

CTH&G

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CTH & G Quarterly

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WELCOME TO THE SPRING EDITION OF THE CTH & G QUARTERLY!

As we commence our 10th year of publication of the *CTH&G Quarterly*, we take this opportunity to express our appreciation to you, our readers, for your continued support. We are always interested in receiving your comments and suggestions for how we might improve our publication to make it of greater value to you. We look forward to hearing from you and to providing you with timely updates to assist you in the upcoming year.

In this issue of the *Quarterly*, we spotlight two recent decisions concerning excess insurance coverage and one concerning the enforceability of oral settlement agreements. If we have overlooked an area that may be of particular interest to you, please inform us! We welcome any comments, suggestions or questions that you might have regarding the newsletter.

A TALE OF TWO INSURANCE COMPANIES: EXCESS CARRIER HAD NO RIGHT OF REIMBURSEMENT FROM INSURED

Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., 51 Tex. Sup. J. 397 (2008).

Frank's Casing fabricated a drilling platform for a drilling company. This platform was installed and collapsed several months later. Frank's Casing had a primary liability policy of \$1 million and excess coverage up to \$10 million with Excess Underwriters at Lloyd's. Frank's Casing was sued for more than the excess coverage. As the case proceeded, it became clear that the insurers wanted to settle the case to cap their own exposure. Before trial, a settlement was reached within the excess coverage and Frank's Casing demanded that Lloyd's accept and fund the proposed settlement offer, effectively triggering the insurer's *Stowers* duty. The underwriters agreed that the case should be settled but noted a coverage issue remained. Lloyd's paid out the settlement, although it was disputed whether or not the claim against Frank's Casing was covered under the excess policy. Upon subsequent determination that the claim was not covered by the policy, Lloyd's sought reimbursement from Frank's Casing.

In 2005, the Court issued a decision in this case that an excess insurer could seek reimbursement in these circumstances. The Court granted Frank's Casing motion for a rehearing.

Holding: In addressing the issues presented, the Court first reviewed its holding in *Matagorda County*. In *Matagorda County*, the court held that an insurer has no implied reimbursement rights after settling an uncovered claim with a third-party tortfeasor. The court determined that an insurer that settles a claim against its insured, when coverage is disputed, may seek reimbursement from the insured should coverage later be determined not to exist, if the insurer “obtains the insured’s clear and unequivocal consent to the settlement and the insurer’s right to seek reimbursement.” This course of action is consistent with the Texas anti-subrogation rule, the Stowers doctrine, and the voluntary payment defense to equitable subrogation. The Court rejected the underwriter’s suggestion that it use equitable principles to add such a term to the contract or that it overrule its prior decision in *Matagorda County* and instead follow the example of other states that are more permissive about such insurer claims.

In holding that an excess insurer does not have a right to seek reimbursement when the policy language says nothing about the underwriters’ reimbursement rights should they decide to negotiate a settlement of the claim, the court noted that the risk of coverage uncertainties are best placed with the insurer. Allowing an insurer to settle claims and then sue its policyholder fosters conflict and distrust in the relationship between an insurer and its insured.

A SECOND TALE OF TWO INSURANCE COMPANIES: ONE OF TWO PRIMARY INSURERS IS NOT, AS AN “OTHER INSURED”, REQUIRED TO REIMBURSE OTHER FOR COST OF SETTLEMENT.

Mid-Continent Insur. Co. v. Liberty Mutual Insur. Co., 236 S.W.3d 765 (Tex. 2007)

This dispute arose out of an auto accident allegedly caused in part by hazardous road signs and barriers set up by a construction contractor. The contractor was insured by Liberty Mutual Insurance Company under a \$1 million comprehensive general liability (CGL) policy and also maintained a \$10 million excess policy with Liberty Mutual. The subcontractor maintained a \$1 million CGL policy with Mid-Continent Insurance Company which also covered the contractor as an additional insured. Both policies contained clauses providing for equal

or pro-rata sharing up to a co-insurer’s policy limits of liability if the insured maintained multiple insurance policies that covered the liability. The co-insurers were to pay equal portions up to their respective policy limits if two or more policies were primary and provided for equal payment. If other insurers did not provide for equal contribution, each insurers’ share was to be based on a ratio of the insurer’s limit of insurance to the total of all insurers’ limits. Both policies also provided a voluntary payment clause, a subrogation clause, and a no action clause.

