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Supreme Court of Texas.
Mid-Continent Insurance Company, Appellant,
v.
Liberty Mutual Insurance Company, Appellee.
No. 05-0261.

October 18, 2005

Appearances:
Brian L. Blakeley, Blakeley & Reynolds, P.C., San Antonio, for appellant.
Richard A. Capshaw, Capshaw Goss & Bowers, Capshaw Weiland Goss & Bowers, Dallas, for appellee.

Before:

Dale Wainwright, and Don R. Willet, Justices.

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PROCEEDINGS

JUSTICE #1: Please be sited. The court is ready to hear argument in 05- 0261, Mid-Continent Insurance Company versus Liberty Mutual Insurance Company.
COURT ATTENDANT: May it please the Court. Mr. Brian Blakely will present argument for appellant. Appellant have reserve 5 minutes for rebuttal

ORAL ARGUMENT OF BRIAN L. BLAKELEY ON BEHALF OF THE PETITIONER

MR. BLAKELY: May it please the Court, counsel. The reason why we are here is because these are Court of Appellee can recognize that the San Antonio Court of Appeal holding the General Agents is raise number is parted Texas insurance law. So it has before this Court is decide what to do in General Agents. The fact that the choices are: first to rejected as statement of Texas Law. Alternatively the Court can excepted as the Texas Law, and in the fact manufacture of basis court after the fact, because that basis does not exist in current Texas Law. It- ...
JUSTICE: Rather, rather than start with that as a basis. What do you-- what do you think about fact that, Hicks Rubber and Employers

casualty is decided 1943-1969 respectively where not mentioned and can now insurance how do you, how do you interpret that?.

MR. BLAKELEY: The-- I interpret in denial of the court expressed to be define the opportunity, to create an independent cause of action between the insurance care. So they said we're going to respect the cause of action for subrogation.

JUSTICE : Shall independent direct cause of action what they refuse, what we we're choose to recognize a mad case.

MR. BLAKELEY: Correct. Not a cause of action at all, just to correct the issue.

JUSTICE : Correct. Not a cause of action at all, just to direct the issue.

MR. BLAKELEY: Correct. And whether a it was arg-- it what it's. And the employers talks about is that in this context their cannot be a contribution action. Now whether in-- can now for purpose argue that there's appear contribution action is unclear at take unders. The common law is applied the most jurisdictions that the primary excess situation would never be a situation for a contribution action in neighbor.

JUSTICE : In, in Mid-Continent Insurance, we said that the-- we're not can recognize the direct action between insures the situation at this time.

MR. BLAKELEY: Correct.

JUSTICE: However, did employers casualty say and isn't, there's not a direct action in Texas and then Hicks stand for that proposition as well. So isn't it need castling deputed Court analysis says we're not can recognize such an action at this time at two part of our cases indicated that there's not one in Texas, it's that's really what I'm asking.

MR. BLAKELY: No your Honor, because in Hicks and Employers they did not absolutely proclude the existence of contribution action. Now what the court said in those cases is that contribution action, is not viable in this context for two reasons. First, because of the voluntary payment the part of settled. The case they we're not under illegal compulsory pay, so contribution is not applicable. Second, the party is have a program, the insurance clause or other insurance clause that makes their liability separately an independent, when those clauses are present where not going to allow contribution. Actually Employers implies that the contribution action could be viable in the right situation, if that several an independent clause was not present and if there has been no settled so it doesn't absolutely preclude a contribution action. Now another distinction that is important to bare between the American centennial scenario and the employer scenario is that in employers, they were dealing with two prior in Insurance Companies, and that's why their inch in to the issue of contribution comes up, because those Insurance Companies presumably insurer the mutual risk, and that's the key fact in a primary excess situation, you don't ever mutuality of obligation that the excess here is the obligation does not kick in until the primary is to fill so that is not a contribution scenario. So it's a little bit of ample scenario.

JUSTICE : It's sounds like you can suggest that Mid-Continent Insurance is really consisted with excellent employer.

MR. BLAKELY: Yes. I would.

JUSTICE : I read cases just to clime the recognize to right direction under the circumstances?

