NO. 02-0730

IN THE

SUPREME COURT

OF TEXAS

EXCESS UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN COMPANIES SUBSCRIBING SEVERALLY BUT NOT JOINTLY TO POLICY NO. 548/TA4011F01,

Petitioners,

v.

FRANK'S CASING CREW & RENTAL TOOLS, INC.,

Respondent.

PETITIONERS' BRIEF ON THE MERITS

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NO. 02-0730

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Respondent.

IDENTITY OF PARTIES & COUNSEL

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1. EXCESS UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN COMPANIES SUBSCRIBING SEVERALLY BUT NOT JOINTLY TO POLICY NO. 548/TA4011F01 are:

   Lloyd's Syndicates Numbered 535, 52, 123, 552, 228, 735, 1023, 741, 500, and 40
   Zurich (RE) UK Ltd.
   Indemnity Marine Assurance Co., Ltd.
   Commercial Union Assurance Company, PLC.
   Tokio Marine and Fire Insurance Company (UK) Ltd.
   Ocean Marine Insurance Co. Ltd.
   Yorkshire Insurance Co., Ltd., L A/c
   Phoenix Assurance Public Limited Company
   Gan Minister Insurance Company Ltd.
   Sphere Drake Insurance Plc. No. 1 A/c
   Northern Assurance Company Ltd. M A/c.
   Terra Nova Insurance Company Ltd.
   Compagnie D'Assurances Maritimes Aeriennes & Terrestres
   Assurances Generales De France I.A.R.T.
   Skandia Marine Insurance Company (UK) Ltd.
   Folksam International Insurance Co., (UK) Ltd.
   The Americas Insurance Company

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3. Frank's Casing Crew & Rental Tools, Inc., Respondent.

4. Attorneys for Respondent, Frank's Casing Crew & Rental Tools, Inc.: William Fred Hagans, State Bar No. 08685500, Carl D. Kulhanek, Jr., State Bar No. 11761850, HAGANS, BOBB & BURDINE, PC, 3200 Travis, 4th Floor, Houston, Texas 77006. Telephone: (713) 222-2700. Telecopier: (713) 547-4950; Warren W. Harris, State Bar No. 09108080, Tracy C. Temple, State Bar No. 00793446, BRACEWELL & PATTERSON, L.L.P., 711 Louisiana St., Suite 2900, Houston, Texas 77002-2781. Telephone: (713) 223-2900. Telecopier: (713) 221-1212; Greg Abbott, State Bar No. 00794500, BRACEWELL & PATTERSON, L.L.P., 111 Congress Ave., Suite 2300, Austin, Texas 78701-4061.

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NO. 02-0730

EXCESS UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN COMPANIES SUBSCRIBING SEVERALLY BUT NOT JOINTLY TO POLICY NO. 548/TA4011F01,

Petitioners,

v.

FRANK'S CASING CREW & RENTAL TOOLS, INC.,

Respondent.

PETITIONERS' BRIEF ON THE MERITS

Excess Underwriters at Lloyd's, London and Certain Companies Subscribing Severally but Not Jointly to Policy No. 548/TA4011F01, request the Court grant their petition for review because the application of *Matagorda*,[1] beyond its facts and under legal theories not addressed in *Matagorda*, to excess insurers with no duty to defend and who are not controlling the defense, significantly undermines Texas public policy encouraging settlement of disputed claims.

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[1] *Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000)(Owen, J. and Hecht, J., dissenting), included at Appendix to Petition for Review ("Apx."), tab F.

STATEMENT OF THE CASE

Nature of the Case. The Insured, Frank's, was sued for its part in the collapse of an offshore platform. After receiving notice of the claim, Excess Underwriters twice reserved rights to assert various coverage defenses.[2] Defense of the case was controlled by Frank's and its primary carrier.[3] During trial, Frank's demanded Excess Underwriters settle the claim and "Stowerized" Excess Underwriters,[4] who agreed to fund the settlement under reservation.[5] Excess Underwriters then sued for a coverage determination and reimbursement of the settlement funds.[6]

Trial court's disposition. Trial was before the Honorable Jeff Work in the 189th Judicial District Court of Harris County, Texas. The trial court ruled in favor of Excess Underwriters, finding that there was no coverage for the claims[7] and dismissed Frank's counterclaims.[8] The trial court also granted Excess Underwriters summary judgment, ruling

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[2] CR Vol. III at 687 695, 697 699.

[3] CR Vol. XVI at 3408 09.

[4] CR Vol. III at 679 682, 685.

[5] CR. Vol. III at 717 720, 723 724.

[6] CR Vol. I at 2.

[7] CR Vol. XV at 3227, 3229.

[8] CR Vol. V at 1025 1038; CR Vol. XV at 3221 222 (negligence and gross negligence); 3216 217 (breach of duty of good faith and fair dealing and insurance code violations); 3219 (breach of the insurance contract); 3224 225 (business disparagement); 3231 (declaratory relief).

that they were entitled to reimbursement[9] in the amount of $7,013,612.00.[10]

Before entry of final judgment, this Court issued its opinion in *Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County*.[11] The trial court directed Frank's to file a motion for new trial on the reimbursement issue in light of *Matagorda*.[12] After a hearing, the trial court withdrew its order granting Excess Underwriters' motion for summary judgment on reimbursement and granted Frank's motion for summary judgment, entering a take nothing judgment against Excess Underwriters.[13] Judge Work signed a final judgment in Frank's favor on February 12, 2001.[14]

Proceedings in the court of appeals. Excess Underwriters appealed the February 12, 2001 judgment to the Fourteenth Court of Appeals at Houston.

Court of Appeals' disposition. The Court of Appeals affirmed the trial court's judgment, concluding that *Matagorda* barred reimbursement even though the court recognized " . . . this case carries *Matagorda County* to a logical conclusion that is somewhat disquieting Frank's was able to resolve the parties' coverage dispute in its own favor simply by sending a *Stowers* demand to the Underwriters."

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[9] CR Vol. XV at 3210 211, 3213 214.

[10] CR Vol. XVII at 3630.

[11] 52 S.W.3d 128 (Tex. 2000)(Owens J. and Hecht, J., dissenting) at Apx. tab F.

[12] CR Vol. XVII at 3631-632.

[13] Apx. tab B.

[14] *Id.*

The panel that decided the case was composed of Chief Justice Scott Brister and Justices John S. Anderson and Kem T. Frost. Chief Justice Brister authored the opinion for the panel, which is published at No. 14-01-00349-CV, 2002 WL 1404705, -- S.W.3d --, (Tex.App.--Houston [14th Dist.] June 27, 2002).[15] Judgment was rendered and the opinion issued on June 27, 2002.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal under Texas Government Code §22.001(a)(6) because the Court of Appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected.

ISSUES PRESENTED

ISSUE 1: The trial court and Court of Appeals erred in applying the *Matagorda* case to reverse a judgment in favor of Excess Underwriters' (granting recovery of more than $7 million) and grant Frank's Motion for Summary Judgment on Reimbursement.

Subissue 1: The *Matagorda* ruling was based on unique facts and *Matagorda* should not be extended to the facts of this case. This Court held in the *Matagorda* case that a primary insurer on a Texas policy, that defends and settles a case, cannot without the insured's consent be reimbursed for funds paid to settle noncovered claims. The Excess Underwriters here had no duty to defend, and did not control the defense or settlement, but settled at Frank's insistence. Frank's controlled the defense, solicited settlement, and acknowledged coverage issues reserved between Frank's and Excess Underwriters. Did the trial court err when it withdrew the judgment allowing reimbursement and applied the *Matagorda* case to an excess insurer on a Louisiana policy?

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[15] Apx. tab A.

Subissue 2: Extension of *Matagorda* to this case undermines its equitable principles without advancing public policy because it impedes settlement and disregards the commercial, practical, and legal realities of excess insurance. Should the Supreme Court grant review to further articulate the standards necessary to satisfy *Matagorda*'s consent requirement to guide Texas courts and potential litigants?

