NO. 02-0730

IN THE

SUPREME COURT OF TEXAS

AUSTIN, 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.

RESPONDENT'S BRIEF ON THE MERITS

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FRANK'S CASING CREW & RENTAL TOOLS, INC.

IDENTITY OF PARTIES AND COUNSEL

The identity of parties and counsel in Petitioners' Brief on the Merits is correct with one exception. Greg Abbott is no longer co-counsel for Respondent Frank's Casing Crew & Rental Tools, Inc.

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STATEMENT OF THE CASE

Nature of the case:	Claim for equitable reimbursement by insurance company against their insured.
Trial court:	189th Judicial District Court, Harris County, Texas, the Hon. Jeff Work.
Trial court's disposition:	Motion for summary judgment granted that insurer take nothing on claim for reimbursement.
Parties in court of appeals:	Excess Underwriters at Lloyd's, London and Certain Companies Subscribing Severally But Not Jointly to Policy No. 548/TA4011F01—Appellants. Frank's Casing Crew & Rental Tools, Inc.—Appellee.
Court of appeals:	Fourteenth Court of Appeals: Panel consisted of Chief Justice Brister and Justices Anderson and Frost. Chief Justice Brister authored a unanimous opinion for the court.
Court of appeals' disposition:	Affirmed the trial court's summary judgment. *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, No. 14-01-00349-CV, 2002 WL 1404705 (Tex. App.—Houston [14th Dist.] 2002, pet. requested) (not yet published).

ISSUES PRESENTED

1. It is undisputed that Underwriters do not have a contractual right to reimbursement for funds paid to settle claims. Nor did Underwriters obtain Frank's clear and unequivocal consent to seek reimbursement before they settled the underlying litigation. Does this Court's decision in *Texas Ass'n of Counties County Gov't Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), bar as a matter of law Underwriters' claim for equitable reimbursement?

2. Underwriters failed to meet their burden with regard to the choice-of-law issue. Underwriters did not properly raise the issue in the trial court and thus did not preserve the issue. Further, Underwriters failed to prove that Louisiana law is any different than Texas law on the issue presented in this litigation. Did the court of appeals properly hold that Texas law applies?

STATEMENT OF FACTS

A. *Background of the parties and the underlying litigation.*

Frank's provides oil well and completion services and products throughout the United States. (C.R. 196, 296-97). Frank's is headquartered in Louisiana, but has offices in and transacts business in Texas. (C.R. 196). In 1994, Frank's was hired by ARCO/Vastar (ARCO) to perform fabrication on a three-legged drilling platform to be installed in the Gulf of Mexico. (C.R. 297). In 1995, the platform collapsed onto the floor of the Gulf of Mexico. (C.R. 297). In 1996, ARCO brought suit against Frank's and other parties in the 80th Judicial District Court of Harris County, Texas. (C.R. 294-313).

Frank's had purchased primary insurance in the amount of $1 million from a different syndicate of Underwriters, (C.R. 405), and excess insurance in the amount of $10 million from Underwriters for the relevant time period, (C.R. 315-429). Frank's promptly notified both its primary carrier and Underwriters of the ARCO lawsuit. (*See* C.R. 687, 701). The primary carrier hired the Stibbs & Burbach law firm to defend Frank's in the litigation. (C.R. 431).

Underwriters issued a reservation of rights letter to Frank's on March 27, 1997, and again on January 23, 1998, challenging coverage on certain of the claims made against Frank's. (C.R. 456, 687-97, 697-98). Despite their claimed coverage questions, Underwriters did not file a declaratory judgment proceeding. The reservation of rights letters did not mention any intent by Underwriters to seek reimbursement from Frank's. (C.R. 687-94, 697-98). It is undisputed that there is no provision in the excess policy

giving Underwriters a right to seek reimbursement from Frank's for funds paid on claims. (C.R. 437; R.R. 5).

ARCO made a pre-trial settlement demand on Frank's of $9.9 million. (C.R. 461). Frank's rejected the $9.9 million demand and did not forward it to Underwriters. (*See* C.R. 461). Frank's believed the $9.9 million demand was too high, even though it was within policy limits. (C.R. 461, 3678).

B. ***As trial approaches, Underwriters engages in secret settlement negotiations and provides additional defense counsel in the underlying litigation.***

Underwriters incorrectly implies in their Brief on the Merits that Frank's unilaterally settled the underlying litigation and that Underwriters had no involvement in the defense of the case. (*See* Petitioners' Brief on the Merits at 7, 9, 14, 16). To the contrary, before and during trial Underwriters were involved in the settlement negotiations and actually hired counsel to defend Frank's at trial.

