." *Id.* When the insured's interests are no longer at stake, there

is "no reason for courts in these circumstances to prohibit insurance companies from engaging in sharp negotiations with each other." *Id.*

D. Commentary on *Mid-Continent*

In sum, the Court held that no right of contribution and no right of subrogation existed between co-insurers. Contribution was inapplicable because it requires a compulsory payment, which Liberty Mutual did not make—its payment was voluntary. Subrogation, on the other hand, also was inapplicable because that cause of action only grants the insurer the same rights held by the insured. Because the insured had been fully defended and indemnified, no enforceable right existed upon which subrogation could be based.

Although a seemingly innocuous opinion as to insureds, the Supreme Court of Texas' opinion in *Mid-Continent* actually may have long-lasting adverse effects. Most importantly, the Court's opinion detracts from its traditional precedent wherein settlement always is the preferred outcome. This, on the other hand, is the anti-settlement case.

For instance, now when two insurers are in the position faced by Liberty Mutual and Mid-Continent, no incentive exists for one insurer to step up to the plate and settle the case on behalf of its insured. No insurer will take the road taken by Liberty Mutual, which cut defense costs and eliminated the need for further litigation. Instead, an insurer in the position of Liberty Mutual will be forced to play their hand at the mercy of a recalcitrant co-insurer. That is, regardless of its own reasonable assessment of the case at hand, a reasonable co-insurer must operate based on the analysis of another, seemingly less reasonable, co-insurer. If the latter won't budge on its assessment of the case, then the former must go forth with litigation and defense costs, and the insured has to come along for the ride.

Thus, at least for now, insureds seem to be stuck with co-insurers that likely will no longer be as willing to settle cases. Without an incentive to reasonably assess the likelihood of a judgment against a co-insured, a co-insurer can low-ball the case and stand firm, knowing that the Supreme Court of Texas will not force them to cough up more than its "reasonable" assessment. As such, despite Texas' general tradition in favor of settlements, the *Mid-Continent* opinion will encourage more litigation rather than less.

III. *TRINITY UNIVERSAL V. EMPLOYERS MUTUAL*

Although hope existed that the Court's ruling would perhaps fall between the cracks or at least be limited only to the facts at issue there, alas, those hopes were shattered when the Southern District of Texas extended the *Mid-Continent* holding from its application to the duty to indemnify, making it applicable to an insurer's duty to defend its insured as well. *See Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 2008 WL 2078202 (S.D. Tex. May 15, 2008) ("*Trinity*").

A. The Background Facts

Lacy Masonry, Inc. ("Lacy Masonry") is the named insured under four CGL policies issued by Plaintiffs Trinity Universal Insurance Company, Utica National Insurance, and National American Insurance Company (collectively, the "Plaintiffs"), and Defendant Employers

Mutual Casualty Company ("EMC"). Together the insurers provided insurance to Lacy Masonry from March 25, 2000 to May 14, 2004 and May 16, 2004 to May 16, 2005. Each policy contained identical "other insurance" clauses, providing that when more than one policy applies the insurers contribute on a "pro rata" basis. *Trinity Universal*, 2008 WL 2078202, at *1.

On November 1, 2005, Lacy Masonry (along with others) was sued in Texas state court by McKenna Memorial Hospital ("McKenna") for damages caused by extensive water infiltration issues, arising out of the construction and improvement of a building. In particular, Lacy Masonry was alleged to have performed "all masonry work" on the project and other façade items. A co-defendant in that lawsuit allegedly installed an EIFS system on the project. *Id.* at *1–*2.

On or before February 2, 2006, Lacy Masonry notified the Plaintiffs and EMC of the underlying lawsuit. Each of the Plaintiffs agreed to defend Lacy Masonry subject to a reservation of rights, but EMC claimed that it had no such duty, refusing to contribute any portion of the defense costs. Instead, those costs were borne entirely by the Plaintiffs. As a result, the Plaintiffs asserted claims against EMC for breach of contract, contribution, and attorney's fees, as well as sought a declaration that EMC had a duty to defend Lacy Masonry against McKenna. The parties cross-moved for summary judgment as to whether the allegations in McKenna's suit were potentially covered by EMC's policy so as to trigger its duty to defend Lacy Masonry, and whether Texas law allows a co-insurer to recover a share of defense costs from another insurer when their policies contain identical "other insurance" clauses. *Id.* at *2.