Subissue 3: The *Matagorda* case reaffirmed the right to reimbursement under a quasi-contractual or other equitable theory. Excess Underwriters are entitled to reimbursement under the equitable doctrines of quantum meruit (because the settlement required Frank's written approval) and under assumpsit (because they paid the settlement upon Frank's demand). Did the trial court err when it applied *Matagorda* without considering Excess Underwriters' rights to reimbursement under these equitable doctrines?

Subissue 4: Under Texas choice of law rule, Louisiana law governs Excess Underwriters' right to reimbursement because Louisiana has the most significant contacts to the insurance relationship between Frank's and Excess Underwriters. Louisiana law permits Excess Underwriters, without Frank's express consent, to recover funds paid to settle noncovered claims. Did the lower courts err in denying reimbursement under Texas law?

A. Texas law holds that insurance contracts are governed by the law of the state with the most significant relationship to the policy. Frank's policy was issued and delivered in Louisiana, under Louisiana law, to a Louisiana insured. Did the trial court err when it applied Texas law to interpret Excess Underwriters' right to reimbursement?

B. Louisiana law holds that an insurer funding a settlement not covered by the policy may later seek reimbursement of those funds from its insured. Excess Underwriters funded a settlement of claims that were subsequently adjudicated as not covered under the umbrella policy. Under Louisiana law, are Excess Underwriters entitled to reimbursement of those settlement funds?

C. Louisiana public policy permits an insurer to sue an insured when the action is one for reimbursement. Did the lower courts err in denying reimbursement based on Texas law and Texas public policy?

D. Louisiana law allows an action for unjust enrichment when one party pays a debt owed by another. The trial court correctly found that there was no coverage for the claims against Frank's. Excess Underwriters paid a claim that Frank's owed. Are Excess Underwriters entitled to reimbursement of funds paid to extinguish a debt that Frank's owed?

E. Even if Louisiana's law were undecided on the reimbursement issue, a Texas court may not properly presume Louisiana law to be the same as Texas law. Such a presumption may arise only when the foreign state's law is derived from common law. Louisiana's law is not. Did the Court of Appeals err in presuming Louisiana law to be the same as Texas law?

STATEMENT OF FACTS

The Court of Appeals' opinion correctly states the nature of the case, but omits significant facts relevant to Excess Underwriters' right to reimbursement.

The underlying lawsuit against Frank's arose out of work that Frank's performed at its Louisiana yard on a drilling platform that was installed offshore Louisiana.[16] Excess Underwriters insured Frank's under an excess umbrella liability policy that was issued, delivered, and paid for in Louisiana.[17]

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[16] Cause No. 96-24068, *Arco Oil & Gas Company, et al v. Enercon Engineering, Inc., et al.*; CR Vol. XIV at 3006 007, paras. 8, 10; CR Vol. VI at 1306 (Frank's Answer to Interrogatory No. 1).

[17] Apx. tab D at 315; CR Vol. V at 1099 1100.

The policy did not contain a duty to defend clause[18] and Frank's prior written approval was required for settlement.[19] Frank's outside and in-house counsel directed and controlled its defense.[20] Frank's in-house counsel, concerned about how the trial was going, unilaterally contacted plaintiffs' counsel in a late night "emergency" call to solicit a settlement demand.[21] Frank's counsel suggested a demand in the $7 million range be made, which he would demand Frank's excess insurers pay.[22] Plaintiffs' counsel immediately demanded $7.5 million.[23]

Frank's advised Excess Underwriters of the plaintiffs' settlement offer and demanded Excess Underwriters settle under the "*Stowers*" doctrine.[24] Excess Underwriters wrote to Frank's, agreeing that the settlement demand was reasonable, but disputing coverage, and requesting that Frank's jointly fund the settlement.[25] Frank's responded with a second "*Stowers*" demand.[26]

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[18] Apx. tab D at 329 (Condition H).

[19] Apx. tab D at 330 (Condition J).

[20] CR Vol. XVI at 3408 409; Vol. XV at 3252 253; CR Vol. VII at 1427 428, 1429 430, 1445.

[21] CR Vol. VII at 1419 420.

[22] CR Vol. VII at 1419 422.

[23] CR Vol. VII at 1422; CR Vol. X at 2191, 2192, 2195 196.

[24] CR Vol. III at 679 682.

[25] CR Vol. III at 683 684.

[26] CR Vol. III at 685.

Excess Underwriters advised Frank's in writing that they would fund the settlement, which was excess of the primary policy limits, conditioned upon their right to seek reimbursement if no coverage was found.[27] Excess Underwriters' counsel contacted plaintiffs' counsel and accepted the $7.5 million demand, reiterating these conditions.[28] The same day, Excess Underwriters filed this coverage action for reimbursement.[29]

The following day, Frank's defense counsel appeared before the trial court to announce the settlement on the record.[30] Excess Underwriters' counsel expressly advised the court that as a condition of settlement, Excess Underwriters reserved all coverage defenses and would hold Frank's responsible for reimbursement if the claims were not covered.[31] Frank's accepted the settlement funding, although Frank's contended that settlement would waive Excess Underwriters' coverage defenses.[32] Thereafter, Frank's counsel helped draft the settlement agreement, which expressly carves out "any claims that exist presently" between Frank's and Excess Underwriters.[33] At the time the settlement agreement was executed, Frank's had already answered this pending action for reimbursement.[34]

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[27] CR Vol. III at 717 720.

[28] CR Vol. III at 723 24.

[29] CR Vol. I at 2.

[30] CR Vol. III at 730 731.

[31] CR Vol. III at 734 735.

[32] CR Vol. III at 730 732.

[33] Apx. tab E at 1369 (Indemnity); 1369 370 (Releases); 1370 (Covenants Not to Sue); 1371 372 (para. 8(g)).

[34] CR Vol. I at 10 18.

SUMMARY OF THE ARGUMENT

The facts and circumstances of this case provide the unique opportunity for the Court to consider whether the principles applied in *Matagorda*, requiring the "insured's clear and unequivocal consent to . . . the insurer's right to seek reimbursement,"[35] can (or even should) be met when the insured controls the defense, demands settlement, Stowerizes the excess carrier, and acknowledges, but attempts to unilaterally circumvent, coverage issues.

The *Matagorda* decision was significantly influenced by the facts that the insurer controlled the litigation and settlement, and the insured's consent could not be implied from the facts and circumstances presented. There was no indication that the insured even agreed to be bound by the settlement. There was certainly no indication that the insured demanded settlement. Under those circumstances, equity weighed against reimbursement.

But here, Excess Underwriters did not control the defense or settlement. Indeed, the excess umbrella policy imposed no duty to defend and prohibited Excess Underwriters from settling without Frank's written consent. Frank's controlled its own defense through in-house and outside counsel. And it was Frank's, through its in-house counsel, that unilaterally solicited the settlement demand. Frank's then demanded settlement under *Stowers* and executed a settlement agreement that expressly preserved existing claims between Frank's and Excess Underwriters. Unlike the insured in *Matagorda*, Frank's demanded and accepted

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[35] Here, it was undisputed that Frank's had clearly and unequivocally consented to the settlement. *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, No. 14-01-00349-CV, 2002 WL 1404705, at *2 (Tex.App. Houston [14th Dist.] June 27, 2002), at Apx. tab A.

the benefit of the settlement while acknowledging the coverage dispute and refusing to acknowledge Excess Underwriters' right to litigate coverage. Frank's cannot be allowed to simultaneously demand settlement and object to reimbursement and thereby unilaterally alter the legal relationship between itself and its insurers.

If, however, *Matagorda* requires consent without exception, this Court should further articulate when consent may be assumed. Frank's affirmative conduct in orchestrating and demanding settlement, and agreeing to be bound by it, must be found to satisfy the *Matagorda* standard for reimbursement. If not, even the most reasonable insureds will demand settlement but withhold consent to reimbursement to obtain absolute coverage under *Matagorda*. The California Supreme Court has recently allowed reimbursement in a situation more similar to this case than that in *Matagorda*, holding that the insured's *express* agreement is not a prerequisite to reimbursement. Otherwise, as the Court of Appeals observed, Frank's can expand the scope of coverage under the policy "simply by sending a *Stowers* demand."