Two weeks before the trial in the underlying litigation was to start, Underwriters approached counsel for ARCO without notifying Frank's or its counsel that it was meeting with ARCO's counsel. (C.R. 451). Underwriters secretly attempted to negotiate a settlement with ARCO whereby the claims that Underwriters believed were covered under the excess policy would be settled, with Frank's left exposed to liability on the remaining claims. (C.R. 519). Underwriters' attempt to settle with ARCO on these terms failed, but Underwriters continued their negotiations to attempt to structure a settlement. (C.R. 519).

When ARCO later made demand on Underwriters for $7.55 million to settle all claims against Frank's, Underwriters asked Frank's to contribute money to a settlement

with ARCO. (C.R. 457). Underwriters claimed that approximately one-third of Frank's exposure was not covered by the excess policy. (C.R. 457). Underwriters proposed to waive all of their coverage defenses and to contribute two-thirds of the funds for a settlement if Frank's would contribute the remaining one-third. (C.R. 457). If Frank's refused to contribute, Underwriters proposed to pay $5 million and later resolve coverage issues in arbitration. (C.R. 457). Frank's refused all of Underwriters' proposals. (C.R. 470). Frank's informed Underwriters that Frank's believed there was coverage under the policy and that Underwriters' was responsible for the entire amount. (*See* C.R. 685).

Almost two weeks before trial, Underwriters availed themselves of the right to hire additional counsel and hired Lee Godfrey and Randy Wilson of Susman Godfrey, L.L.P. to assist in the defense of the claims against Frank's. (C.R. 454). Although the excess policy did not obligate Underwriters to provide a defense, the policy gave Underwriters the right to "associate with the Assured or the Assured's underlying insurers or both in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve Underwriters." (C.R. 329). In the event Underwriters associated in the defense, Frank's was required to "co-operate in all things in the defense of such claim, suit or proceeding." (C.R. 329). Underwriters made the unilateral decision to hire Susman Godfrey and assumed the cost of the additional defense. (C.R. 454).

C. *Trial starts and ARCO demands $7.5 million to settle.*

The underlying litigation proceeded to trial as scheduled on February 16, 1998. It became clear for the first time during trial that Frank's was the target defendant in the

litigation. (C.R. 461-62). Underwriters disingenuously states in their brief that Frank's unilaterally "orchestrated" a settlement demand from the plaintiffs during the trial. (Petitioners' Brief on the Merits at 9, 14, 16). In reality, Frank's was able to obtain a settlement demand that both Frank's and Underwriters believed was reasonable and favorable.

When it became clear at trial that Frank's was the target defendant, Frank's in-house counsel called ARCO's lawyer to discuss settlement. (C.R. 3678). During that phone conversation, ARCO's counsel asked Frank's counsel what amount Frank's would be willing to send to Underwriters' as a *Stower's* demand. (C.R. 461, 3678). ARCO's lawyer specifically asked this because of Frank's previous refusal to forward the $9.9 million as a *Stower's* demand to Underwriters. (C.R. 3678). Frank's counsel believed that $9.9 million, although within policy limits, was too high to send to Underwriters. (C.R. 461, 3678). Frank's in-house counsel responded that something in the $7 million range would be reasonable. (C.R. 517, 3678). On February 18, 1998, ARCO sent Frank's a settlement demand of $7.5 million, an amount within policy limits. (C.R. 464, 517). The $7.5 million demand was $50,000 less than the amount Underwriters had tried to settle the case for prior to trial. (*Compare* C.R. 457 *with* C.R. 464).

Frank's forwarded ARCO's $7.5 million settlement demand to Underwriters. Frank's told Underwriters that, in light of the developments at trial, ARCO's demand was reasonable. (C.R. 461-62). Frank's also stated that it did not agree with Underwriters' coverage position and that Frank's was looking to Underwriters to fund the entire amount of the settlement. (C.R. 462).

On February 20, 1998, Underwriters responded and agreed that the case should be settled. (C.R. 466). Underwriters again claimed that coverage disputes existed, but stated that Underwriters would fund the settlement amount if Frank's would agree that all coverage issues could be resolved at a later date. (C.R. 467). Frank's refused Underwriters' proposal and reiterated that Underwriters was contractually obligated to fund the settlement because ARCO's claims against Frank's were covered. (*See* C.R. 469). Underwriters did not mention any intent to seek reimbursement from Frank's. (C.R. 467).

D. ***Underwriters declares the $7.5 million settlement demand favorable, settles the underlying litigation, and for the first time reveals their intent to seek reimbursement.***

On the morning of February 23, 1998, Underwriters wrote Frank's and agreed that the $7.5 million settlement demand was not only reasonable, but was "favorable." (*See* C.R. 469-70, 719). Underwriters informed Frank's that it would fund the entire amount (above the primary limits) to "ensure that the favorable settlement will not be lost to both Frank's and Umbrella Underwriters." (C.R. 470).