B. The Duty to Defend Exists

Before reaching a discussion as to the application of *Mid-Continent* to the facts before it, the Southern District of Texas first had to assess whether EMC's duty to defend its insured even was triggered by the allegations in McKenna's pleadings against Lacy Masonry. For two reasons, EMC claimed that no such duty existed: (1) the "designated work" exclusion barred coverage for any claims arising out of a project on which EIFS is applied; and (2) the fortuity doctrine barred coverage for the claims. The court addressed each in turn. *Id.* at *3.

With regard to the "designated work" exclusion, the court noted that the endorsement specifically excluded coverage for "[a]ny work or operations with respect to any exterior component, fixture or feature of any structure i[f] an 'exterior insulation and finish system' is used on any part of that structure.'" *Id.* at *4. On the other hand, the allegations stated that Lacy Masonry performed "all masonry work" on the project and that water infiltration existed, in part, because of improperly installed masonry. As noted, allegations also existed that EIFS had been applied by a different subcontractor. EMC claimed that such allegations made "clear that the only thing Lacy Masonry is being sued for involves exterior components of a structure that incorporate[s] EIFS." *Id.* at *5. The court, however, disagreed. It found that the petition did not allege that "masonry work was performed exclusively on the *exterior* of the building or that there was no masonry work done in the *interior* of the building." *Id.* at *6. Because Texas law requires that such allegations be construed in favor of the insured, the court held that EMC was not excused from its defense duty by the "designated work" exclusion. *Id.*

Turning to the "fortuity doctrine," the court recognized that EMC relied entirely on extrinsic evidence to support its claim that Lacy Masonry was aware of the McKenna loss before its policy incepted on May 16, 2004. *Id.* The court addressed Texas law on the use of extrinsic evidence as to the duty to defend and found that even if the Supreme Court of Texas were to acknowledge an exception to the strict "eight corners" rule, the evidence relied upon by EMC was inadmissible. In particular, the court said that the evidence proffered by EMC "does not fit within this presumed narrow exception to the eight-corners rule." *Id.* at *7. For instance, some of the evidence was developed during litigation of the underlying lawsuit and other evidence overlapped—at least in part—with the merits of McKenna's claims against Lacy Masonry. *Id.* at *7–*9. Accordingly, the court found that EMC could not escape its duty to defend its insured. *Id.* at *9.

Or could it . . .

C. Taking *Mid-Continent* Another Step Too Far

After finding that EMC had wrongfully denied a defense to its insured and had breached its contract in doing so, the court addressed whether the Plaintiffs could recover any of the defense costs that they had incurred in fully defending the parties' mutual insured. On that issue, EMC argued that the Supreme Court of Texas' decision in *Mid-Continent* precluded the Plaintiffs' recovery from EMC for those costs. Addressing that contention, the Southern District of Texas discussed the intricacies of the *Mid-Continent* decision. *Id.*

First, in *Mid-Continent*, the Court adhered to its longstanding opinion in *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142 (Tex. 1943), and ruled that when two co-insurers have identical "pro rata" or "other insurance" clauses, a contribution claim asserted by one against the other to recoup defense costs was precluded. Second, the Court had found that when an insurer pays more than its pro-rata share under an "other insurance" clause, its payment is voluntary, also barring it from recovering via a claim for contribution. Third, in addressing Liberty Mutual's subrogation claims, the Court held that an insurer steps into the shoes of its insured in such cases, and that because such an insured—which has been fully indemnified—cannot sue another insurer for subrogation, neither can one co-insurer that seeks to recover from another co-insurer. *Trinity Universal*, 2008 WL 2078202, at *10.

