

were not damaged by a covered peril.

To the extent All Saints insisted on treating the roof as a single, integrated unit, the court concluded that the doctrine of concurrent causation applied. Part of the loss of the roof resulted from a covered peril—the hailstorm, while part of the loss resulted from noncovered perils—wear and tear and latent defects. Thus, covered and non-covered perils combined to cause the loss of the roof, and the insured was entitled to recover only that portion of the damage caused solely by the covered peril.

The court rejected All Saints' reliance on *Great Texas County Mutual Insurance Co. v. Lewis*, 979 S.W.2d 72 (Tex.App.-Austin 1998, no writ), in which the insured was denied a new engine in replacement of an old one damaged by one covered peril. The *Lewis* court held that the words "repair" or "replace" in a policy meant restoration to a condition substantially the same as that existing before the damage was sustained, and that the insurer improperly sought a deduction from the cost of repair for betterment. United National, however, did not deny All Saints new tiles of the same quality to replace those damaged by the covered peril, hail, it only denied the cost of new tiles to replace those damaged by the non-covered perils of wear and tear or latent defects. Thus, United National did not seek or obtain an improper deduction for betterment.

Comment

Texas imposes a difficult factual burden on insureds in multiple causation coverage disputes. Under Texas law, when covered and excluded perils both contribute to a loss, an insured can recover only the damages caused by the covered perils. Thus, an insured must segregate damages resulting from a covered cause of loss, resulting from an excluded cause of loss. *The Travelers Ins. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971); *State Farm Fire and Cas. v. Rodriguez*, 88 S.W.3d 313 (Tex. App. 2002). // Holt

Subrogation

Texas Supreme Court Recognizes Right of Construction Subcontractor and Subcontractor's

Insurer to Seek Subrogation Recovery from Manufacturer of Defective Product of Amounts Subcontractor's Insurer Paid to Satisfy Subcontractor's Obligation under Construction Subcontract's Indemnity Provision

Whether Subcontractor or Manufacturer Was Primarily Liable Was Question of Fact That Precluded Summary Judgment for Manufacturer

Frymire Engineering Company, Inc. By and Through Real Party in Interest, Liberty Mutual Insurance Company v. Jomar International, Ltd. and Mixer S.R.L., ___ S.W.3d ___, 2008 WL 2404961 (Tex., June 13, 2008)

Case at a Glance

If a liability insurer for a subcontractor pays the subcontractor's contract-based indemnity obligation, then the insurer and the subcontractor have standing to pursue equitable subrogation claims against the manufacturer of the defective product that led to the payment. The liability insurer, as the subcontractor's subrogee, may recover from the manufacturer if: (1) the debt paid was, in reality, primarily that of the manufacturer, (2) the debt was involuntary, and (3) the manufacturer would be unjustly enriched should subrogation be denied. Payments are "involuntary"—and thus support equitable subrogation claims—if they are made pursuant to (a) a provision in the subcontract requiring the subcontractor to indemnify the owner or general contractor for damages resulting from the subcontractor's performance and (b) a provision in the subcontractor's liability policy covering the subcontractor's indemnity obligation.

Summary of Decision

The owner of the Renaissance Hotel in Dallas hired a general contractor to remodel a hotel meeting room. The general contractor in turn subcontracted the HVAC and sheet metal work to Frymire Engineering, Inc. ("Frymire"). As part of its contract with the general contractor, Frymire agreed to pay for any damages caused to the general contractor or the hotel owner "by reason of [Frymire's] performance of the work" and to obtain liability insurance to cover this indemnity obligation. Frymire complied with the

agreement by purchasing a general liability policy from Liberty Mutual Insurance Co. ("Liberty Mutual").

While working on the hotel's air conditioning system, Frymire's employees installed an "Add-A-Valve" to a chilled water line. The water line later ruptured at the site of the valve, resulting in extensive water damage to the hotel. The hotel owner sought indemnification from Frymire under the subcontract's indemnity provision; Liberty Mutual paid the owner \$458,496 on Frymire's behalf; and the parties signed an agreement releasing Frymire and Liberty Mutual from "all actions, claims, and demands" stemming from the incident.

Nearly two years after signing the release, Frymire, by and through Liberty Mutual (together, "Frymire"), sued the manufacturers of the "Add-A-Valve"—Jomar International, Ltd. and Mixer S.R.L. (together, "Jomar")—to recoup the indemnification payment, alleging damages from Jomar's negligence, product liability, and breach of warranty. The trial court granted summary judgment for Jomar without explanation. The court of appeals affirmed, holding that Frymire lacked standing to assert its claims because it failed to establish a right to equitable subrogation.

The Texas Supreme Court reversed and remanded. Most of the high court's opinion is a discussion of the law of subrogation and Texas legal history. Texas Supreme Court decisions have long recognize the right of subrogation "to its fullest extent." *Faires v. Cockrell*, 31 S.W. 190, 194 (Tex. 1895). The doctrine of equitable subrogation is therefore to be understood broadly, and it "allows a party that would otherwise lack standing to step into the shoes of and pursue the claims belonging to a party with standing." See *Mid-Continent Ins. v. Liberty Mutual Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007). Thus, although equitable subrogation is seen most often in insurance contexts, it is not restricted to them, and it "applies 'in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter.' Thus, a party seeking equitable subrogation must show it involuntarily paid a debt primarily owned by another in a situation that favors equitable relief." *Id.* and see also *Smart v. Tower Land Inv. Co.*, 597 S.W.2d 333, 337 (Tex. 1980).