MR. BLAKELEY: Yes. I-- I see now a consistency in Texas Law from this issue, what so ever as long as you take General Agents out of

connects. His general agents that creates the confusion and the problem, and General Agents announces what you call us subrogation action between the primary insurance carrier. But as the Fifth Circuit know it, it provides no basis for that as we all know the subrogation is a diverted of action. The company has to stand in shoes of the insurer. General Agents gives the carrier a brand new per shoes that the insurer does not have. If you really read this sit-- the case in the merely decided on principles of equitable contribution is talking about the rising co-equal insurer's and how they should each have rights list of the each other. That's not really subrogation that's what the court falls in but it's-- that's not what it is. It's really contribution, so what we can let with this three choices, you can just throw General Agents&i out of that mix all together, first. Second you can expended the rights of the insurer's, so when did you insurer what has the court reaction in this context, and then the insurance company that stepping the double shoes and maintenance or this will subrogation action. The third choice would be the same, there's no need to double batch occurring if we're concerned about rights and duties between your insurance companies, we all to do a cut on and create cause of action for contribution. Those are the three choices the second two which involve change in Texas Law of dramatical. Both require over ruling significants supreme court precedent. They both raises factors of unintended consequences and so they both require reading the factual consideration of the necessity for a change.

JUSTICE : Is-- what's it's take care in this dispute really about contract interpretation or is it about some other common law issue. In other words both insurer have policies or contract with the insured. Both policies had pro right of clauses. Those contract on the clauses govern in respective insures relationship that the insured. The either insurance company I can tell contract with each other.

MR. BLAKELEY: Correct.

JUSTICE : Why did the contract policies dictate or how they material to, whether the insurance company is have a cause of action against each other? So these is about contract, it is supply between two insurance companies and this situation or is this about some other area the common law like recognizing or you should put an expending subrogation rights.

MR. BLAKELEY: It can be either depending on the court report decide that take it in two insurance company is have no contract between each other. My client did not make any contract with the other the insurance company, right? The other insurance company labeling this case never the lest laws to pick my clients pocket most you given the my po-- my cleints pocket to take there money. There are two potential ways that they do that, they can do it through subrogation by sorting a right to the insured one half. If they did that, then they are bound by contract. There's a problem on that, but that's we have contraction defenses that preclude them for settling without our written consent and insurer could not walk out and settle a bad case. Say why you just settle up those are really bad so you pay up and insurer's absolutely cannot do that on the Texas Law. What General Agents is say that Liberty Mutual Insurance is that well an insurance company with the candidate for this cannot forget about those contractual defenses. So if you do that, he did that your outside world contract in your outside the world of subrogation, and the next situation you are in the fact creating a new cause of action, a direct cause of action. You don't has to pull it contribution, you can call anything what other jurisdictions do refer to this contribution and bring build upon the common law that

are contribution. If it's not contribution if you-- if it's not contribution really isn't in the common law basis for.

JUSTICE: Does it matter that-- the policy said other insurance clauses?

MR. BLAKELEY: It matters, yes because under-- that is one of the factors under the employers which precludes a subrogate - I, excuse me - contribution action that was the basis for employers. Employers versus transport insurance that case said that, "if you have several and independent obligation, then you don't have any mutuality of obligation." A fundamental prerequisite of contribution is that the parties oft he same laws. The responsible for the same harm like any other joint tort piecers situation , and the Supreme Court reason that, well if you have this other insurance clauses that separate out liability, you don't really have that, so we're not going to allow of contribution action. So if you're going to go forward of contribution action, you have to over rule employers of an aspect, or-- is another aspect about employer was that, you can't go forward in this context, because the insurance company has voluntarily settled and bad aspect we're also have the over rule that your going to create contribution action.

JUSTICE: They for not going to clearly the contribution action, haven't they settle down their-- at their own payroll?

MR. BLAKELEY : Yes, and that would, that would-- that's the way the law it was before General Agency In Texas is, if you think it's worth more you pay and good luck to you. We're going to stand and fight something else it's completely analogous to the joint tort features situation. Prior to define well versus-- Sir, I'm sorry-- Icherpath versus jankensen, it was most common practice for one codefendant to settle a case and then he say, "Why paid but it was really your fault I'm stilling I want the money back back from you because you didn't tend in Hicks versus jankenson." The court said we're not going to do that anymore. If you settle and pay money, your paying to release only your portion of the liability. Later that was caught her by in to the contributions scheme and substantially the same thing here very accessible work asking for the law to remain, which is that if one period, ones to go pay more then let that's not a reason for us then to pick our pocket , take money from us.