Applying that case to the facts before it, the Southern District of Texas extended the *Mid-Continent* decision beyond the duty to indemnify context in which it was rendered and incorporated the same logic to the duty to defend. As for contribution, the court held that the *Hicks Rubber* decision, as analyzed and reaffirmed in *Mid-Continent*, "applies squarely to Plaintiffs' claim for contribution." *Id.* at *11. More specifically, the court found that the insurers' policies all contained "other insurance" clauses identical to those addressed in *Mid-Continent*. Because such clauses render the contractual obligations of the Plaintiffs and EMC to their mutual insured "several and independent of each other, not joint . . . Plaintiffs cannot establish the common obligation element of their contribution claim." *Id.*

In attempting to distinguish themselves from the *Mid-Continent* decision, Plaintiffs argued that their duty to their insured included the provision of a "complete defense"—not a pro-rata one. In other words, the Plaintiffs contended that they did not "voluntarily" pay anything

over their pro-rata share of expenses. According to the Plaintiffs, "the 'other insurance' language typically found in insurance policies—because it specifically references only 'loss,' *i.e.*, indemnity—does not apply to the duty to defend." *Id.* at *11. The court disagreed, finding that the critical portion of the Supreme Court's decision addressed the impact of "other insurance" clauses on the "commonality of obligation" between co-insurers. In particular, the court noted:

> *Mid-Continent* categorically bars direct contribution claims between coinsurers whose policies contain "other insurance" clauses by construing their contractual obligations as "several and independent of each other." [citation omitted] The independence of these contractual obligations affects not only the duty to indemnify, as discussed in *Mid-Continent*, *but necessarily applies with equal force to the duty to defend.*

Id. Accordingly, the insurers turned their otherwise shared contractual obligations into independent duties enforceable—if at all—by Lacy Masonry. *Id.*

Finally, the court addressed the Plaintiffs assertion of a subrogation action for breach of contract as a means to recover from EMC its pro-rata share for the cost of defense. Because Lacy Masonry had been fully compensated, though, the court found that *Mid-Continent* precluded any claim for subrogation. *Id.* at *12. The court also rejected the Plaintiffs' argument that EMC's improper denial of a defense for Lacy Masonry meant that Lacy Masonry could have brought a declaratory judgment action on its own to enforce its contractual rights. Such a declaration was not at issue (and besides, the court already had determined that a duty to defend existed). *Id.* Rather, it is the Plaintiffs' subrogation claim for breach of contract and damages equal to EMC's share of the defense costs that *Mid-Continent* prohibits. This is because the Plaintiffs stand in no better position than Lacy Masonry vis-à-vis EMC.

In light of the foregoing, the *Trinity* court ruled that EMC owed Lacy Masonry a defense. Nevertheless, it also ruled that any previously paid defense costs were non-recoverable because the Plaintiffs had no right to any claims for contribution or subrogation—even at the duty to defend stage—in adherence to *Mid-Continent. Id.* at *12–13.

D. Commentary on *Trinity*

The *Mid-Continent* decision—which already was a bad decision from a settlement perspective—was made worse by its extension to the duty to defend. Now, in light of the *Trinity Universal* decision, a co-insurer that denies a duty to defend has no real incentive to undertake its insured's defense if another insurer has done so. Following *Mid-Continent*, the reasoning appears to be that no claim exists so long as the insured has been fully compensated. The problem with this rationale is that, by enabling unreasonable co-insurers to skirt their duties, the court creates a disincentive for insurers to act reasonably.

IV. FURTHER TREATMENT OF *MID-CONTINENT*

Other courts also have addressed the *Mid-Continent* decision. A brief recap of those decisions is included here.