Beyond the factual distinctions are public policy and equity. Excess Underwriters made good faith efforts to resolve the coverage dispute short of litigation. Indeed, insurers often cannot obtain a ruling on coverage before resolving the underlying suit and thus, Excess Underwriters could not have simply deferred settlement until coverage was determined. Notwithstanding, even under *Matagorda*, Excess Underwriters' right to reimbursement on the theory of quantum meruit is recognized because the settlement did not

bypass the insured, but required Frank's written approval. Frank's derived the benefit of more than $7 million in settlement funds, but such benefit was subject to the express conditions of a determination of coverage and the potential for reimbursement. Frank's accepted of those funds with reasonable notice that repayment may be required. The doctrine of assumpsit also mandates reimbursement because the settlement was funded for the benefit of Frank's, upon Frank's demands and because Frank's took advantage of the money. *Matagorda* did not address assumpsit. The lower courts erred in denying reimbursement under *Matagorda* without regard to these equitable doctrines.

Indeed, the lower courts erred in applying *Matagorda* to this case at all. Louisiana law governs Excess Underwriters' right to reimbursement because Louisiana has the most significant contacts to this dispute. Under Louisiana law, Excess Underwriters are entitled to reimbursement (without Frank's express consent) of funds paid to settle claims that are determined not to be covered and alternatively, have an unjust enrichment cause of action. Frank's was unjustly enriched by receiving more than $7 million in coverage for which it did not bargain and did not pay. The trial court erred in applying Texas law. The Court of Appeals erred in presuming that Louisiana law would yield the same result and in failing to make a choice of law determination.

ARGUMENT AND AUTHORITIES

ISSUE 1: The trial court and Court of Appeals erred in applying the *Matagorda* case to deny Excess Underwriters' and grant Frank's Motions for Summary Judgment on Reimbursement.

Subissue 1: The *Matagorda* ruling cannot properly be extended to an excess insurer with no duty to defend, who disputes coverage, but settles, in good faith and subject to reservation and reimbursement, at the insistence of its insured.

In *Matagorda*, this Court held that:

> when coverage is disputed and the insurer is presented with a reasonable settlement demand within policy limits, the insurer may fund the settlement and seek reimbursement only if it obtains the insured's clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement.[36]

In so holding, the Court was careful to limit its holding to the facts and circumstances before it. In deciding whether TAC, the insurer, could seek reimbursement from its insured, the County, the Court considered "whether the County's consent to reimburse TAC may be implied *from this record*, or whether *the circumstances presented* warranted imposing, in law, an equitable reimbursement obligation."[37]

Those facts and circumstances were that:

1) the insurer had a unilateral right to settle the underlying case;
2) the insurer was a primary carrier with a duty to defend;
3) the insurer controlled the defense and settlement negotiations;
4) the insured did not participate in the settlement or agree to be bound by it;
5) the insured did not respond, verbally or otherwise, to the insurer's statement of intent to seek reimbursement.

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[36] *Matagorda County*, 52 S.W.3d at 135, at Apx. tab F.

[37] *Id.* at 131 (emphasis added).

In light of that record, this Court ultimately held "that the County's consent to reimburse TAC's settlement costs cannot be implied *from this record*, and no equitable remedy will support a right of reimbursement *under the circumstances presented*."[38]

Indeed, by their very nature, implied-in-fact and implied-in-law rights and obligations are fact sensitive and must be determined on a case-by-case basis.[39] Reimbursement in this case does not implicate the Court's concern that allowing a primary insurer to simultaneously control the defense, and unilaterally settle a claim and then seek reimbursement from its insured, poses an inherent conflict of interest.[40] *Matagorda* cannot properly be extended beyond its particular facts, and the facts here warrant a different result.

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[38] *See id.* at 136. See also the court of appeals' conclusion that under the circumstances, TAC had not shown itself entitled to reimbursement and "[i]n the present case . . . there is no indication that the County agreed either to be bound by the settlement or that TAC could later seek reimbursement." *Matagorda County v. Texas Ass'n of Counties County Gov't Risk Mgmt. Pool*, 975 S.W.2d 782, 787 (Tex. App. Corpus Christi 1998)(emphasis added), included at Apx. tab G.

[39] 52 S.W.3d at 140 (dissent) at Apx. tab F.

[40] *Id.* at 134 (discussing equitable subrogation as opposed to equitable reimbursement). Under equitable subrogation principles, which are not at issue here, an insurer pursues a third party's rights against the insured, rather than its own rights against the insured.

1. The policy required Frank's consent to settlement and Frank's demanded settlement.

The policy in *Matagorda* allowed TAC to settle claims against the County at its own discretion and without the County's consent.[41] That is not what happened here.

The umbrella policy required Frank's written consent as a prerequisite to settlement:

> The Assured shall make a definite claim for any loss for which the Underwriters may be liable under this policy . . . . after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters. [emphasis added][42]

Excess Underwriters could not have, and did not, settle the noncovered claims against Frank's in the underlying lawsuit without Frank's approval and consent. To the contrary, Frank's demanded that Excess Underwriters settle for a sum that Frank's own in-house counsel unilaterally "negotiated."[43] Frank's helped draft and executed the settlement agreement which did not release, but preserved Excess Underwriters' coverage rights and this action.[44] Frank's cannot now complain of a settlement that it orchestrated.

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[41] *Id.* at 130.

[42] Apx. tab D at 330 (Condition J).

[43] CR Vol. VII at 1419 422; CR Vol. III at 679 682, 685.

[44] Apx. tab E at 1369 70, 1371 372 (para. 8(g)), 1377.

2. Excess Underwriters had no duty to defend.

The insurers here are excess insurers (not primary insurers) and had no duty to defend. The umbrella policy expressly denies any duty to defend:

> Underwriters shall **not** be called upon to assume charge of the settlement or defense of any claim made or suit brought . . . against the Assured but Underwriters shall have the right and shall be given the opportunity to associate with the Assured or the Assured's underlying insurers or both in the defense and control of any claim . . . where the claim or suit involves, or appears reasonably likely to involve Underwriters, in which event the Assured and Underwriters shall co-operate in all things in the defense of such claim . . .. [emphasis added][45]

This language has been interpreted as unambiguously excluding an excess insurer's defense obligation pending exhaustion of underlying insurance limits and reserving to the insured the right to control the defense.[46] Frank's primary insurer defended Frank's in the underlying lawsuit and did not tender its policy limits until after the settlement had been reached.[47]

Further, Excess Underwriters never assumed control of the defense.[48] In cases involving excess insurers with no duty to defend, the courts have found there is no authority for the proposition that an excess insurer's participation in settlement negotiations, where the

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[45] Apx. tab D at 329 (Condition H).

[46] *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CNA Ins. Cos.*, 28 F.3d 29, 31 (5th Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995)(Texas law); *Institute of London Underwriters v. First Horizon Ins. Co.*, 972 F.2d 125, 126 (5th Cir. 1992)(Louisiana law); *Texas Employers Ins. Ass'n. v. Underwriting Members of Lloyds*, 836 F. Supp. 398, 402, 406 08 (S.D.Tex.1993).

[47] CR Vol. XV at 3252 253.

[48] CR Vol. VII at 1427 428, 1429 430, 1445 (at 13:12 18:21, 24:19 25:9, 86:21 87:2).

insured has independent counsel, is tantamount to assuming the assured's defense.[49] The Fifth Circuit also held that if the policy contains a provision requiring the consent of the assured to any settlement, an excess insurer's participation in settlement negotiations does not constitute an assumption of the insured's defense.[50]

3. Frank's controlled its defense, unilaterally negotiated the settlement, and demanded Excess Underwriters accept the settlement.

Within the first two days of trial, Frank's in-house counsel, Michael Andrepont, unilaterally contacted plaintiffs' counsel in a late-night "emergency" phone call for the sole purpose of soliciting a settlement demand that Frank's would deem reasonable and would "demand" that Excess Underwriters pay.[51] Frank's actually suggested plaintiffs demand an amount in the $7 million range.[52] Not surprisingly, plaintiffs' counsel immediately demanded $7.5 million.[53] Excess Underwriters and their counsel had no involvement in this settlement "negotiation."