Liberty Mutual and Mid-Continent disagreed on the settlement value of the case. Liberty agreed at mediation to settle for \$1.5 million dollars reflecting a sixty-percent liability factor and demanded that Mid-Continent contribute half of that. However, Mid-Continent valued the case at only \$300,000. Thus, Mid-Continent agreed to contribute only \$150,000 to the \$1.5 million settlement. Liberty Mutual paid the remaining \$1.35 million and sued Mid-Continent to recover a pro-rata share of the settlement. Thereafter, Mid-Continent settled claims against Crabtree for \$300,000.

The case was removed from the federal district court based on diversity grounds. The district court held that Mid-Continent was objectively unreasonable in determining the contractor’s liability and found Mid-Continent liable for one-half of the \$1.5 million settlement. The court limited Mid-Continent’s liability to an additional \$550,000 because it had already paid \$450,000 which equaled its total policy limit. Mid-Continent appealed claiming that it has no duty to Liberty Mutual for reimbursement.

Holding: The Texas Supreme Court held that Mid-Continent did not owe Liberty Mutual reimbursement under a right of contribution. The general rule is that a primary insurer has a right to contribution from another primary insurer when the insurers share a common obligation and the insurer seeking contribution has made a compulsory payment for more than its share of the obligation. However, a pro rata clause precludes contribution because the clause forces the insurance contracts to be independent of one another (limiting each policy only to a pro-rata share instead of an equal share of the whole) eliminating the common obligation requirement of contribution. Thus, a co-insurer who pays more than their pro-rata share does so voluntarily and cannot recover the amount in excess of its policy

limit from other insurers. The court noted, however, that an insured who has not been fully indemnified may enforce a claim under contract to recover the insurers' shares within the policy limits of the covered loss. Therefore, Liberty Mutual could not seek reimbursement through a right to contribution because the pro-rata clauses made each insurer liable only for their pro-rata portion and Liberty Mutual voluntarily paid an amount exceeding its policy coverage.

ORAL SETTLEMENT AGREEMENT ENFORCEABLE
Mangum v. Turner, 2008 Tex. App. LEXIS 1564 (Tex. App. 2008).

As executrix of the LaVada Oakes estate, Rubye Mangum sued Trent and Donny Turner to rescind three deeds conveyed by Oakes and Mangum's deceased husband. The parties settled the dispute by oral settlement in a Rule 11 agreement simply stating that both parties "agree that all matters in controversy have been settled." Both parties' attorneys signed the agreement. The Turners' attorney then drafted a "Full, Final, and Complete Release" agreement and sent it to Mangum's attorney. Both parties' attorneys approved and signed these documents; however, when Mangum received them, she refused to sign the release.

The Turners filed a claim seeking to enforce the Rule 11 agreement, but the trial court denied motion. The Turners filed counterclaim to Mangum's suit asserting a contract was formed between the parties for full settlement of the litigation. The trial court severed the counterclaim and held a jury trial upon it. The jury held that Mangum authorized her attorney to settle for \$104,000 in return for releasing the Turners. The jury also awarded \$50,000 in attorneys' fees to the Turners.

Mangum appealed asserting the trial court erred in denying the motion for judgment notwithstanding the verdict for three main reasons: (1) the oral agreement did not comply with the statute of frauds, rendering it unenforceable; (2) the existence of the contract was questioned but was not submitted to the jury; and (3), the evidence presented on the elements of contract was factually insufficient to enforce the settlement contract.

Holding: The Texas Court of Appeals for the Tenth District held that the trial court did not err in denying Mangum's motion for judgment notwithstanding the verdict. The court first decided that the statute of frauds did not apply to Mangum because the real estate transaction involved was merely incidental to the contract. The oral agreement was for the settlement of the claims; thus, the statute of frauds did not.

Thus, an oral settlement agreement memorialized by a Rule 11 agreement is sufficient to create a binding settlement contract even when real estate is involved in the transaction as long as the real estate is merely incidental to the settlement.

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The *CTH&G Quarterly* reviews recent decisions by the Texas courts and current trends in civil litigation. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