Frymire contended that the debt was primarily owed by Jomar, since Jomar manufactured the

product that caused the line to rupture, and that payment of the debt was involuntary because the indemnify contract created a legally enforceable obligation. In addition, said Frymire, Jomar would be unjustly enriched unless equitable subrogation standing was found, since Jomar would thereby escape liability for its defective product, not because of the fault of any other person but because of the existence of and performance under the contractual indemnity provision in the Frymire contract. The court of appeals rejected this entire argument, so Justice Willet, writing for the unanimous supreme court considered all its elements.

Third-Party Debt. For over a century, the Texas Supreme Court had recognized a right of subrogation when one pays the debt of another. Oddly enough, however, it had never ruled precisely what constituted "a debt owed by another." The court's answer is that two legal persons—A and B—can have different debts—both running to C—where both those debts arise out of and are triggered, in part, by the same event, and if one of those debts is primary while the other secondary, then, the person whose debt which is secondary and hence dependent on the other, primary debt should be regarded as having paid a third-party's debt as well as having paid his own. Thus, in Justice Willet's analysis, "the satisfaction of [Frymire's] *contractual debt* does not foreclose the existence and satisfaction of another debt owed by Jomar to the hotel." (Italics added.) This would be Jomar's *tort-based* debt arising out of defects found in its product.

Justice Willet pointed out that the court treated tort-based debt as primary, and contract-based duty to indemnify as secondary, when it permitted an excess liability carrier to sue a primary liability carrier for negligence and defense counsel for legal malpractice in *Keck, Mabin & Cate v. Nat'l Union Fire Ins. Co., of Pgh, Pa.*, 20 S.W.3d 692, 695-96 (Tex. 2000). There, the excess insurer alleged that both the primary insurer and defense counsel mishandled the suit against the insured, causing the excess carrier to pay part of the settlement it negotiated for the insured. It made no difference that *Keck* involved excess insurance versus primary insurance; contract versus related tort and therefore secondary versus primary were involved in both. "Equitable subrogation applies in 'every instance in which one person . . . has paid a debt for which another is primary liable.'"

Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 774 (Tex. 2007) (Emphasis added by this court.)

Involuntary Payment. To repeat, the party asserting a right of subrogation must show that his payment was, in some sense, involuntary. Interestingly, according to the court, this is the most frequently disputed component of all the controvertible elements built into the idea of equitable subrogation. Significantly, “Texas courts are “liberal in their determinations that payments were made involuntarily.”” *Keck* at 702, quoting *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537, 542 (Tex. App.—Corpus Christi 1993, writ ref’d). Now, according to this court in this case, “[a] payment is voluntary when[, i.e., if and only if] the payor acts ‘without any assignment or agreement for subrogation, without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any right or property.’” *First Nat’l Bank of Kerrville v. O’Dell*, 856 S.W.2d 410, 415 (Tex. 1993), quoting *Qury v. Sanders*, 13 S.W. 1030, 1031 (Tex. 1890).

Jomar had argued that “Frymire voluntarily entered the contract [with the hotel owner] and voluntarily satisfied the hotel owner’s demand for payment, [and so] is not entitled to equitable subrogation.” Justice Willett, and his colleagues, rejected this argument since the Texas Supreme Court has for over a century—beginning with *Qury*—recognized payments made because of legal obligations as involuntary, for subrogation purposes, as have been payments made for the protection of the payor’s interests. See *Galbraith-Foxworth Lumber Co. v. Long*, 5 S.W.2d 162, 167 (Tex. Civ. App.—Dallas 1928, writ ref’d). Obviously, said the court, payments pursuant to actual existing contractual indemnity provisions qualify. If this were not true, subrogation for insurers would be wiped out.

Unjust Enrichment. Jomar argued that it would not be unjustly enriched, even if its product was defective, since the hotel owner had chosen to

recover from Frymire which also had an obligation. The court rejected this view. An injured party’s choice of who it will pursue does not determine who should, in the end, bear the burden of paying for the injury. If Frymire is without fault, Jomar’s product is defective, and the product is causally crucial, then justice requires that Jomar bear the burden of paying for the hotel owner’s loss, not an innocent indemnitor.

Of course, if Frymire is at fault and Jomar is not, or if the latter’s product is not defective, or if no evidence supports Jomar’s causal role, then it remains appropriate that Liberty should have paid for Frymire and that Jomar (or its liability carrier) pay nothing. The court, however, pointed out that the issue in the case before it was standing and that Jomar’s substantive defenses would come up after the lawsuit evolved following remand. Defense issues go to the substantive merits of Frymire’s case, and have nothing to do with the procedural-jurisdictional issue of standing.

Comment

It is perfectly obvious that justice requires the result in this case. What is not obvious, but what is equally true, is that the language of subrogation must change. Do we really want to say that a subrogee steps into the shoes of its subrogor? Fairly clearly, justice would not permit the hotel owner to recover fully first from Frymire and then also fully from Jomar. This would be a double recovery. Yet the metaphoric language the law uses to express a right of subrogation describes exactly this. Clearly, Frymire is not stepping into the shoes of the hotel owner after it has been de-victimized. It is stepping into the shoes of the tort victim, considered hypothetically as an entity which had not recovered. The tort victim is to be conceptualized *as if* it were a victim which had not recovered. // Quinn