Frank's then twice demanded that Excess Underwriters pay to settle the case or Frank's would proceed with a *Stowers* action.[54] Both parties agreed that $7.5 million was

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[49] *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445-46 (5th Cir. 1991).

[50] *Nat'l Union Fire v. CNA*, 28 F.3d at 31 32 (citing *Arkwright-Boston*, 932 F.2d at 445-46).

[51] CR Vol. VII at 1419 422.

[52] *Id.*

[53] CR Vol. VII at 1419 422; CR Vol. III at 682.

[54] CR Vol. III at 679 682, 685.

a reasonable settlement demand, but Excess Underwriters continued to dispute coverage.[55] Excess Underwriters agreed, in good faith, to fund the settlement on Frank's behalf, expressly subject to a continued reservation of rights and to seeking reimbursement of funds paid to settle noncovered claims.[56] Excess Underwriters' rights had been properly reserved in letters to Frank's[57] and Excess Underwriters reiterated the conditions of settlement to the court.[58]

Excess Underwriters filed this action prior to the settlement hearing.[59] Frank's participated in the hearing and later helped draft the settlement agreement, which expressly preserved any existing claims between Frank's and Excess Underwriters.[60] Frank's executed the settlement agreement with actual knowledge of this pending action for reimbursement, which Frank's had, in fact, already answered.[61] Any conflict of interest posed by these facts was biased against Excess Underwriters and does not warrant an extension of *Matagorda* to this case.

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[55] *Id.*; CR Vol. III at 683 684.

[56] CR Vol. III at 717 720.

[57] *Id.*; CR Vol. III at 687 695, 697 699.

[58] CR Vol. III at 734 735.

[59] CR Vol. I at 2; CR Vol. III at 727.

[60] Apx. tab E at 1369 370.

[61] CR Vol. I at 10 18.

Subissue 2: Extension of *Matagorda* to this case undermines its equitable principles without advancing public policy because it impedes settlement and disregards the commercial, practical, and legal realities of excess insurance. The Supreme Court should grant review to further articulate the factors needed to satisfy *Matagorda*'s consent requirement in the context of excess insurance.

This Court has long observed that "If [tort plaintiffs] fail to establish [their] case against [Frank's], the questions raised by [a declaratory judgment action] would be purely academic and we would have had a considerable amount of judicial wheel spinning for nothing."[62] That is especially true in the context of excess insurance and in the absence of a duty to defend. Although the *Matagorda* court relied on its previous decisions in *Gandy*[63] and *Griffin*[64] to explain that one option for "insurers in TAC's position," who cannot obtain the insured's consent to reimbursement, is to resolve coverage issues through a declaratory judgment action prior to resolution of the underlying claim,[65] Excess Underwriters did not have that option. In fact, excess insurers generally may not have the option of a declaratory judgment.

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[62] *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968). *See also Keck*, 20 S.W.3d at 703 (disfavoring rules of law that "discourage insurance companies from . . . settling disputed claims and thereby force insureds more often into litigation with their insurers.").

[63] *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

[64] *Farmers Texas County Mutual Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997).

[65] *Matagorda*, 52 S.W.3d at 135 at Apx. tab F. The court noted the elapse of two years between the time TAC filed its declaratory judgment action and the time TAC settled the underlying litigation. *Id.* at 135 n.6. Excess Underwriters filed the declaratory judgment action prior to settlement and within a reasonable time of determining that the coverage issue could not be resolved short of litigation.

While *Gandy* generally requires insurers to either accept coverage or make a good faith effort to resolve coverage before resolving the underlying claim,[66] the duty to indemnify is not always justiciable before the insured's liability is determined. In *Firemen's Ins. Co. of Newark, N.J. v. Burch*, the court held that litigating an insurer's duty to indemnify before the insured's liability was determined was premature.[67] The Court later created an exception to the *Burch* rule:

> It may sometimes be necessary to defer resolution of indemnity issues until the liability litigation is resolved. In some cases, coverage may turn on facts actually proven in the underlying lawsuit. . . . In many cases, however, the court may appropriately decide the rights of the parties before judgment is rendered in the underlying tort suit.
>
> We now hold that the duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify.*[68]

Significantly, this "*Griffin* exception" to *Burch* does not apply when the duty to defend is not at issue.[69] Thus, since Excess Underwriters undisputedly had no duty to defend, their duty to indemnify may not have even been justiciable before the underlying litigation

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[66] *Id.* at 135.

[67] *Griffin*, 955 S.W.2d at 83 (discussing *Burch*, 442 S.W.2d 331 (Tex. 1968)). That ruling was based upon the prohibition that courts cannot render advisory opinions and language found in the Texas State Constitution at the time. *Id.* The state constitution has since been amended.

[68] *Griffin*, 955 S.W.2d at 84 (emphasis in original).

[69] *See Mt. Hawley Ins. Co. v. Steve Roberts Custom Bldrs, Inc.*, 215 F. Supp.2d 783, 789 90, 793 (E.D. Tex. 2002); *McKinney Bldrs. II, Ltd. v. Nationwide Mut. Ins. Co.*, No. CIV.A.3:97-CV-3053, 1999 WL 608851, at *11 (N.D. Tex. Aug. 11, 1999)(citing *Burch*, 442 S.W.2d at 333; *Foust v. Ranger Ins. Co.*, 975 S.W.2d 329, 332 & n.1 (Tex.App. San Antonio 1998, pet. denied)).

was resolved. Notwithstanding, Excess Underwriters made good faith efforts to resolve coverage short of litigation and fairly met the dictates of *Gandy*.

The distinctions between excess and primary insurers were not considered in *Matagorda*.[70] In the context of excess insurance and the facts of this case, *Matagorda* does nothing to facilitate settlement but rather empowers the insured to unilaterally expand the scope of coverage without regard to the terms of the umbrella policy. Insureds should not be allowed to leverage themselves into coverage they did not bargain or pay for. To allow them to do so would create a hardship on other insureds in the state.

Allowing reimbursement rights, however, encourage insurers and insureds to settle cases for which coverage is unclear and shift the risk that the insured may be unable to satisfy a judgment or settlement from the injured third party to the insurer. To this end, the California Supreme Court recently extended an insurer's right to reimbursement to include funds paid to settle noncovered claims.[71] Significantly, the court held that the insured's *express* agreement is not a prerequisite to reimbursement.[72] In *Blue Ridge*, coverage was disputed and the insureds demanded the insurer settle the claims against them while

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[70] *See generally e.g. Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, PA*, 20 S.W.3d 692, 700 01 (Tex. 2000)(recognizing that excess insurers typically assume fewer duties under the insurance contract than primary insurers).

[71] *See Blue Ridge Ins. Co. v. Jacobsen*, 22 P.3d 313, 321 (Cal. 2001), included at Apx. tab H.

[72] *See id.* at 320. *See also Matagorda*, 52 S.W.3d at 136 (dissent); *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997)(involving defense costs); *Grinnel Mut. Reins. Co. v. Shierk*, 996 F. Supp. 836, 839 (S.D.Ill. 1998); *Knapp v. Commonwealth Land Title Ins. Co., Inc.*, 932 F. Supp. 1169 (D.Minn. 1996), for the proposition that acceptance of the benefits of the insurer's defense with notice of the reservation of rights to seek reimbursement constitutes an implied agreement to the reservation).

simultaneously objecting to reimbursement.[73] Reimbursement was allowed despite the insureds' prior objections because an insured cannot seek to receive either the benefit of an unconditional settlement of a noncovered claim, or, in the alternative, the opportunity to make a bad faith claim should the insurer fail to settle.[74] Under such circumstances, a right to reimbursement is implied in law to avoid the insured's unjust enrichment.[75]

Similarly, the court in *Colony Ins. Co. v. G & E Tires & Serv., Inc.*[76] permitted reimbursement of costs the insurer paid to defend noncovered claims, even though the insured (like Frank's and the *Blue Ridge* insureds) repeatedly disagreed with the insurer's coverage position and insisted there was coverage. Because the insurer provided the defense subject to reimbursement if no coverage was found and the insured accepted that conditional defense, fairness required the insured to make the insurer whole once it was determined there was no coverage and therefore, no duty to defend. As here, *Colony Ins.* involved a commercial insurance policy and a sophisticated insured, who objected to the insurer's coverage position, but nevertheless demanded and accepted a conditional offer to defend. However, an insured cannot accept an insurer's offer for defense or settlement conditioned upon coverage and reimbursement while unilaterally altering the material terms of that

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[73] *See Blue Ridge*, 22 P.3d at 315 16, at Apx. tab H.