Underwriters, for the first time, also informed Frank's that they intended to seek reimbursement of all sums paid in settlement of claims for which no coverage existed. (C.R. 470, 524). At no time prior to the February 23, 1998 letter had Underwriters given Frank's notice, either oral or written, of an intent to seek reimbursement for the sums paid to settle the underlying litigation. (C.R. 524).

That same morning, Underwriters settled the claims with ARCO. (C.R. 472). Frank's was not given an opportunity to respond to Underwriters' letter regarding

reimbursement, which was faxed to Frank's literally a few hours before Underwriters settled the litigation. (*See* C.R. 719). Later that same day, Underwriters filed this lawsuit, suing Frank's for reimbursement of the settlement funds in the 189th Judicial District Court of Harris County, Texas. (C.R. 2). Underwriters specifically pleaded that venue was proper in Harris County, Texas. (C.R. 3).

The next day, February 24, 1998, the parties in the underlying litigation appeared in court and memorialized the terms of the settlement on the record. (C.R. 475). At the settlement hearing, Frank's expressly denied that coverage issues had been preserved, (C.R. 479 ("Frank's denies that the underwriters may preserve coverage")), and has never waivered from that position.

The settlement agreement for the underlying litigation was drafted by Underwriters and executed by the parties to the underlying proceeding and the insurers. (C.R. 489-505). The settlement agreement contains a release of claims and a covenant not to sue, but excepts from the release and covenant "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." (C.R. 494). The settlement agreement also provides that it shall be construed in accordance with and governed by the laws of the State of Texas and that the agreement is performable in Harris County, Texas. (C.R. 495). There is no provision in the settlement agreement giving Underwriters a right to reimbursement from Frank's. (*See* C.R. 494-505).

SUMMARY OF THE ARGUMENT

The issue in this case is which party bears the risk when an insurer settles a claim

against the insured at a time when coverage is disputed, the insurer has no contractual right to reimbursement, and the insured does not consent to reimbursement. In *Matagorda County*, this Court held that the risk is placed on the insurer because the insurer is in the business of insurance and in the better position to guard against the risk. That holding is equally applicable to this case.

Matagorda County is on point and bars as a matter of law Underwriters' claim for reimbursement. It is undisputed that Underwriters did not obtain Frank's clear and unequivocal consent to reimbursement of funds paid to settle the underlying claim, as this Court required in *Matagorda County.* In an attempt to avoid application of *Matagorda County*, Underwriters claims alleged factual distinctions, but none of the distinctions affect the application of *Matagorda County*. The court of appeals properly determined that this case is governed by *Matagorda County* and that Underwriters are not entitled to equitable reimbursement.

The court of appeals also correctly held that Underwriters did not meet their burden of establishing that Louisiana law should be applied to the reimbursement issue. Underwriters never properly raised the issue in the trial court. Further, Underwriters did not show that Louisiana law is any different than Texas law and, thus, Louisiana law is presumed to be the same as Texas law. Even if Underwriters had preserved the choice-of-law issue, Texas law should still apply based on the relevant Texas contacts.

ARGUMENT

I. *Matagorda County* Bars Underwriters' Reimbursement Claim.

This Court's decision in *Texas Ass'n of Counties County Gov't Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (2000), bars Underwriters' reimbursement claim as a matter of law. Underwriters did not obtain Frank's agreement or its clear and unequivocal consent to seek reimbursement for funds paid to settle uncovered claims as required by *Matagorda County*. This Court should, therefore, deny the petition for review.

A. Matagorda County *is on point and is controlling.*

In *Matagorda County*, this Court addressed the issue Underwriters now seeks to bring before the Court. The issue in *Matagorda County* was whether the insurer could "seek reimbursement from its insured for settlement funds paid under a reservation of rights upon an adjudication of noncoverage." *Id.* at 131. The insurance policy in *Matagorda County*, like the policy in this case, did not provide the insurer with a right of reimbursement. *Id.* This Court held:

> [W]hen 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.*

Id. at 135 (emphasis added). Thus, the insurer must show that the insured consented not only to the settlement of the underlying claim, but also to the insurer's right to seek reimbursement if the insurer seeks reimbursement because it is later determined that there was no coverage.

