

CO-PRIMARY CARRIER CAN SEEK CONTRIBUTION FOR DEFENSE COSTS IN TEXAS

Trinity Universal Ins. Co. v. Employers Mut. Cas. Co., 592 F.3d 687 (5th Cir. 2010)

The Fifth Circuit recently reversed a district court's decision applying the controversial *Mid-Continent v. Liberty Mutual* holding to defense costs. In *Mid-Continent*, the Texas Supreme Court held that a co-primary carrier who "overfunds" its portion of a settlement has no contribution or subrogation right for reimbursement against the carrier who "underpaid." The court held that the "other insurance" clause "precludes a direct claim for contribution among insurers because the clause makes the contracts several and independent of each other. With independent contractual obligations, the co-insurers do not meet the common obligation requirement of a contribution claim." See *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 772 (Tex. 2007). The *Mid-Continent* case has had significant implications for carriers at the same level of coverage as it effectively leaves a settling carrier who pays more to eliminate the risk of an excess judgment without a remedy.

It was also interpreted, by the United States District Court for the Southern District of Texas, to limit a co-carrier's rights to reimbursement of pro rata defense costs even when the other carrier had breached its duty to defend. But the Fifth Circuit disagreed, reading *Mid-Continent* narrowly and holding that the "other insurance" clause applied strictly to indemnity and not to defense costs. The court reasoned that this was consistent both with the express terms of the other insurance clause (note the standard other insurance clause applies to "loss") and Texas law stating that the duty to defend is broader than the duty to indemnify. Having affirmed the district court's determination that Employers Mutual had a duty to defend, the court held that the defending carriers had succeeded in meeting both elements of a contribution claim against Employers, i.e., (1) that several insurers share a common obligation or burden and (2) the insurer seeking contribution has made a compulsory payment of more than its fair share of the common obligation or burden.

Held: Defending carriers entitled to reimbursement of breaching carrier's pro rata share of defense costs.

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