JUSTICE: This recognizing some sort of direct action or expanded con-- subrogation action encourage settlement?

MR. BLAKELEY: That is--

JUSTICE: Rather than having you folks of your argument front of us.

MR. BLAKELEY: That is of excellent point and there is not much evidence on that, one way of the other. One way -

JUSTICE: Let me-- if, if there's certainty in that parties know that in the situation like the one we have today that if a reasonable sudden minutes amount is, is, is offered and then paid, and then the insurance companies with a common interest that is both primaries are going to be responsible in proportion to the amount of insurance they provided-- that provide some certainty and when there's certainty parties can act recently can't they when this own certainty then you have more disputes, don't you?

MR.BLAKELEY: Okay, Believe the empirical evidence is on the law. When he--

JUSTICE: But there certainly hear that if you settle-- settled that your own payroll that seems to me that will encourage dialogue between the two respective primary insurers.

MR. BLAKELEY: That is an in effect what is happened over the years in Texas, you don't have a lot of these cases in Texas no haven't a lot of people who trying to bring these action, and in fact since General Agents was decided five years ago now these cases is the only one that you cited the form of libel. In contrast looked in California and Illonois they recognize an equitable contribution action similar to General Agents, they have literally dozen of this cases if you build up they will come, if you allow this cause of action, you will have the insurance company is in arguing this issues and you will have more of us here than you have now ...

JUSTICE: And in phrase don't allow it then you gets hurt.

MR. BLAKELEY: That's -

JUSTICE: The insured?

MR. BLAKELY: - the insured never gets hurt in this situation

JUSTICE: Why not?

MR. BLAKELEY: Because the insureds-- if the insurer was hurt we can do to be a stylers type point. In out of this round.

JUSTICE: So we don't do something that encourage to settlement insured that it can get hurt because he insured as a law suit.

MR. BLAKELEY: Did it come sir?

JUSTICE: That's it, the insurer is not hurt because the insurer has the right to a lawsuit. That's why the insurer is not hurt?

MR. BLAKELEY: In this-- in the sold context were talking about. Here's first of all, in order him to get into a context that more added in this case. You need two carriers both of whom have a soon coverage without reservation. So there's an averment issue that the insurer is going to be out of pocket inference. Second element that you need for you get here is that the case to be settled, but these were talking about the reasonable settlement varying, so you never get a year in the case like this at there getting harmony insurer. If there is any harm to be insured, the insurer can bring an action the, the insurer rights are, are govern by the stawers doctrine. Whether that's good enough or bad enough that's something that's an issue in stylers case and they're plenty of arguments to be made that there need to be changes in that doctrine but that's not really what were here about today. We're here about rights between insurance companies. I think the practical of matter is one thing come back you don't have amicus briefs in this case. I'm sorry my time is expired.

JUSTICE: Thank you Mr. Blakely. The court is ready to hear argument from the Appellee.

COURT ATTENDANT: May it please the Court Mr. Richard Capshaw [inaudible].

ORAL ARGUMENT OF RICHARD A. CAPSHAW ON BEHALF OF THE RESPONDENT

MR. CAPSHAW: Please the Court your Honor. It is our position that we don't need to rewrite Texas law on insurance because of this case. As McCommen says I already told you all this case present are you both of your narrow type of an issue role it from to the narrow occasion. You almost have to have a purpose on-- for this case to erupt. The only reason this case for those who played these because there was money available pay the short fall that mid conduct was refuse about and that money not been available the case was not settled that the insurer could have been harmed. He could have been harmed by an adverse

judgment. He soon and certainly wouldn't have been harm by the knee to bring lawsuits, there was an excess judgment. Anyone being harmed by the knee participating in this continued litigation.

JUSTICE: Tho-- those are hypothetical in me to be extended to both primary on, on, on the policy. Your obligation longs to each of you, I mean he sure's not harm, it sures still haves access cover genuine your and your instances, there is no harms to the insurer and that's merely-

MR. CAPSHAW: You-- your oblige your Honor, this is a scenario that form does not occur for the insured, because their abussual acted objectivley, reasonably and in common that they act is occurently unreasonably and liberate unusual paid the common shared to loss in protect the insurer.

