

Another Texas Decision Barring Allocation Among Insurers

United States District Court, Southern District of Texas

Trinity Universal Ins. Co. v. Employers Mutual Casualty Co., 2008 U.S. Dist. LEXIS 39581 (S.D. TX May 15, 2008)

The Southern District of Texas last week followed the recent Texas Supreme Court's holding in *Mid-Continent Ins. Co. v. Liberty Mutual Ins. Co.*, 236 S.W.3d 765 (Tx. 2007)(reported in our last newsletter) finding that an insurer's claim for contribution and subrogation for defense costs against another insurer was without legal merit. Texas now has two decisions that place insurers on warning that their perception of "other insurance" rights against co-insurers of a common insured are not what they think they are.

In *Trinity*, the insured masonry contractor was named as a defendant in an EIFS construction defect claim concerning the construction of a hospital. The masonry contractor made a demand for a defense and indemnity under four policies he claimed covered the claims brought against him. Three of his four insurers agreed to defend him pursuant to a reservation of rights. The fourth, EMC, refused to defend contending that the allegations of the complaint came within a specific policy exclusion. (The Court, applying the summary judgment standard on the duty to defend, found EMC did not carry its burden on the exclusion.) All four policies had identical pro-rata "other insurance" clauses. While the liability case was pending, the three defending insurers filed for declaratory relief against the fourth carrier, asserting contribution and subrogation, based on EMC's failure to pay its pro-rata share of the defense costs. The Court citing *Mid-Continent* stated the insurers paying the defense costs under reservation of rights had no right to contribution via their "other insurance" terms finding that a "co-insurer that pays more than its pro-rata share under the 'other insurance' clause does so voluntarily".

Additionally, the Court reiterated that each of the insurance policies, as a result of the "other insurance" language were independent contracts with the insured only and the "independence of the contracts extended not only to the duty to indemnify but also to the duty to defend". As regards the insurers' claim for subrogation, the Court denied subrogation finding, in accord with *Mid-Continent*, that as the insured was fully defended, had been made whole, and his insurers "stand in no better position" for recovery. The Court refused to rule on the duty to indemnify until the issue had been made ripe by judgment or settlement.

Our Comment: Even under *Mid-Continent*, this case appears wrongly decided, at a minimum as regards the going forward defense cost and future indemnity obligations, which are not already "voluntarily" paid by the participating insurers. Their declaratory action should entitle them to a judicial ruling of allocation per the "other insurance" clause of all future defense and indemnity obligations

against a true co-insurer of a common insured that are incurred once the declaratory judgment proceeding is instituted. This argument would be further strengthened by adding the insured as a co-plaintiff with the insurers in a declaratory judgment action against a non-participating co-insurer. Also, the reasoning of this case and *Mid-Continent* decision require considering the use of the “loan receipt” for payment of defense cost in order to maintain a recoverable interest in the insured and increase the odds against the “voluntary payment” logic followed by these decisions.

Best regards,
THE JOHNSON FIRM, LLC