The facts in *Matagorda County* are strikingly similar to the facts in this case. The following chart demonstrates the similarities:

Facts in *Matagorda County*	**Facts in This Case**
• the insurance policy did not contain a reimbursement provision;	• the insurance policy does not contain a reimbursement provision, (C.R. 437; R.R. 5);
• TAC and Matagorda County disputed coverage;	• Underwriters and Frank's disputed coverage, (C.R. 462);
• TAC sent Matagorda County two reservation of rights letters reserving the right to continue to deny coverage;	• Underwriters sent Frank's two reservation of rights letters reserving coverage issues, (C.R. 687-94, 697-98);
• the *Coseboon* plaintiffs in the underlying litigation offered to settle the subject claims within policy limits;	• ARCO offered to settle the underlying litigation within policy limits, (C.R. 464);
• Matagorda County refused to contribute to any settlement with the plaintiffs;	• Frank's refused to contribute to any settlement with ARCO, (C.R. 470);
• Matagorda County's counsel admitted that the proposed settlement was reasonable and prudent;	• Frank's counsel admitted that the proposed settlement was reasonable and prudent, (C.R. 462);
• TAC settled the case and funded the settlement;	• Underwriters settled the case and funded the settlement, (C.R. 472);
• TAC sent a letter claiming a right to seek reimbursement; and	• Underwriters sent a letter to Frank's claiming a right to seek reimbursement, (C.R. 470); and
• Matagorda County was silent with regard to TAC's claim that it would seek reimbursement. 52 S.W.3d at 129-30.	• Frank's was silent with regard to Underwriters' claim that it would seek reimbursement.

In both cases, the insurer attempted to reserve a right to seek reimbursement when it did not have an agreement with the insured or the consent of the insured. In both cases, the insured did not consent to the unilateral attempt to seek reimbursement, but instead consistently disputed the insurer's coverage position and insisted that it fund the settlement. (C.R. 462, 469). Because Frank's did not consent to Underwriters' claim for reimbursement, as a matter of law Underwriters' claim is barred under this Court's decision in *Matagorda County.* 52 S.W.3d at 133.

B. *The purported distinctions claimed by Underwriters are immaterial.*

Throughout their brief, Underwriters attempts to distinguish *Matagorda County* from the facts of this case. (*See, e.g.,* Petitioners' Brief on the Merits at 3-4, 9-13, 14-16). Underwriters, however, never explains how the alleged factual distinctions make any difference to the application of *Matagorda County* or the policy considerations behind the decision. Nor can it do so. As the court of appeals recognized, "[n]one of the Underwriters' distinctions affect any of these reasons." Slip op. at 4.

Underwriters relies on four main allegations in their attempt to convince this Court not to apply *Matagorda County*: (1) Underwriters is an excess carrier with no duty to defend; (2) the policy required Frank's consent to settlement and Frank's demanded settlement; (3) Frank's controlled its defense, unilaterally negotiated the settlement, and demanded Underwriters accept the settlement; and (4) Frank's sent a *Stower's* letter to Underwriters. (Petitioners' Brief on the Merits at 9, 14-16). None of these allegations change application of *Matagorda County* to the facts of this case.

1. *Underwriters' excess carrier status and lack of duty to defend are immaterial.*

Although Underwriters repeatedly states that it is an excess carrier with no duty to defend, (Petitioners' Brief on the Merits at 12, 15), this case has nothing to do with the duty to defend or reimbursement of defense costs. This case involves Underwriters' indemnity obligations under the excess policy. It is undisputed that, like the insurer in *Matagorda County*, Underwriters was notified of the suit long before trial. (C.R. 687). Underwriters in fact participated in the defense of Frank's, as it had a contractual right to do, and even hired Susman Godfrey, L.L.P. at their own expense as additional trial counsel for Frank's. (C.R. 454). Underwriters unilaterally participated in the settlement discussions with ARCO and tried to settle the case to their benefit while leaving Frank's exposed. (C.R. 519). Underwriters never even attempts to explain how their status as an excess carrier is material to the case. Although Underwriters had no duty to defend, Underwriters did participate in the defense and settlement negotiations and, thus, the fact that it had no duty to defend is immaterial.

2. *The policy requirement of Frank's consent to settlement makes no difference because consent to the settlement is required* by Matagorda County.

Likewise, the fact that the excess policy requires Frank's consent to settlement is also a distinction without a difference. Consent to the settlement is required under the *Matagorda County* decision. *See* 52 S.W.3d at 135-36. Thus, whether the policy in this case did or did not require Frank's consent to settlement has no impact on the application of *Matagorda County*.

3. *Frank's alleged negotiation of the settlement amount and demand for payment are factually incorrect and immaterial.*

Underwriters' repeated claims that Frank's "unilaterally negotiated" or "orchestrated" the settlement with ARCO are not only factually incorrect, but also immaterial. Underwriters was involved in the settlement negotiations in this case both prior to and during trial. (*See* C.R. 451, 457, 466-67, 519). Although Frank's called ARCO's counsel during trial to discuss settlement, ARCO's counsel inquired as to what amount Frank's would be willing to forward as a demand to its carriers. (C.R. 3678). ARCO's counsel did this because prior to trial, Frank's had refused to send a *Stower's* demand to Underwriters because Frank's believed ARCO's demand of $9.9 million—although within policy limits—was too high. (C.R. 461, 3678). Only after it became clear at trial that Frank's was the target defendant and when ARCO's counsel lowered its demand to the admittedly reasonable amount of $7.5 million did Frank's make the *Stower's* demand to Underwriters.