MR. JUSTICE: Well, you know I, I have a problem that that announce coming from the insurance background, I mean what's reasonable to one carrier certainly not in reasonable to another and not reasonable to plaintiff, not reasonable to the defendant, not reasonable to corporation, reason for men and minds differ.

MR. CAPSHAW: I, I agree with you entirely, I think thats why that this standard that was applied in this case and the standard that was apply to demolition cases on court. The standard appellee is much hard than any other standard is applied is higher than negligence higher than the good do you good faith if your dealing. Standard of the court found in this case was that deliberately mutual acting objectively, reasonably and admitted confident acted objectively unreasonable. That's why it is not been challenged by-- of the incumbent. I believe that [inaudible]

JUSTICE: What's that? I'm finding base on evidence report case for various case.

MR. CAPSHAW: Yes your Honor, but that was base upon was the evidence that the developers in the course of offensive the case, where the party exchange there position us to evaluation in the trapped were found that Mid-Continent unreasonably refused to changes evaluation for relying upon Liberty mutual to take care in selling his portion.

JUSTICE: It looks like generally the plaintiff of an situation. Here-- you-- are in difficult position because you've been arguing in the-- in the liability suit that the plaintiff doesn't have case and now you've got to turn around and argue that there case is really pretty good at way we're going to get stuck a lot worst than thought. How, how is that work over dynamic control.

MR. CAPSHAW: Well, I think-- in terms of the underlying case obviously the underlying case that try. Then the pinch would have assorted is vigorously as possible is a plaintiff fund. Since that case was not prime in the ended up with a settlement, then we have an essence try to conduct with the two insurer in the underlying track, and that's why we give in this case we try to conduct for the underlying insurer and the trial court found that objectively the conduct of mid common base upon the fact the totality of circumstances and on the time, they acted upon reasonably and who was here in reason act?

JUSTICE: Was there evidence that you settled for hired then you shouldn't becomes of the, of the excess coverage?

MR. CAPSHAW: No, no, I believe the evidence was that the fact changes where it appeared the as the course of the, of the case when all in got closer to trial the liability became clearer and the damages where always significant and ask those local defects then clearer, the evidence that use is the trial court level was the Mid-Content made of material adjustment to there four levels says, "Well, this case is for

more than he said" but when they came to me [inaudible] they did not put that money on the table instead they held back the line upon to be mutual holding liberty mutual unless is often to make sure that Liberty Mutual will hate the full amount give to this case up and that was the basis will trial court finding of an objectively unreasonable conduct.

JUSTICE: What in Liberty Mutual say, "Will two comply this case" so now settle.

MR. CAPSHAW: They could.

JUSTICE: These the fact the jail when excess policy to protect even if basis in your mind why shouldn't go?

MR. CAPSHAW: I don't believe that the excess policy gets any place in this analysis either top or level or in a level [inaudible]? here now it was almost the happy coincident in the since that it getting the source of money to pay this lost.

JUSTICE: Well, you see, you say that in a, in a, in the seven twice down. My question is was that base on the prediction of what this Court would rule in this very case whether there is that right to contribution or subrogation what ever you uncalled.

MR. CAPSHAW: I dont believe it was, and it forces no, no evidence.

JUSTICE: No, but I'm saying do you say that the money was availed holder from Mid-Continent and, and it wouldn't settled without that other insurance money, that couldn't contributed to this client new tag, you'd be able to get it back, wasn't that just your analysis of what the law eventually be.

MR. CAPSHAW: I, I don't think this. But it could be that I, I think in all fairness had make the, the rule analysis here was, what is the value. The value on this case in the settlement advance being made with in to me. And they didn't find which what the case settled for, that's the really good settlement because of trial we made and put us $3 or $4 million burden -

JUSTICE : Well, and -

MR. CAPSHAW: - and so they fail.

JUSTICE: - and with the $3, $4 million burden your solidly in to the excess it said, "That you worrying away protecting your excess and, and the great to settle more and how of course to fair it out." What we're this interest command the play to Mexico versus position resume or not?