[74] *See id.* at 322.

[75] *See also Matagorda*, 52 S.W.3d at 136 (dissent).

[76] 777 So.2d 1034 (Fla.App. 1st Dist. 2000).

offer.[77]

The dissenters in *Matagorda* recognized that an implied-in-fact agreement to reimburse may (and should) arise when the insured demands settlement, does anything to affirmatively accept the settlement, or tacitly accepts the benefits of the settlement.[78] Whether such an agreement has arisen must be determined on a case-by-case basis.[79] Such an agreement arose here and a right to reimbursement preserves and promotes basic notions of fairness, as well as the bargain struck in the terms of the insurance contract.[80]

The Supreme Court should grant review to refine the principles of *Matagorda* in the context of excess insurance and address whether an insured's express agreement is necessary to satisfy the *Matagorda* standard for reimbursement.

Subissue 3: *Matagorda* reaffirmed the right to reimbursement under a quasi-contractual or other equitable theory. Excess Underwriters are entitled to reimbursement under quantum meruit because the settlement required Frank's written approval and under assumpsit because they paid the settlement upon Frank's demand. The lower courts erred in applying *Matagorda* without considering Excess Underwriters' rights to reimbursement under quantum meruit and assumpsit.

Texas courts have long recognized the equitable doctrines of quantum meruit and assumpsit as bases for restitution. Far from abolishing those bases for recovery, *Matagorda*

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[77] *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS §69 (1981)).

[78] 52 S.W.3d at 139, 140 (dissent), at Apx. tab F.

[79] *Id.* at 140.

[80] *Id.* at 139, 140 (dissent); *Blue Ridge*, 22 P.3d at 321.

simply held that quantum meruit did not apply under the circumstances of the case[81] and did not consider assumpsit since it was not raised by the parties.

A. Excess Underwriters are entitled to reimbursement based on the well-established theory of quantum meruit because the settlement did not bypass Frank's, but required Frank's written approval.

Quantum meruit is based upon an "implied agreement to pay for benefits received."[82] To establish a right to reimbursement under quantum meruit, Excess Underwriters must establish that (1) it furnished valuable services, (2) for Frank's, the party sought to be charged, (3) which were accepted by Frank's, and (4) were accepted under such circumstances that Frank's was reasonably notified that Excess Underwriters, in funding the settlement of noncovered claims, expected to be paid.[83]

In *Matagorda*, quantum meruit did not apply because the settlement "bypassed" the County and did not require its acceptance or approval, and there was no indication that the County executed or otherwise agreed to be bound by the settlement agreement.[84]

Here, the settlement did not "bypass" Frank's. Frank's unilaterally sought out a settlement demand and demanded twice that Excess Underwriters pay its solicited demand or be subject to bad faith liability.[85] Excess Underwriters were prohibited by the policy from

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[81] 52 S.W.3d at 134 (citing with approval *Matagorda*, 975 S.W.2d at 785), at Apx. tabs F and G, respectively.

[82] *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

[83] *See id.*; *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990).

[84] 52 S.W.3d at 134 (citing with approval *Matagorda*, 975 S.W.2d at 785), at Apx. tabs F and G, respectively.

[85] CR Vol. VII at 1419 422; CR Vol. III at 679 682, 685.

settling without Frank's consent[86] and Frank's gave its consent.[87] Under these facts and circumstances, quantum meruit applies.

There can be no dispute that Excess Underwriters' funding of the settlement on Frank's behalf was valuable. Upon funding, Frank's obtained a full release of liability from all parties to the underlying lawsuit, (excluding, however, any then-existing claims or future claims between Frank's and Excess Underwriters arising out of the underlying lawsuit).[88] Frank's accepted the benefit of the funding knowing that Excess Underwriters had filed a coverage action and were seeking reimbursement. Excess Underwriters notified Frank's of its intent to seek reimbursement and its expectation of payment (in the event noncoverage were established) prior to funding the settlement, and in direct response to Frank's written demands.[89] Excess Underwriters are entitled to reimbursement of settlement funds based on quantum meruit as a matter of law.

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[86] Apx. tab D at 330 (Condition J).

[87] *See e.g.*, Apx. tab E at 1377.

[88] *Id.* at 1369 370.

[89] CR Vol. III at 717 720.

B. Excess Underwriters are entitled to reimbursement under the doctrine of assumpsit because they funded the settlement on Frank's behalf and upon Frank's demands.

The equitable doctrine of assumpsit or, "money had and received," also entitles Excess Underwriters to reimbursement.

> A cause of action for assumpsit arises when money is paid for the use and benefit of another if made at the beneficiar[y's] request or if the beneficiary adopted or took advantage of the money. This form of recovery amounts to a quasi-contractual obligation to repay funds advanced for another's benefit.[90]

Recovery for assumpsit is not predicated upon wrongdoing, or the parties' agreement or intent, but only upon the justice of the case.[91] "[W]here the benefit is received and accepted, the promise to pay for such benefit will be implied in law."[92] All Excess Underwriters must show is that Frank's holds money which in equity and good conscience belongs to Excess Underwriters.[93]

Excess Underwriters funded the settlement on Frank's behalf and upon Frank's demands. Frank's negotiated and chose the coverage it contracted for with Excess Underwriters. The settled claims were not covered under that insurance contract and were Frank's obligation alone. Frank's received and accepted the benefit of payment for those

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[90] *King v. Tubb*, 551 S.W.2d 436, 442 (Tex.Civ.App. Corpus Christi 1977, no writ)(internal citation omitted). *See also Williams v. Khalaf*, 802 S.W.2d 651, 656 (Tex. 1990).

[91] *Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 164 (Tex.App. El Paso 1997, no writ).

[92] *King*, 551 S.W.2d at 442.

[93] *Id. See also Staats v. Miller*, 243 S.W.2d 686, 687 88 (Tex. 1951); *Miller-Rogaska, Inc. v. Bank One, Texas, N.A.*, 931 S.W.2d 655, 662 (Tex.App. Dallas 1996, no writ); *Siegler v. Ginther*, 680 S.W.2d 886, 890 n.1 (Tex.App. Houston [1st Dist.] 1984, no writ); *King*, 551 S.W.2d at 442 (citing *Staats*, 243 S.W.2d at 687 88).

noncovered claims and thereby, has impliedly promised to pay for such benefit.[94] Without regard to agreement or intent, these facts properly invoke the doctrine of assumpsit and demand reimbursement.

Subissue 4: Texas' choice of law rules dictate application of Louisiana law on reimbursement because Louisiana has the most significant contacts to the insurance relationship between Frank's and Excess Underwriters. Louisiana law permits Excess Underwriters, without Frank's express consent, to recover the funds paid to settle noncovered claims. The Court of Appeals erred in failing to perform a choice of law analysis because Louisiana law conflicts with Texas law.[95]

A. Texas law holds that insurance contracts are governed by the law of the state with the most significant relationship to the policy. The umbrella policy was issued and delivered in Louisiana to a Louisiana insured. Louisiana law governs and entitles Excess Underwriters' to reimbursement as a matter of law.

Both parties agree that under Texas choice of law rules, Texas courts look to specific sections of the Restatement (Second) Conflict of Laws ("Restatement") to determine which state's law to apply.[96] The parties also agree that disputes under a contract of insurance are governed by the law of the state with the most significant relationship to the case.[97] Factors to consider are: (1) the place of contracting; (2) the place of contract negotiations; (3) the

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[94] *King*, 551 S.W.2d at 442.