Even if Frank's had "unilaterally negotiated" or "orchestrated" the settlement, however, Underwriters' concession that the settlement was not only reasonable, but was "favorable" to Underwriters, moots any complaint about Frank's actions. (C.R. 469-70, 719). The fact that Frank's was able to negotiate a settlement demand that was $50,000 less than the amount for which Underwriters had previously attempted to settle the part of the claim, (*see* C.R. 457, 464), did not harm or prejudice Underwriters in any way. This favorable settlement instead benefited Underwriters.

Matagorda County is also not distinguishable based on the fact that Frank's made demand on Underwriters to settle the case. The insured in *Matagorda County* had also

forwarded to its insurer a settlement demand that was within policy limits, advised the insurer that "the proposed settlement was reasonable and prudent, given the facts and circumstances of the case," and demanded that the insurer fund the settlement. *See* 52 S.W.3d at 129-30; *see also* Petitioners' Brief on the Merits, No. 98-0968, *Texas Ass'n of Counties County Gov't Risk Management Pool v. Matagorda County*, at 11 ("[T]he [insured] agreed that the *Coseboon* suit should be settled, demanded that [the insurer] fund the settlement, and stipulated that the settlement was reasonable."). *Matagorda County*, thus, cannot be distinguished based on Frank's demand for settlement.

4. *Frank's was entitled to exercise its Stower's rights.*

Frank's properly exercised its rights under Texas law in making the *Stower's* demand to Underwriters. The *Stower's* demand did not, as Underwriters claims, allow Frank's to resolve the coverage dispute in its favor. (Petitioners' Brief on the Merits at 3, 16-17). The *Stower's* demand simply forced Underwriters to take a stand on their coverage position. If Underwriters was correct that there was no coverage, then it had no *Stower's* duty and did not face any *Stower's* liability. *See American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994) (there is no duty to settle noncovered claims). If there was no coverage, Underwriters did not have to pay the ARCO settlement and would not face liability for a failure to pay. And, as this Court explained in *Matagorda County*, it is appropriate to require the insurance company, and not the insured, to make this decision:

> Requiring the insurer, rather than the insured, to choose a course of action is appropriate because the insurer is in the business of analyzing and allocating risk and is in the best position to assess the viability of its coverage dispute. . . . On

> balance, insurers are better positioned to handle this risk, either by drafting policies to specifically provide for reimbursement or by accounting for the possibility that they may occasionally pay uncovered claims in their rate structure.

52 S.W.3d at 135-36 (citations omitted).

On the other hand, the insured is in the untenable position of having to assess the strength of the insurer's coverage position at the same time it is staring down the barrel of a significant claim that could ruin the company. *See id.* at 135 ("Otherwise, the insured is forced to choose between rejecting a settlement within policy limits or accepting a possible financial obligation to pay an amount that may be beyond its means, at a time when the insured is most vulnerable."). This is particularly important in this case, where the insurer tells the insured for the first time that it will seek reimbursement literally a few hours before the insurer settles the case and attempts to condition the settlement on reimbursement in the event of non-coverage. (*See* C.R. 524, 719). Frank's had little if any time to assess and consider its coverage position and the reimbursement claim before Underwriters settled the case.

Underwriters' argument with regard to the *Stower's* demand also undermines the protections afforded under the *Stower's* doctrine. Underwriters would have this Court hold that an insured who exercises its *Stower's* rights can be deemed to have impliedly consented to a reimbursement right not contained in the policy. (*See* Petitioners' Brief on the Merits at 21, 22). An insured would be forced to choose between exercising its *Stower's* rights on the one hand and involuntarily agreeing to a reimbursement right it did not contractually agree to under the policy on the other. The facts of this case do not justify an erosion of the protections afforded under the *Stower's* doctrine.

The *Matagorda County* decision is based on a balancing of policy considerations applicable to the relationship between an insurer and its insured. The Court recognized in *Matagorda County* that both the insurer and the insured will be faced with a difficult decision when coverage is disputed. 52 S.W.3d at 135. The insurer, however, is in the business of insurance and is in the best position to assess the viability of its coverage position and handle the risk of a later adjudication of non-coverage. *Id.* The court of appeals correctly determined that *Matagorda County* is on point and bars Underwriters' claim for reimbursement as a matter of law.

C. *The settlement agreement does not create any right to reimbursement.*

The settlement agreement between the ARCO plaintiffs, Frank's, and Frank's insurers ended the underlying litigation. Contrary to Underwriters' assertions, the settlement agreement does not provide Underwriters with a right to reimbursement; it simply provides that any existing or present claims were not released.