MR.CAPSHAW: Excellent question and I think it way you look at that is you look at this set-- settle. That each have primary limits of the million dollar both of this two carrier. And so if the case was worth settlement of a million fog and that were we didn't get pass for million for each then the Hich should have pay their millions. Have the case evaluation going above to make it in a court room but in the settlement was brutal for me then obviously the excess care it has to come in but I submit that in this particular case will we have to focus on is the, is the two primary numbers, because that was what supposed to be protecting the insurer, which is the - ...

JUSTICE: But the-- this insurance protectively I mean, if you would for man-- would man walking with to work the subrogation scenario, I will full loathed of a merchants saying here that can every work with the insurer is fluent protective, because the casual sound.

MR. CAPSHAW: Well, because if the-- your right because case is settled, therefore the insurer is not exposed because one insurance care is than paid more than there share. So you have to look at almost like protection but equitable subrogation is always look upon to someone of a fixed. And when we have to consider, if both insurer's company where unreasonable, then we wouldn't have the settlement in the

insured to be harm. If one insurance company is unreasonable then thus the insurer have the right batch. In my, my contention is, is that they would. The only difference between General Agent and the existing on Texas is that this case was so. If this cases had going to truck and there had been a verdict and that verdict was $2 million. There is no question and it come out soon admitted this, that they pay they're million we pay our money and that would be that. The only thing that can relates is the-- see us-- it tells this, Why don't we do if there's a settlement -

JUSTICE : That, that, I mean that's the problem I'm having with the-- this subrogation argument is the premise of the subrogation argument is that the insured has been injured of someone and when you take away that under penning. Howe do you apply the equitable subrogation construct here.

MR. CAPSHAW: Because the-- you're right the insurer has not in fact than injured because somebody else is that the prepaid that over bind of, but that does not mean that the insurer would not have that one. We're the same, insurer in this, in this area all the time, they range to base on there experience that we're there lost patience. So it could be that the insurer's premium are going to be tired because it's interior Liberty Mutual, paid more than it should be to the insured tab and become that paid less. So there are circumstances where the insurer can sustain direct input in this particular instance, you're right. The insurer did not in fact sustain a direct injury, but that doesn't mean that we cannot analyze the case from the stand corner of what would've happen had in sustain such as direct injury. Does the insurer have the calls of action against the insurance company and it's always been, this fourth desire to protect the insurer.

JUSTICE: In this case if the disputed not settled, and all the other facts were the same, with the insured have stawarise your client for appellant client.

MR. CAPSHAW: It could have and the only reason I hesitate to my answer is because the excess insurance base in difference, so lets just pretend like there was $2 million is apparent raise in no excess, then you probably wouldn't have established situation. It's possible that it can be still our situation because the injured were severe.

JUSTICE: Well, in this-- in this case the settlement offer was a million five. And each of the two parties here at the million dollars in primary coverage. So certainly Mid-continent was exert us at-- if the insured proceeded that is demand to, to Mid-continent because it's an excess of it's policy on it's-- is an excess of your client primary policy limits. So if the case having settled, you believe the insured had Stowers your client?

MR. CAPSHAW: My client may have been Stowers because of presence in this possibility excess, but Mid-continent law - I heard, that's why I don't think this is the Stowers case, but also think that the level of, of the standing here has being apply the, the totality of circumstances and objectively unreasonable takes care of all that because what you have is a very high factual standard that my client had to meet in order to obtain recovery that's what General Agent is establish for us and have this case not in settled unprotected existing Texas law, there's no question of what would have happened Mid-Continent would've paid sum of fifty. We would pay that liberty mutual what have paid sum of fifty. And that is the basic on which I think that General Agent should be upheld and we should-- in this portion in form that this survey of, of what the standard is that there's a cause of action here and it doesn't rise have equitable contribution that is

always been presence in the state, and that standard of evidences required that this sound is extremely none if this the objectively none reasonable in a settlement is it screaming on? It is adjectively unreasonable it's not the bad faith standard of the-- should have known as settlement was reasonable is certainly not the negligence standard of Stowers. I think it is a much higher standard so that - ...

JUSTICE: So the objectively reasonable is matter of law? Question.

MR. CAPSHAW: I think objectively unreasonable and objectively reasonable is that matter of fact finding because you have - ...

JUSTICE: So, so what you're saying is that were going to have this cases out there were we going to ask the jury to question of totality of circumstances that you just heard from them. Was-- they come us, come us objectively out of reason is that's the question you would ask?