[95] *Young Refining Corp. v. Pennzoil Co.*, 46 S.W.3d 380, 385 (Tex.App. Houston [1st Dist.] 2001, pet. denied); *Texas Employers' Ins. Ass'n v. Borum*, 834 S.W.2d 395, 399 n.2 (Tex.App. San Antonio 1992, writ denied)(both citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 419 (Tex. 1984)).

[96] *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); Appellants' Brief at 11; Appellee's Brief at 7-8; CR Vol. IV at 750; CR Vol. V at 1099-100; CR Vol. VI at 1140; CR Vol. XV at 3121, 3122.

[97] *Id.*; RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §188 (1971).

place of performance; (4) the location of the subject matter of the contract; and (5) the parties' domicile, residence, nationality, place of incorporation and place of business.[98] All of those factors point to Louisiana.

Frank's is a Louisiana company with its principal place of business in Louisiana.[99] The umbrella policy was issued as a surplus lines policy through an insurance agency in New Iberia, Louisiana and delivered in Louisiana.[100] In addition, the underlying lawsuit arose out of a loss offshore Louisiana.[101] Frank's involvement in that lawsuit was based upon work Frank's performed at Frank's yard in Lafayette, Louisiana.[102] Indeed, Frank's even argued below that Louisiana has the most significant relationship to the umbrella policy.[103]

For the first time on appeal, Frank's contended that the Restitution section of the Restatement provides the relevant choice of law rule.[104] Significantly, however, the most-significant-relationship factors mandate application of Louisiana law even though Excess Underwriters seek restitution based on quasi-contractual claims that are derivative of the insurance contract. The Restitution section of the Restatement provides that the "most

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[98] *See Minnesota Mining and Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 735 36 (Tex. 1997).

[99] CR Vol. I at 16, para. 6.

[100] Apx. tab D at 315; CR Vol. V at 1099 1100.

[101] CR Vol. XIV at 3006 007.

[102] CR Vol. VI at 1306 (Frank's Answer to Plaintiff's First Set of Interrogatories, Interrogatory No. 1).

[103] CR Vol. V at 1099-1100. *See also* CR Vol. XV at 3121; CR Vol. VI at 1140 (noting, however, that Texas law would yield the same result on policy interpretation).

[104] Appellee's Brief at 8.

significant relationship" test (Section 188) presumably governs one party's restitution rights against another "When the enrichment was received in the course of the performance of a contract between the parties . . . ."[105] Here, Frank's enrichment was received only because of its contractual relationship with Excess Underwriters (formed in Louisiana) and Frank's demands for performance under that insurance contract. Section 188's most-significant-relationship-test applies and mandates application of Louisiana law.

Moreover, Texas has no meaningful contacts to the umbrella policy. The fact that the underlying action was in Texas is insufficient to apply Texas law to insurance disputes with no other contacts with Texas.[106] The Fifth Circuit has explained that:

> It is important that neither Texas nor the [underlying plaintiff] have any interest in whether the settlement is paid by [the insured] or, instead, by its insurers. Their only interest is in being paid, and they have been. Texas's interest in the [underlying plaintiff's] recovery against [the insured] ended with its settlement and payment. What remained [is] a dispute between [the insured] and its insurance carriers.[107]

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[105] RESTATEMENT (SECOND) CONFLICT OF LAW §221, cmt. d ("When the enrichment was received in the course of the performance of a contract between the parties, the law selected by application of the rules of ss 187-188 will presumably govern one party's rights of restitution against the other.")

[106] *See e.g., Atlantic Mut. Ins. Co. v. Truck Ins. Exchange*, 797 F.2d 1288, 1291 92 (5th Cir. 1986); *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 205 (5th Cir. 1996) (Accident in Louisiana but insurance policies were issued under Texas law so that insurance contacts with Texas were more significant). *Compare Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532 (5th Cir. 2002)(applying Texas, rather than Pennsylvania law where there was no conflict between their laws, and, alternatively, finding that Texas had a more significant relationship to the dispute where litigation was in Texas and other significant contacts were not concentrated as they are in this case, but pointed to Pennsylvania, New York, and South Carolina).

[107] *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 874 (5th Cir. 1990)(New York law applied to dispute between New York insured and its New York insurers even though underlying litigation and settlement were in Texas). *See also Hull & Co., Inc. v. Chandler*, 889 S.W.2d 513, 517 (Tex. App. Houston [14th Dist.] 1994, writ denied) (Texas had no significant interest in Florida insured's suit against British insurer on policy formed, issued and delivered in Florida involving yacht berthed in Florida).

Likewise, in *Atlantic Mutual Ins. Co. v. Truck Ins. Exchange*,[108] involving a dispute between insurers over contributions made to settle an underlying Texas case, the Fifth Circuit held that the law applying to the insurance contracts should control over the law applying to the settlement agreement. The court stated that the law of the state issuing the policies had a more significant interest in determining how those policies applied to the settlement than did the law of the state where the injury and settlement occurred.[109]

Further, Texas Insurance Code article 21.42, mandating the application of Texas law, does not apply here because neither the umbrella policy nor the settlement were payable to a Texas citizen.[110] There is no reason to apply Texas law to this dispute and no Texas interest to protect. Louisiana law governs.

B. Louisiana law allows insurers to recover funds paid to settle noncovered claims.

Louisiana law holds that an insurer funding a settlement not covered by the policy may seek reimbursement of those funds from its insured.[111] Although Louisiana law does not

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[108] 797 F.2d 1288 (5th Cir. 1986).

[109] *Id.* at 1291 92.

[110] Plaintiff Vastar is a Delaware corporation. CR Vol. XIV at 3003. *See also Austin Bldg. Co. v. Nat'l Union Fire Ins. Co.*, 432 S.W.2d 697, 700 01 (Tex. 1968)(art. 21.42 does not apply to policies written by foreign insurers for foreign insureds).

[111] *See Peavey Co. v. M/V ANPA*, 971 F.2d 1168, 1177 (5th Cir. 1992); *United States v. Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986) (both applying Louisiana law). *See also e.g., T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667 (5th Cir. 2001)(citing WILLIAM S. MCKENZIE & H. ALSTON JOHNSON, INSURANCE LAW AND PRACTICE, 15 LOUISIANA CIVIL LAW TREATISE § 216 (1996)); *Prudential Ins. Co. of Am. v. Harris*, 748 F. Supp. 445 (M.D. La. 1990)(citing *Central Surety & Ins. Corp. v. Corbello*, 74 So.2d 341(La. App. 1st Cir. 1954)); *DeVillier v. Highlands Ins. Co.*, 389 So.2d 1133 (La. App. 3d Cir. 1980); *Shelter Ins. Co. v. Cruse*, 446 So.2d 893 (La. App. 1st Cir. 1984); *Dear v. Blue Cross of La.*, 511 So.2d 73 (La. App. 3d Cir. 1987); *Mutual Fire, Marine & Inland Ins. Co. v. Electro Corp.*, 461 So.2d 410 (La. App. 4th Cir. 1984).

generally allow an insurer to sue its insured, reimbursement for noncovered claims is one instance in which the law recognizes an exception.[112] In *United States v. Parish of St. Bernard*, the Fifth Circuit Court of Appeals allowed a reimbursement action by an insurer under Louisiana law for more than $100 million in flood insurance paid to Louisiana flood victims.[113] The court recognized that insurers are entitled to litigate with their insureds in certain actions, and that an action for reimbursement is one such instance where public policy does not prohibit suit.[114] Whether the payment made is subject to a coverage dispute, pursuant to an expired policy, or because there is double payment of the obligation by the same insurer or two separate insurers, the theory relied upon is that the insurer does not owe the obligation.[115]

Unlike *Matagorda*, the consent of the insured is not a prerequisite to a reimbursement action under Louisiana law and reimbursement actions are not limited to cases involving fraud. The court of appeals erred in concluding otherwise.[116] Rather, the Fifth Circuit has held that the insured's stipulation to the coverage dispute is sufficient to permit a

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[112] *Peavey*, 971 F.2d at 1177 (citing *United States v. Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985)(applying Louisiana law)), at Apx. tabs I and J, respectively.