The settlement agreement excepts from its release, indemnity, and covenant provisions "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." (C.R. 493, 494). This provision in the agreement is not surprising because of the pending lawsuit between Frank's and Underwriters. An agreement that present or future claims would not be released, however, does not give rise to an affirmative right to seek reimbursement that Underwriters never had. Frank's has never argued that Underwriters' claim for reimbursement was released by the settlement agreement. Frank's' position is that

Underwriters had no right to reimbursement and that Underwriters was contractually obligated to pay the settlement under the insurance policy. (C.R. 239, 258-66).

Underwriters also claims a right to reimbursement based on the fact that, at the time Frank's executed the settlement agreement, Frank's knew of Underwriters' claim for reimbursement. (Petitioners' Brief on the Merits at 17). This argument ignores the fact that Underwriters had already accepted ARCO's settlement offer and did so just a few hours after it informed Frank's for the first time that Underwriters would seek reimbursement. (C.R. 470, 524, 719). Thus, the fact that Frank's knew of Underwriters' reimbursement claim at the time the settlement document was actually executed is of no significance.

D. *This Court should reject Underwriters' invitation to overrule* Matagorda County.

Underwriters essentially urge this Court to overrule the two-year-old *Matagorda County* decision and instead follow the California Supreme Court's decision in *Blue Ridge Ins. Co. v. Jacobsen*, 22 P.3d 313 (Cal. 2001). In *Matagorda County*, however, this Court was well aware of California law and the circumstances under which California allows reimbursement, and chose not to follow California law. *See* 52 S.W.3d at 134 (citing *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997)). California insurance law is substantively different than Texas insurance law and, thus, different policy considerations guided the *Blue Ridge* opinion. *See* 22 P.3d at 317-18. The only state that has distinguished *Matagorda County* is California in the *Blue Ridge* decision. The California court expressly stated that it did so based on the substantive differences

between California and Texas insurance law. *Blue Ridge*, 22 P.3d at 322-23. This Court should decline Underwriters' invitation to follow California law.

Underwriters also claims that this Court should "further articulate" and refine the consent requirement of *Matagorda County*, arguing that consent does not have to be express, but may instead be implied. (Petitioners' Brief on the Merits at 10, 20-22). This Court dealt with that very issue in *Matagorda County* when it held that the consent of the insured must be "clear and unequivocal." 52 S.W.3d at 135. The Court considered whether to imply consent and determined that consent could not be implied. *Id.* at 131-32. The Court in *Matagorda* County also had before it the implied consent arguments raised by Underwriters in this case.[1] *See* No. 98-0968, Brief of Amicus Curiae Underwriters at Lloyds, London, and Certain Companies Subscribing Severally But Not Jointly to Policy No. 548/TA4011F01 in Support of Petitioner at 17-19. There is no need to further articulate the consent requirement.

The *Matagorda County* decision was correctly decided. As the Court recognized, an insurer has several options available to it to protect itself in this situation. The insurer may: (1) put a provision in the policy allowing reimbursement; (2) obtain the consent of the insured; or (3) timely file a declaratory judgment action. *See* 52 S.W.3d at 135-36. Underwriters failed to do any of these.

[1] Although this lawsuit between Underwriters and Frank's was pending at the time Underwriters filed its brief of amicus curiae, Underwriters failed to disclose that fact in the statement of interest in its amicus brief. *See* No. 98-0968, Brief of Amicus Curiae Underwriters at Lloyds, London, and Certain Companies Subscribing Severally But Not Jointly to Policy No. 548/TA4011F01 in Support of Petitioner at 2.

Because Underwriters did not timely file this declaratory judgment action, they now argue that a declaratory judgment action relating to an insurer's indemnity obligation may not have been justiciable until the underlying litigation is resolved. (Petitioners' Brief on the Merits at 19). But there is always the chance that a court will find the coverage issue is not justiciable until the underlying liability has been determined. This Court nevertheless held in *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996), and reiterated in *Matagorda County,* that an insurer is required to make a good faith effort to resolve the coverage dispute. Underwriters did not make a good faith effort to resolve the coverage issue when it waited a year from when they determined that coverage issues existed to file the declaratory judgment action. (C.R. 687). Not only did they wait a year to bring the declaratory judgment action, Underwriters sued their insured, Frank's, for declaratory relief on the same day they first revealed their intent to seek reimbursement in the event of non-coverage and the same day it settled the underlying lawsuit conditioned on a purported right to reimbursement. (C.R. 2, 470, 524, 719). Underwriters did not make a good faith effort to resolve the coverage dispute.