MR. CAPSHAW: That would be the question should ask.

JUSTICE: So will ask 12, 12 people who have no experience in insurance industry and then never spend more than twenty thousands dollars in there logs deciding whether they would accept this case for $1.5 million or $1.75. You misses what the insurance industry loans

MR. CAPSHAW: Well, on some setting that's right but that's, that's no difference than asking 12 citizen whether an insurance company is acting in bad faith because does, does the bad faith standard was I submit is a lower standard was I submit is a lower standard that what General Agents as suppose to call my client proven to this facts is equally difficult for a, a lady for some jury to, to figure out. So and again I do get back to form were I don't think that this height of the, of the of plain can happen very much it has happen very much in the law if we look it. If we look it in mid-continence brief I think they say, they say tiny slippery of a plain

JUSTICE: Why, why did the court of jurisprudence of Texas?

MR. CAPSHAW: Because it -

JUSTICE: Why is it important of jurisprudence of Texas? That don't have that all.

MR. CAPSHAW: Because even all of this happen all and that doesn't mean that a wrong doer which with Mid continent clearly fund within here should be more or than a wrong doer should be allowed to escape. The consequences of there wrong-- just because it doesn't happen.

JUSTICE: Your present Counsel was about to say why we haven't seen and make us bruise in this case. Do you have an opinion this to what we have?

MR. CAPSHAW: I think he fells at is a slither of a client is not going to happen, very often. It takes a perfect storm for this kind of a circumstances that come up. Those were the only kind of explanation that I and I can find - ...

JUSTICE: Is it really that rare?

MR. CAPSHAW: It is because it is rare were your going to the-- usually was going to happens is it delivers going to have a million and Ben Tonmpson is going to have a million and the [inaudible] be two and a half million they came in their over that in our case that made in a million and that's all there is and liberty don't have the million of and a half to make up for the short law. So only in the second were there's money available maybe the insurer has to step in that could have well happen again that should not realize but that could have happen, where the insurer steps in and says I'm not back. Now I want to said one, first thing about voluntary payment - ...

JUSTICE: But, but, but I, I just want, when we start getting into equitable contribution law is between insurers everything that there would be a lot of interest in, in this case.

MR. CAPSHAW: Well, that's because I don't think it's contribution, I think it's subrogation. I think what you put it have your respectable subrogation what we have spent-- what literally spent in the shoes of the insurer and the speaking step to enforce it's rights and that's consistent with, with Canal and Texas law for, for a long time and liberal destruction of equitable subrogation. I think make more sense than equitable contribution, that the one thing one said that counter payment is that they-- it throw a long term payment really is a defensive contribution claim I don't contribution is the right way to get I think subrogation, equitable subrogation is the better way to get but I would not that the voluntary opinion claim in our view is, is gone and why is that is because of the wrong for conduct they can-- there is no question that in all of the bad faith decision were, one insurance company has submitted batchclip. They lost their contract will defenses they have an essence breech and that's why you have to appear some brief we don't claim them, them all their opinion provision what have we made in the difference but again we offered paid provisional and applies it for talking about an equitable contribution scheme.

JUSTICE: What, what say that again. The voluntary claimant is there contractual defense because if we go if we stick then straight subrogation you step-in to your short shoes so then they claim voluntary claimant no legal liability, no judgment. How's the-- how's voluntary payment only go to equitable contribution.

MR. CAPSHAW: I say, I said brake. No I'm not leaving.

JUSTICE: Okay. Now it seems to me like the problem that you have, you have to problems on. We just stick to the same scheme that we have right now you go against against them they defend on their contract, they got the same rule and the policy that may a pledge somebody, some ware else. You can't are you, everybody stands on their own contract and their contractual limitation. We go to equitable contribution we just throwed out the window [inaudible] don't we?

MR. CAPSHAW: No, because I think in this wide group reform, equitable subrogation cooperating, it doesn't give the factor because with-- the, the-- they won't conduct again I get back to the finding, was that [inaudible]

JUSTICE: Okay. You either have tell wrong?

MR. CAPSHAW: That goes what?

JUSTICE: You want to have wrongful conduct to defeat their, their voluntary plain of defense or you might prefer to have a definition of payment under this situation not being voluntary plain. Either one of those gets you the same place we don't have to restructure law , we just have to deal with the subrogation, plain and everybody raise their own contracts, persist their own premiums and you-- and all we deal with the-- is the insured drives under contract to pay more up for him.