[113] *United States v. Parish of St. Bernard*, 756 F.2d 1116, 1127 (5th Cir. 1985), at Apx. tab J.

[114] *See also Peavey*, 971 F.2d at 1177, at Apx. tab I.

[115] *See id.*; *United States v. St. Bernard*, 756 F.2d 1116; *Acadia Ins. Agency v. Transportation Ins. Co.*, No. 99-1991, 2000 WL 863975 (E.D. La. June 27, 2000) (Insurer allowed reimbursement for payments made on an expired policy); *See also Insurance Co. of N. Am. v. West of England Shipowners Mut. Ins. Ass'n*, 890 F. Supp. 1302 (E.D. La. 1995) (Payments made by insurer without knowing that P&I policy covered claim were not recoverable from P&I insurer but from insured on whose behalf the debt was paid).

[116] *Excess Underwriters v. Frank's*, 2002 WL 1404705, at *3 & n.3, at Apx. tab A.

reimbursement action. In *Peavey Co. v. M/V ANPA*, the Fifth Circuit allowed a reimbursement action (as opposed to subrogation) where the insured stipulated in open court that its insurer had settled the underlying action, but that coverage issues remained.[117] Significantly, the court held that the stipulations made in open court:

> effectively have the power of a consensual agreement that [if there is no coverage] then [the insured] would be liable to reimburse fees paid by [the insurer].[118]

Here, Excess Underwriters' counsel advised the court that they were funding the settlement subject to a continued reservation of coverage defenses and that Excess Underwriters would hold Frank's responsible for reimbursement of all noncovered claims.[119] Significantly, Frank's did not object to Excess Underwriters' right and intent to seek reimbursement. Rather, Frank's acknowledged, in open court, the coverage dispute, but attempted to claim that Excess Underwriters' conditional funding, under protest, would somehow waive any coverage defenses.[120]

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[117] 971 F.2d at 1177, at Apx. tab I.

[118] *Id.*

[119] CR Vol. III at 734 735, ln. 8:21 9:13.

[120] CR Vol. III at 731 732:

> [Excess] Underwriters have attempted to reserve all rights against Frank's as to coverage of the umbrella policies [sic]. It is Frank's position that no proper preservations [sic] have been made and Frank's demand that the underwriters may preserve coverages, more specifically, Underwriters may resolve with [Vastar] and which were made pursuant by a stours [sic] letter dated February 19, 1998, and February 20, 1998, forwarded by [Frank's in-house counsel] to [Excess Underwriters' counsel]. [Excess] Underwriters have accepted this offer in order to avoid the possibility of having to pay out funds in excess of policy limits.
>
> As a result, it is Frank's position that [Excess] Underwriters have either waived their right to reserve coverages alternatively or stop from asserting coverage issues since Underwriters have agreed to the settlement . . . .

Frank's further acknowledged in the settlement agreement that claims remained between it and Underwriters and the settlement agreement expressly carved out those remaining claims:[121]

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4. Indemnity

. . . , **excepting any claims that exist presently or may arise in the future between Defendants, Frank's and Frank's Insurers** . . . .

5. Releases:

This covenant does not apply to any claims that exist presently or may arise in the future between Defendant Frank's and Frank's Insurers arising from the claims asserted by Plaintiffs.

6. Covenants Not to Sue:

This covenant does not apply to any claims that exist presently or may arise in the future between Defendant Frank's and Frank's Insurers arising from the claims asserted by Plaintiffs.

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This suit was pending when Frank's executed the settlement agreement that preserved existing claims.[122] Frank's cannot have its cake and eat it too. It cannot both accept a settlement subject to a coverage dispute and reimbursement action and claim the coverage

[121] Apx. tab E at 1369 (Indemnity); 1369 370 (Releases); 1370 (Covenants Not to Sue).

[122] CR Vol. I at 10 18; Apx. tab E at 1377.

dispute and reimbursement right are waived by the settlement. Frank's admissions are sufficient under Louisiana law to allow reimbursement.

Louisiana law permits reimbursement in instances where the coverage dispute arises only after settlement of the underlying litigation and therefore, the insured's consent is irrelevant. In *Mutual Fire, Marine & Inland Ins. Co. v. Electro Corp.*,[123] the Louisiana Court of Appeals allowed an action by insurer Mutual Fire, against its insured Electro Corporation, and against a second insurer, for reimbursement of settlement funds Mutual Fire paid on behalf of the insured. The insured contributed its deductible and Mutual Fire funded the remainder of a settlement of the second insurer's subrogation action. Mutual Fire later concluded that its policy did not provide coverage, and sued its insured and the subrogated insurer for return of its money. Citing Louisiana Code Article 2310, which provides for restitution for payment of the debt of another, the court held that Mutual Fire was entitled to seek return of money it paid (whether mistakenly or otherwise) before the coverage determination.[124] Even if the insurer is mistaken in its payment, there is no waiver under Louisiana law where the insurer has previously reserved its rights and has no intention of relinquishing those rights.[125] The court of appeals erred in concluding otherwise.[126]

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[123] *Mutual Fire, Marine & Inland Ins. Co. v. Electro Corp.*, 461 So.2d 410 (La. App. 4th Cir. 1984).

[124] *Id. See also Shelter Ins. Co. v. Cruse*, 446 So.2d 893 (La. App. 1st Cir. 1984) (Insurer may recover payments made to insured under void policy because payments made were not due); *Central Surety & Ins. Corp. v. Corbello*, 74 So.2d 341 (La. App. 1st Cir. 1954) (Insurer allowed to recover money paid to insured on policy which had expired because payments made were not due).

[125] *Steptore v. Masco Constr. Co.,* 643 So2d 1213, 1216 (La. 1994). *See also Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.,* 416 S.W.2d 396, 401 (Tex. 1967).

[126] 2002 WL 1404705, at *3, at Apx. tab A.

In *DeVillier v. Highlands Ins. Co.*,[127] the Louisiana Court of Appeals allowed a medical insurer reimbursement from the deceased insured's widow for expenses it paid before there was a judicial determination of coverage. Finding that the widow had received the benefit of having noncovered expenses extinguished by the insurance payments, and that the insurer had no obligation to pay a debt it did not owe, the insurer was allowed reimbursement from the widow.[128]

There are not many Louisiana cases discussing reimbursement as a separate cause of action because Louisiana has a direct action statute. The issue of underlying liability, and coverage for that liability, are typically determined in the same action. However, in the cases allowing the right of reimbursement and in the civil code, there is a common theme. Either the insurer did not know of a coverage defense when the payments were made, or the facts showing no coverage had not been adjudicated at the time the payments were made. The key, as described by one Louisiana federal district court, is the fact that the insurer paid a debt it did not legally owe and the insured received the benefit of money to which it was not entitled.[129] There is no doubt here that Frank's received the benefit of over 7 million dollars to which it was not entitled.

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[127] *DeVillier v. Highlands Ins. Co.*, 389 So.2d 1133 (La. App. 3d Cir. 1980).

[128] *Id.* at 1136-37.

[129] *Prudential Ins. Co. v. Harris*, 748 F. Supp. 445, 446-47 (M.D. La. 1990). *See also e.g.* La. Civ. Code art. 2299 ("A person who has received a payment or a thing not owed is bound to restore it to the person from whom he received it.")

C. Reimbursement does not contravene Louisiana pubic policy because that policy does not require insurers to pay noncovered claims.

In *Peavey*, the Fifth Circuit held that public policy considerations preventing an insurer from suing its own insured do not apply when the action is one for reimbursement.[130] Further, Louisiana's recognition of an insurer's right to reimbursement for noncovered claims is consistent with that of other jurisdictions. The California Supreme Court has repeatedly held that rights to reimbursement are implied in law.[131] The right is such that it is not dependent on the insured's express assent to reimbursement, but is implicit in the policy terms which provide indemnification **only for *covered* claims**.[132] To hold otherwise is to subject the insurer to a "Catch-22," in which the insurer must settle a noncovered claim or be at risk for a potential bad faith action.[133]

An insured cannot seek to receive either the benefit of an unconditional settlement of a noncovered claim, or, in the alternative, the opportunity to make a bad faith claim should the insurer fail to settle.[134] In this situation, the insurer has no practical option other than to settle and forego reimbursement for are clearly noncovered claims.[135] There is no Louisiana

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130 *See Peavey*, 971 F.2d at 1177, at Apx. tab I.

