IN THE SUPREME COURT OF TEXAS

No. 05-0261

MID-CONTINENT INSURANCE COMPANY, APPELLANT,

v.

LIBERTY MUTUAL INSURANCE COMPANY, APPELLEE

ON CERTIFIED QUESTIONS FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued October 18, 2005

JUSTICE WILLETT, concurring.

I concur with the Court's answer to the first certified question and with the Court's analysis. I write only to provide some additional thoughts on why Texas law should not recognize a claim by one primary insurer against another in these circumstances.

At the outset I emphasize my belief that we must confine ourselves to the factual circumstances presented. This Court frequently finds itself deciding high-stakes insurance law questions, which, for me at least, can be fiendishly difficult. With some regularity these questions originate in the form of certified questions from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit appreciates that the outcomes of these cases often pivot heavily on the underlying facts, and here it has continued its excellent practice of providing us with a detailed

compendium of the relevant facts. Some insurance cases present recurring issues, and, of course, courts must scrupulously apply governing legal principles, but it is indisputable that case outcomes are often driven by unique factual circumstances.

Here, the body of precedent presenting similar but not identical issues deserves our respect and most careful analysis, but with an appreciation of the factual differences between those cases and the one before us now. We should start with the principle that Mid-Continent's primary, if not exclusive, contractual and common-law duty is to its insured, Kinsel Industries. Mid-Continent did not deny coverage or sit idly on the sidelines; it participated in the defense but disputed Liberty Mutual's subjective assessment of what the case was worth. I see no basis for concluding that Mid-Continent, by taking a hard line in negotiations, breached a duty to Kinsel—to defend, to exercise good faith, to settle within policy limits, or any other contractual or common-law duty an insurer might owe its insured. Kinsel purchased insurance and got what it paid for, a legal defense of the claim against it and a settlement within policy limits, both funded by its insurers. Not surprisingly, Liberty Mutual, with Kinsel as its named (as opposed to additional) insured and vastly greater exposure because of its excess policy, paid most of the settlement.

Insurance companies are not eleemosynary institutions, and where, as here, the insured is protected throughout the litigation process, insurers are entitled to exercise their business judgment in deciding whether to settle a claim and for how much. I see no reason for courts in these circumstances to prohibit insurance companies from engaging in sharp negotiations with each other. To hold that primary carrier A has a claim against primary carrier B, because a "reasonable" insurer would have chipped in more toward the settlement, would recognize a cause of action that is

unnecessary for the protection of insured parties or insurance companies. Again, here the insurance companies provided the protection for which Kinsel bargained. As for protecting insurance companies from each other, I would not recognize that one owed a duty to protect the business interests of the other. I would treat their negotiations inter se in this case as a matter best left to the business world. Insurance companies that can successfully engage in such negotiations stay in business, as they should as long as they fulfill their duties to their clients.

As a further reason for not recognizing the cause of action Liberty Mutual pursues, claims of this sort present an almost impossibly complex challenge for the fact finder. A jury considering such a claim would have to decide what the reluctant insurer *should* have paid in settlement, based, I suppose, on (1) considering the range of awards that a jury hearing the underlying claim against the insured *might* have awarded (given all manner of tangible and intangible factors that inform such an analysis), (2) arriving at an expected value of the judgment in the underlying case, and (3) factoring into the calculus the implications of the *Stowers* doctrine and what a reasonable insurer would do given this barrage of complicated information.

So I would deny Liberty Mutual's claim. The result would be different if language from the Mid-Continent policy required it to pay more of the settlement. But I see nothing in the policy obliging Mid-Continent to do so, and I agree with the Court that the "other insurance" clause of the Mid-Continent policy, especially when considered with the "voluntary payment" and "no action" clauses, precludes a claim by Liberty Mutual against Mid-Century for contribution. I also see no claim based on subrogation, whether contractual or equitable, since Liberty Mutual's right of

subrogation must be premised on the concept of standing in the shoes of the insured, Kinsel, and here Kinsel has no complaint against Mid-Continent.

The result might also be different in a case involving a primary insurer and an excess carrier, where the primary alone provided the defense and failed to settle within its policy limits,[1] if a judgment had been entered against and paid in part by Kinsel and Mid-Continent refused to cover its proportionate share of the judgment,[2] or if Mid-Continent had denied coverage and had refused to pay anything or defend the insured.[3] But, as emphasized above, the facts matter greatly in these cases, and here the facts are different.

Don R. Willett
Justice

Opinion delivered: October 12, 2007

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[1] *See Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 481–82 (Tex. 1992).

[2] *See Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142, 145–47 (Tex. 1943).

[3] *See Employers Cas. Co. v. Transport Ins. Co.*, 444 S.W.2d 606, 607, 610 (Tex. 1969).