MR. CAPSHAW: That's right. I read all, I read all of that. In the insurer in this setting the insurance have a stepping to the shoes of an in term this firm.

JUSTICE: And I was a preaching now was asking is that a did I missed state, did I missed the scenario somehow?

MR. CAPSHAW: I, I think you did it reclaimed it on.

MR. CAPSHAW: Do you agree with the fifth circuit factual amendment that Mid-continent paid the credit for the resettlement after the kimsol settlement so that it full million dollars was available.

MR. CAPSHAW: Yes, sir I don't think you can [inaudible]

JUSTICE: Both sides?

MR. CAPSHAW: Yes, yes sir. I guess since my time about to run out,

the only other point I'd make is there's really is a public policy points. And I do think that what it include-- let me hang and get away with this kind, kind for any insurance carry this kind of conduct that we are going to the courage are to be insured and we are going to disturbed it self. That has to be a reasonable approach to the settlement by both of the insurers under this scenario.

JUSTICE: I, I, I agree with, I agree with that exactly what you said but how, how's this gets public policy how this it not this current scheme, how this it not the encourage parties to path dialogue in it is incase resolve this if you have the risk of settling a case at your own pearl

MR. CAPSHAW: Because if you don't have something to let one issue in this thing, one insurance company four surviving [inaudible] and unreasonable position and objectively very [inaudible] reasonable position and make a whole of that and, and, and not being responsible for that and in my opinion of that is against on policy -

JUSTICE: But is-- but is object to self to risk when go to trial who loss and they could have settle within the policy limits now you have an excess from except judgment in excess of the one missing then the Stowards there's a whole avenue for the insured to pursue -

MR. CAPSHAW: Right. But under-- if, if we don't give us that insurance company the position of liberty mutual in this case the General Agent type of rights then that's for were you going to end up with. You're going to end up all the way down that's right what it be this trial could stop in an earlier board and that's why I must emphasize it is gift judging unreasonable that is what drives our position in this case.

JUSTICE: Mr. Capshaw I'm, I'm just a little confuse let me ask you to see if, to see if you can straight me out here again. You're position if we leave the current law as it is your entitled to equitable subrogation you step in to the insured ships. So all you want from a-- well you saying under current law your position is under current law the finding of unreasonable this on their part allows you to equitable subrogation and against them on that recover so you're really not waring any change in the law?

MR. CAPSHAW: That's right, I'm not. I'm just warning I'm the warning to be able to the forced same equitable subrogation. That's, that I would have a settlement that I have-- that I can [inaudible] worst in a judge.

JUSTICE: Okay, you want a settlement to be a not voluntary claimant.

MR. CAPSHAW : Yes, I want that because that someone's objectively reasonable through the management effectively unreasonable contact [inaudible] in other words what I'm saying is -

JUSTICE: Okay, but she did I thought she just said to that's the current status the law when you got the objectively unreasonable finding that wipe out your contractual thing.

MR. CAPSHAW : [inaudible]

JUSTICE: And you did not pursue statutory contribution in Texas because there is no judgment.

MR. CAPSHAW: Thank you your honor.

JUSTICE: Thank you.

JUSTICE: Mr. Blakely, Mid-Continent is a wrong doer and never challenge that finding is conduct is objectively unreasonable and lets just assume all that is actually correct and what part is that play in, your analysis and what if their subrogation and more equitable subrogation or contribution or whatever.

REBUTTAL ARGUMENT OF BRIAN L. BLAKELEY ON BEHALF OF PETITIONER

MR. BLAKELEY: Let me address that point your Honor. The finding was challenge at court of appeal if not challenge has been clearly erroneous is that was not proper standard on review it was challenge. And the problem that we have in this context is the district court was in making that finding that we were objectively unreasonable was looking at one side of the equation was looking at only that allegation against can sell and totally ignore Mid-Content obligations for factory. We have two dollars in this client and if you want to look at, how reacted like with one insurer in isolation.