A. *Duininck Brothers, Inc. v. Howe Precast, Inc.*

In *Duininck Brothers, Inc. v. Howe Precast, Inc.*, 2008 WL 4372709 (E.D. Tex. Sept. 19, 2008), the court ruled that *Mid-Continent* did *not* preclude a claim based on the facts before it. In particular, after noting that *"Mid-Continent* is a narrow case," the court focused on the difference between contractual liability coverage and additional insured status. Notably, because of a valid indemnity agreement, the court concluded that only one insurer was obligated to fund the liability in the underlying lawsuit. Moreover, in contrast to *Mid-Continent*, the insured had not yet been fully indemnified. *Id.* at 9.

B. *Lexington Insurance v. Chicago Insurance*

In *Lexington Insurance Co. v. Chicago Insurance Co.*, 2008 WL 3538700 (S.D. Tex. Aug. 8, 2008), Judge Lee Rosenthal applied the concepts embodied in *Mid-Continent* to deny a claim by one insurer against another. The case involved consecutive primary professional liability policies. Both insurers paid to defend the insured and an employee of the insured in connection with a medical malpractice lawsuit. Moreover, each insurer contributed half the amount needed to settle the claims against the insureds. The issue before the court was whether Lexington could obtain reimbursement from the other insurer, Chicago, on the ground that the Lexington policy did not in fact cover the underlying lawsuit. Relying on *Mid-Continent*, Judge Rosenthal concluded that Lexington had no claim for contribution or subrogation against Chicago. *Id.* at 21. In addition, the court rejected the argument that the nonwaiver agreement altered the result by holding that the "nonwaiver agreement does not create an independent contractual obligation between Lexington and Chicago for reimbursement." *Id.* In other words, "[t]he agreement does not create independent rights between Lexington and Chicago, but instead only reserves any rights the parties already had under their policies and applicable law." *Id.*.

C. *American Home v. Liberty Mutual*

On February 12, 2008, the Eastern District of Louisiana refused to apply the *Mid-Continent* decision, finding instead that Louisiana law applied and that, in any event, the *Mid-Continent* decision specifically was limited to its facts. *American Home Assurance Co. v. Liberty Mutual Ins. Co.*, 2008 WL 440303 (E.D. La. Feb. 12, 2008). The Eastern District of Louisiana, contrary to the Supreme Court of Texas, concluded that American Home had a right to seek contribution from Liberty Mutual for its portion of defense and indemnity costs that American Home had paid on behalf of their mutual insured. In particular, the court found that American Home had paid its policy limits in good faith in order to reduce its insured's exposure and thus it was entitled to seek contribution from Liberty Mutual for its share of defense and settlement costs. *Id.* at *4.

D. *Nautilus Insurance Company v. Pacific Employers Insurance Company*

In *Nautilus Insurance Co. v. Pacific Employers Insurance Co.*, No. G-04-619 (S.D. Tex. February 25, 2008), the court granted summary judgment against an insurer seeking to enforce identical pro rata sharing provisions contained in multiple primary insurance policies. In particular, in *Nautilus*, several insurers were called on to defend and indemnify a seismic testing company that allegedly damaged over 200 buildings in Galveston County while conducting

seismic testing. Pacific Employers was the only insurer that refused to contribute to the settlement. Nautilus Insurance, who was one of the participating insurers, sought to recover from Pacific Employers by way of subrogation and enforcement of the policies respective pro rata "other insurance" clauses. The court, relying on *Mid-Continent*, rejected the claim. More specifically, because the insured had been fully indemnified, the court noted that "there is nothing to which Plaintiff can be subrogated."

V. CONCLUSION

The decision in *Mid-Continent* and the cases that have followed it are significant with respect to their potential adverse affect to settlement negotiations among an insured and its insurers. By stripping settling insurers of their right to recover from non-settling insurers via contribution or subrogation, the Supreme Court of Texas has put reasonable insurers in a substantial bind and, at the same time, has put insureds in a state of limbo. In addition, the problems caused by *Mid-Continent* were made worse by its extension to the duty to defend. It is too soon to determine what the ultimate impact of *Mid-Continent* will be and whether the Supreme Court of Texas, if given the opportunity, will further clarify (or reign in) its intended application. For now, however, *Mid-Continent* has had a negative impact on settlements while rewarding recalcitrant insurers.