The Court in *Gandy* also noted that declaratory judgment actions can work to the insured's benefit because "[a] plaintiff who thinks a defendant should be covered by insurance may be willing to await or even assist in obtaining an adjudication of the insurer's liability." *Id.* Allowing an insurer to wait to file a declaratory judgment action benefits the insurer, but puts the insured in the uncertain and precarious position of having to defend the underlying claim without knowing whether coverage exists. *See Matagorda County*, 52 S.W.3d at 135.

Two years ago this Court in *Matagorda County* considered all of the issues raised by Underwriters in this case. The Court carefully considered the policy implications of its decision and found that the better rule is to place the burden on the insurer when choosing a course of action in the face of a coverage dispute. This Court should reject Underwriters' invitation to overrule *Matagorda County*.

E. *Underwriters' claims for reimbursement under their equitable theories are also barred by* Matagorda County.

Underwriters' claim for reimbursement under theories of quantum meruit and assumpsit are also foreclosed by *Matagorda County*. This Court expressly rejected equitable reimbursement theories unless the insured clearly and unequivocally agrees to both the settlement *and* the insurer's right to seek reimbursement. 52 S.W.3d at 135. Because Frank's did not agree to Underwriters' right to seek reimbursement, Underwriters cannot recover under quantum meruit or assumpsit.

Underwriters argue that they are entitled to recover under their equitable theories because Frank's accepted funding of the settlement at a time when it knew that Underwriters was claiming a right to reimbursement. (Petitioners' Brief on the Merits at 24). This argument is disingenuous. Underwriters again fails to acknowledge that they only notified Frank's of their intent to seek reimbursement a mere two hours before it settled the litigation with the ARCO plaintiffs. (*See* C.R. 524, 719). The fact that funding occurred later is immaterial; the dispositive fact is that Underwriters had already settled the underlying litigation.

Underwriters is also not entitled to recover under quantum meruit or assumpsit because Underwriters benefited from the settlement.[2] *See Truly v. Austin*, 744 S.W.2d 934, 937 (Tex. 1988) (quantum meruit); *King v. Tubb*, 551 S.W.2d 436, 442 (Tex. Civ. App.—Corpus Christi 1977, no writ) (assumpsit). In this case, Underwriters benefited from the payment of the ARCO settlement in three ways: (1) it cut off defense costs; (2) it put a cap on the damages to be paid to the plaintiff; and (3) it avoided a potential *Stower's* claim. Underwriters even agreed that the settlement was "favorable to Underwriters." (C.R. 470). Underwriters paid the settlement demand because it obviously believed the settlement was in their best interest and to their own benefit.

II. The Trial Court Correctly Applied Texas Law.

Underwriters failed to meet their burden of establishing Louisiana law or that Louisiana law is in conflict with Texas law. Underwriters never asked the trial court to apply Louisiana law to the reimbursement issue and never proved that Louisiana law was any different than Texas law on the reimbursement issue. Even if they had met their burden, however, Texas law should still apply because of the relevant Texas contacts.

A. *Standard of review.*

A party must raise a choice-of-law issue in the trial court or the issue will be waived. *See General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 919-20 (Tex. 1993) ; *see also Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 769 (Tex. App.—

[2] In *Matagorda County*, Underwriters filed a Brief of Amicus Curiae in which it argued that recovery should be allowed under theories of quantum meruit and assumpsit. *See* Brief of Amicus Curiae Underwriters at Lloyd's, London, and Certain Companies Subscribing Severally But Not Jointly to Policy No. 548/TA4011F01 at 24-27.

Corpus Christi 1999, pet. denied) (requiring preliminary motion in trial court. The moving party must establish the foreign state's law and that the foreign law is in conflict with Texas law. *See Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 650 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd w.o.j.). Failure to establish these elements results in a presumption that the foreign state's law is the same as Texas law. *Walters*, 1 S.W.3d 769; *Deloitte & Touche*, 905 S.W.2d at 650. The movant then has the burden to demonstrate, under a conflicts of law analysis, which law should apply based on the state's contacts with the asserted claims. *Deloitte & Touche*, 905 S.W.2d at 650.

B. *Underwriters failed to establish the foreign state's law and that it was in conflict with Texas law.*

1. *Underwriters never properly requested Louisiana law in the trial court.*

Underwriters did not meet their burden of establishing Louisiana law or that Louisiana law is in conflict with Texas law on the reimbursement issue.[3] At no point did Underwriters properly request the trial court to apply Louisiana law on the reimbursement issue, argue that Louisiana law was in conflict with Texas law, or argue, under a RESTATEMENT (SECOND) CONFLICT OF LAWS analysis, which law should apply. (*See* C.R. 535 (merely stating "to the extent Louisiana law might apply to this case"), 958, 1039).

[3] Both parties argued Louisiana law to the trial court on the coverage issue. (*See, e.g.*, C.R. 1100, 1140). On the reimbursement issue, however, both parties argued Texas law to the trial court. (C.R. 258-84, 958-77). It is not unusual to have different states' laws govern different issues in the same case. *See, e.g.*, *Caton v. Leach Corp.*, 896 F.2d 939, 942-43 (5th Cir. 1990) (applying California law to breach of contract claim and Texas law to restitution claim).