JUSTICE: I guest what I'm asking is a, would your, would your arguments change, if the condent of one insurer in this situation was clearly and effectively unreasonable that. There is confession by the defendant, I did this and I cause those damages and, and you got coverage for the other side is coverage and you know contribute. Would your announce, would your announce this change if that would cases. If-- we didn't have any question about the an objectively that it was objectively unreasonable. Question now in the sent to which liberty can gain subrogation or contribution.

MR. BLAKELY: Obviously, I think you need some sort of finding of breach of duty based on unreasonableness or whatever that is and if you don't have that they don't give any ware under any theory - ...

JUSTICE: Okay, so you havn't and what is that to, to the General Agent case.

MR. BLAKELY: It hasn't but you still have to decide what figure you are going to proceed, isn't the subrogation action or the contribution action. Isn't the subrogation action that was just hate the situation where you have an insurer.

JUSTICE: Let me, and I'm trying let me just leave it long a little further. Let say that we decide this not a subrogation action what it impact would that situation at all contribution action.

MR. BLAKELY: That you would-- that would be an element that you would meet to me in a contribution action with also need to meet other elements. You need out ruling employers versus transport insurance say that the other transport doesn't matter take that out of the equation you have to over rule the voluntary attainment portion of employers and say, "That doesn't matter" then you would need to considerwhether you actually have true calling jurors that are insuring the same risk as a prerequisite for contribution in every jurisdiction, you did not have that here. We did n ot have our identical risk because we have different exposure in that case. The identity risk is a key component in contribution in every jurisdiction that recognizes it. When you get through all those steps then yes you need some sort of finding with regard of reach of do. What that standard would be as a top concept. The court has wrestled with it at link in the first party context and it's going to be an easier in this context to come up with it standards that everybody thinks it's correct but obviously you didn't need some that standard in their and then final you're going to need a measure of damages and that's going to depend on the standard of being jurors whether they were actually primary jurors or whether there's a primary excess situation. Here you have both and lively likes to jumble of all together and say it doesn't matter but really does matter because the

primary carrier is never the excess carrier is never going to be on top of contribution there going to be entitled for subrogation only under the best circumstances so you need to know who paid one of what cause all those factors need to cover the play in any come from.

JUSTICE: We have situation that same, same scenario here same parties involve you got difficult familiar and work the and the excess for carrier and excess for policy rather they say I think a reason was on the sex both you go settle this case. Why would've next this care you have any say so on what the violent-- value of a cases of it's with in the primary limits seems to me that we expand this in your carry to cause of action perhaps of an excess carrier enough all of the one through anybody that has a piece of the risk.

MR. BLAKELY: I think that's not truth of correct. You are creating and inviting litigation about litigation and you have one.

JUSTICE: He said that it the, the kind of the settlement Mid-continental was also considering that Craftory issue I think that was ultimately at $300,000 settlement.

MR. BLAKELY: It was. Yes your Honor.

JUSTICE: Mid-continent on a law suit knew that liberty mutual may have been Stowars by the demanded they can solve case. Correct?

MR> BLAKELY: No, Stowars matter -

JUSTICE: - but do you have a different,but you have the different?

MR. BLAKELY: Stowars never again, again there in to it because there was at least I believe $12 to $ 13 million with the coverage for himself as suppose to one protractors. There was a significant Stowars exposure on the factory side but only can sell side no one can his ever been made that there was an error Stowars problem on that side.

You know actual problem but if the settlement have fallen apart. Was there a recognition that, because the demand was a million five perhaps with in the Liberty Mutual is not just primary but excess coverage assuming that meets the Stowars were quite fit Continent law that, that, that, that Liberty could have been Stowars or no?

MR. BLAKELY: Well, I think under card law nobody was Stowars and that's present some of the kinds in the Stowars doctrine but that's there was not that demand that was with in anybody's limits so as to Stowars the primary carriers the excess carrier was not Stowars because the primary carrier said not ten - ...

JUSTICE: So you disgree with the posing counsel that, on that point?

MR. BLAKELY: Well, I'm not actually not so sure -

JUSTICE: And of ...

MR. BLAKELY: - that he is really arguing that it was Stowars situation but if he is our district.

JUSTICE: Any further question? Thank you, counsel. The cause is submitted and that includes all argument for today the martial will adjourned the court.

COYRT MARTIAL: All rise. Oyez! Oyez! Oyez! in Honorable Supreme Court of Texas has ending.

2005 WL 6169058 (Tex.)