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The Limited Legacy of *Mid-Continent*

by DON D. MARTINSON

In the five years since the Texas Supreme Court issued its decision in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.* (2007), appellate courts have limited the ruling to its facts.

In *Mid-Continent*, the high court ruled 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."

Mid-Continent created a claims-handling dilemma for co-insurers who provided primary liability insurance coverage to a common insured for the same occurrence under two separate liability policies. If two insurers contribute disproportionately to settle a claim against their common insured, the overpaying insurer has no subrogation rights against the underpaying insurer if the insured has been fully indemnified.

In that situation, if the two co-insurers cannot agree whether they should accept a settlement demand in a claim against a common insured and the claim settles, the co-insurer wishing to accept the settlement demand on behalf of the common insured has two unpleasant choices: It may contribute more than its proportionate share to settle the claim for the amount demanded, or it may reject what it believes is a reasonable settlement demand and permit the claim to proceed to trial.

Equally troubling, the decision left unresolved the scope of its application. Does *Mid-Continent* apply to other contribution and subrogation claims arising out of cases in which co-insurers of a common insured have an indemnity obligation arising out of the same occurrence?

In the five years since the high court decided *Mid-Continent*, appellate courts have limited the decision's application to the specific facts of the case. In 2010, the 5th U.S. Circuit Court of Appeals, in a well-reasoned opinion, *Amerisure Insurance Co. v. Navigators Insurance Co.*, resolved a split among the federal district courts in Texas relative to *Mid-Continent*'s scope.

The 5th Circuit concluded that it should limit *Mid-Continent* to its facts — that is, cases involving: 1. co-primary insurers; 2. no coverage disputes; 3. insurance policies containing pro-rata clauses; and 4. fully indemnified insureds. In rejecting the minority's overly broad view of *Mid-Continent*'s subrogation exclusion, the 5th Circuit majority noted that deciding other than it did would effectively end contractual subrogation. The 5th Circuit also made an *Erie* guess that, in cases outside the co-insurer context, Texas courts would interpret *Mid-Continent* not to bar contractual subrogation simply because the insured is fully indemnified.

Since 2007, Texas intermediate appellate courts have not addressed directly the scope of *Mid-Continent* when applied to contractual subrogation generally. Only one court has analyzed *Mid-Continent* in the context of contractual subrogation, and that court limited *Mid-Continent* to its facts.

In *U.S. Fidelity & Guaranty Co. v. Coastal Refining & Marketing Inc.* (2012), Houston's 14th Court of Appeals concluded that *Mid-Continent* did not bar an insurer's subrogation claim against a co-insurer where the insured had not been fully indemnified by the co-insurer, which, over a 10-year period, had yet to pay the $1 million it owed toward the settlement. Thus, although one state intermediate appellate court has addressed *Mid-Continent*'s application to contractual subrogation when the insured has not been fully indemnified, none of the state intermediate appellate courts have addressed *Mid-Continent*'s application to contractual subrogation in the context of a fully indemnified insured.

Courts Are Split

Federal and state courts are split with regard to the applicability of *Mid-Continent* to co-insurers' duty to defend a common insured. In *Trinity Universal*

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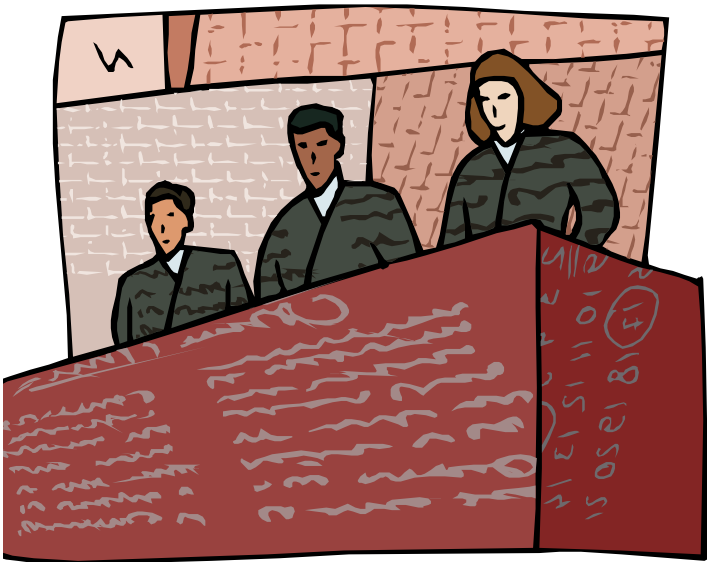

Insurance Co., et al. v. Employers Mutual Casualty Co. (2010), the 5th Circuit found that *Mid-Continent* left open the question whether a co-insurer that pays more than its share of defense costs may recover such costs from a co-insurer who violates its duty to defend a common insured. The 5th Circuit noted that "other insurance" clauses only apply to the duty to indemnify and not to the duty to defend. As such, the 5th Circuit concluded that *Mid-Continent* did not apply to bar a co-insurer from seeking contribution for its defense costs.

In *Truck Insurance Exchange v. Mid-Continent Casualty Co.* (2010), Austin's 3rd Court of Appeals disagreed with the 5th Circuit's conclusion and analysis of the Supreme Court's *Mid-Continent* decision relative to contribution. The 3rd Court held instead that *Mid-Continent* barred a co-insurer's contribution claim for defense costs. Notably, the 3rd Court is the only state intermediate appellate court to have decided this issue.

In summary, although the Texas Supreme Court has yet to specify the boundaries of its holdings in *Mid-Continent* relative to contribution and contractual subrogation by co-insurers, the impact of *Mid-Continent* in federal courts, at least for now, is clear. Federal courts limit the holdings in *Mid-Continent* to the precise situation at issue in *Mid-Continent* relative to subrogation claims and refuse to extend the holdings to defense costs relative to contribution claims.

The impact in state intermediate appellate courts, on the other hand, is unclear, except in the 3rd Court, because the courts have yet to address the scope of Mid-Continent's application to contribution or contractual subrogation claims by co-insurers of a common insured, who has been fully indemnified, for an occurrence shared by the insurers.

As a practical matter, for the practitioner representing a co-insurer of a common insured in defending a claim against the insured pursuant to the terms and conditions of a primary liability insurance policy, one cannot rule out potential legal and equitable subrogation rights against the other primary co-insurers except in the fact situation present in *Mid-Continent*. TNL

Don D. Martinson is a director in Fanning, Harper, Martinson, Brandt & Kutchin in Dallas.