131 *See e.g., Blue Ridge Ins. Co. v. Jacobsen*, 22 P.3d 313 (Cal. 2001), at Apx. tab H; *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997).

132 *See Blue Ridge*, 22 P.3d at 321 (emphasis added), at Apx. tab H. See also *Matagorda*, 52 S.W.3d at 138 (dissent); *Grinnel Mut. Reins. Co. v. Shierk*, 996 F. Supp. 836, 839 (S.D.Ill. 1998); *Knapp v. Commonwealth Land Title Ins. Co., Inc.*, 932 F. Supp. 1169, 1171-72 (D.Minn. 1996), for the proposition that acceptance of the benefits of the insurer's defense with notice of the reservation of rights to seek reimbursement constitutes an implied agreement to the reservation.

133 *Blue Ridge,* 22 P.3d at 321.

134 *Id.* at 322.

135 *Id.*

public policy in favor of insureds being unjustly enriched at the expense, and in derogation of, their contract with their insurers.

D. Louisiana law allows an action for unjust enrichment when one party pays a debt owed by another. Frank's was unjustly enriched by Excess Underwriters' payment of a claim for which Frank's was solely liable.

Louisiana law provides Excess Underwriters a direct cause of action for reimbursement of benefits paid that were not owed. Louisiana law also allows the court to fashion an equitable remedy when no other legal remedy is provided.[136] Excess Underwriters are entitled to recover in equity based on the unjust enrichment of Frank's. The lower courts erred in ruling that Texas law applies and preempts this cause of action.

Under Louisiana law, "[a] person who has been enriched without cause at the expense of another person is bound to compensate that person."[137] The elements of the cause of action are:

1) there must be an enrichment;
2) there must be an impoverishment;
3) there must be a connection between the enrichment and the impoverishment;
4) there must be an absence of 'justification' or 'cause' for the enrichment and impoverishment; and
5) the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature.[138]

All of the elements for unjust enrichment are satisfied in this case.

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[136] La. Civ. Code Art. 4 (2001).

[137] La. Civ. Code Art. 2298 (2001).

[138] *Edmonston v. A-Second Mortgage Co.*, 289 So.2d 116, 120 (La. 1974), included at Apx. tab K.

"Enrichment" exists where an obligation is discharged in a party's favor based upon that party's "recei[pt of] a benefit they had never bargained for."[139] Frank's has been enriched because it did not have to pay any part of a settlement that extinguished its uninsured legal liability to Vastar.[140] One who pays for another's liability is impoverished, even if he benefits from being released from potential liability as well.[141] Excess Underwriters were impoverished to the extent that they paid for the settlement of noncovered claims.

There is an undisputed causal connection between the enrichment and impoverishment in this case, the funding of the settlement that simultaneously enriched Frank's and impoverished Excess Underwriters.[142] There is no "justification" or "cause" for Frank's receiving the benefit of more than $7 million in coverage for which it did not bargain and did not pay premiums. There is nothing in the policy or in the law requiring Excess Underwriters to pay uncovered claims, or justifying Frank's being released from a debt owed by it in return for nothing.[143]

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[139] *Id.* at 121.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* (If no element of the contract between the parties entitles the person receiving the enrichment to the proceeds, there is an absence of "cause" for the impoverishment of the payee).

Even under Texas law, payments made by an excess insurer to settle a suit against the insured are presumptively involuntary payments.[144] The involuntary payment made here was subject to a condition, the right to reimbursement. Even the trial court determined that there was no legal justification or "cause" for Frank's enrichment where it determined there was no coverage under the umbrella policy, which excluded coverage for:

> c) Property Damage to the Assured's products arising out of such products or any part of such products.
>
> d) The . . . inspection, repair, replacement, or loss of use of the Assured's products or work completed by or for the Assured or of any property of which such products or work form a part.
>
> c) The . . . inspection, repair, replacement, or loss of use of the Assured's products or work completed by or for the Assured or of any property of which such products or work form a part.[145]

Notably, Frank's did not appeal that coverage determination. Frank's attempt to retain its undue advantage at the expense of its insurers is the very model of unjust enrichment under Louisiana law.

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[144] *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 702 (Tex. 2000); *see also DeVillier v. Highlands Insurance Co.*, 389 So.2d 1133 (La. App. 3d Cir. 1980) (Payments made by an insurer under a policy not covering the claim are not a natural obligation but involuntary).

[145] CR Vol. XV at 3227, 3229. *See also* Apx. tab C at 412, 414 (The umbrella policy followed form to the primary policy in relevant respects).

E. Louisiana law cannot be presumed to be the same as Texas law because Louisiana law is not derived from common law. The Court of Appeals erred in presuming that Louisiana law is the same as Texas law.

The absence of a Louisiana Supreme Court case on reimbursement does not entitle Frank's to a presumption that Louisiana law is the same as Texas law.[146] That presumption may arise only when the foreign state's law is derived from common law.[147] Louisiana's law is not.

The court must instead make an *Erie*-type analysis, educated by Louisiana law, on how the Louisiana Supreme Court would rule on the issue.[148] That analysis shows that Excess Underwriters are entitled to reimbursement under Louisiana code provisions and case law.[149] Further, it is notable that even though the Louisiana Supreme Court has not addressed the precise issue before this Court, it has cited *Peavey Co. v. M/V ANPA* with approval on its pronouncement of Louisiana law on other issues.[150] Indeed, Frank's relies upon *Steptore* the very case in which the Louisiana Supreme Court recognizes *Peavey* as good

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[146] Post Submission Brief of Appellee at 2 3 & n.2 (citing *American Honda Fin. Corp. v. Bennett*, 439 N.W.2d 459 (Neb. 1989); *Gaines v. Jacobsen*, 124 N.E.2d 290 (N.Y. 1954)).

[147] *See* 29 AM. JUR. 2D *Evidence* § 259 (2002); 57 N.Y.JUR. 2D *Evidence* §112 (2002) (both discussing the inapplicability of the presumption as set forth in *Gaines v. Jacobsen*, 308 N.Y. 218 (1954), which Frank's has relied on).

[148] *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 993 (5th Cir. 1999)(involving diversity action); *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 873 74 (5th Cir. 1990)(involving funding of settlement of Texas litigation against New York insured under New York policy; where New York law differed with Texas law on relevant issues, or was unclear, Erie dictated application of law of the state with most significant interest in dispute, rather than general rules that favored the insured).

[149] *See* Louisiana cases, Louisiana code provisions, and Fifth Circuit cases, *supra*.

[150] *Steptore v. Masco Constr. Co., Inc.*, 643 So.2d 1213, 1216 (La. 1994) (citing *Peavey*, 971 F.2d 1168 (5th Cir. 1992)).

law.[151] No disapproval on the issue of reimbursement has been noted by the Louisiana courts.

PRAYER

For these reasons, Excess Underwriters respectfully ask the Court to grant this petition for review, set this case for oral argument, and after argument, sustain Petitioners' issues presented for review, reverse the trial court's February 12, 2001 order granting final summary judgment in favor of Frank's Casing Crew & Rental Tools, Inc. and render judgment in favor of Excess Underwriters at Lloyd's, London and Certain Companies Subscribing Severally but not Jointly to Policy No. 548/TA4011F01 for reimbursement in the amount of $7,013,612.00, plus pre- and post-judgment interest and attorneys fees on appeal. Alternatively, Excess Underwriters ask the Court to reverse the Court of Appeals judgment and remand to the Court of Appeals for a choice of law determination, directing the entry of judgment in favor of Excess Underwriters in the amount of $7,013,612.00, plus pre- and post-judgment interest and attorneys fees on appeal.

[151] Brief of Appellee at 23 24; CR Vol. II 281 82.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I sent a copy of the foregoing *Petitioners' Brief on the Merits* to counsel listed below, on this 29th day of November, 2002, by First Class U.S. Mail.

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