Even when the trial court asked the parties to brief whether *Matagorda County* "applies or does not apply to the case at bar," (C.R. 3631), Underwriters never argued that Louisiana law was in conflict or that it controls. (*See* C.R. 3670) (stating only that "To the extent this Court finds Louisiana law controlling, it provides *an additional, independent basis* on which to deny Frank's Motion for New Trial and Motion for Reconsideration.") (emphasis added). Because Underwriters never properly requested the trial court to apply Louisiana law, the trial court did not err in applying Texas law. *See Walters*, 1 S.W.3d at 769; *Deloitte & Touche*, 905 S.W.2d at 650.

Underwriters was content arguing Texas law on the reimbursement issue as long as it thought it was winning. Only when it was forced to recognize the Texas law was unfavorable, did Underwriters then try to argue Louisiana law. This Court should not allow Underwriters to litigate under Texas law until it loses and then pick a law it believes is more favorable; this is too late. *See Consolidated Eng'g Co. v. Southern Steel Co.*, 699 S.W.2d 188, 193 (Tex. 1985) (party that waited until after the jury returned a verdict in favor of the other party could not then argue another state's law applied).

2. *Underwriters never proved any alleged difference between Louisiana law and Texas law.*

Underwriters also never proved that Louisiana law is any different than Texas law on the reimbursement issue. In support of their claim that Louisiana law is different than Texas law, Underwriters cite two Fifth Circuit cases and several Louisiana state cases. (Petitioners' Brief on the Merits at 29-31). As the court of appeals correctly noted, these cases are all distinguishable or do not address the reimbursement claim at issue in this case. *See* Slip op. at 4-5.

Underwriters cite the inapposite case of *United States v. Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), in support of their claim that it is entitled to reimbursement under Louisiana law. Nowhere in the opinion does the court state that Louisiana law allows an insurer to seek reimbursement from its insured without the prior agreement or consent of the insured. *See id* at 1128. The reimbursement right discussed in *Parish of St. Bernard* was triggered by fraud. *Id.* There has never been any hint or allegation of fraud in this case.

In *Peavey Co v. M/V ANPA*, 971 F.2d 1168 (5th Cir. 1992), the court held that an insurer could recover from its insured where there was a consensual agreement with the insured for reimbursement. The insured and insurer in *Peavey* agreed on the record that a coverage dispute remained outstanding and stipulated that the insured would reimburse the insurer if it was later determined that coverage did not exist. *Id.* at 1177 n.17. Underwriters mis-cites *Peavey* when it claims that an agreement that a coverage dispute exists is sufficient to consent to reimbursement. (Petitioners' Brief on the Merits at 31). In *Peavey*, the stipulation went much further—the insured agreed it would pay the insurer if no coverage was found. There is no such stipulation in this case.

Likewise, the Louisiana state law cases cited by Underwriters are all inapplicable. *See, e.g., Dear v. Blue Cross of La.*, 511 So. 2d 73, 76 (La. Ct. App. 1987); *Mutual Fire & Marine Island Ins. Co. v. Electro Corp.*, 461 So. 2d 410, 412 (La. Ct. App. 1984); *Shelter Ins. Co. v. Cruse*, 446 So. 2d 893, 894 (La. Ct. App. 1984); *Central Surety & Ins. Corp. v. Corbello*, 74 So. 2d 341, 342 (La. Ct. App. 1954); *see also Prudential Ins. Co. of Am. v. Harris*, 748 F. Supp. 445, 446 (M.D. La. 1990). All of these cases involved

payments made by mistake[4] or payments made pursuant to fraudulent acts by the insured. As the court of appeals recognized, Underwriters did not make the payment by mistake: "[I]ndeed, their eyes were wide open to their dilemma." Slip op. at 5. And, of course, there is no issue of any fraud on the part of Frank's.

C. ***Under a choice-of-law analysis, Texas law applies.***

Even if Underwriters had properly raised the choice-of-law issue, Underwriters RESTATEMENT argument ignores the many Texas contacts relevant to the reimbursement issue. For example, the reimbursement claim involves the settlement of litigation pending in Harris County, Texas. (C.R. 489). The settlement agreement specifically states that it is governed by Texas law and "is performable in Harris County, Texas." (C.R 1371). The settlement payment was made in Texas. (C.R. 3402, 3404). Although Frank's is a Louisiana corporation, it also conducts business in Texas and has offices in Texas. (C.R. 196). Underwriters is not a citizen of Louisiana, but is instead a consortium of mostly foreign companies. (C.R. 196). Underwriters claims that the excess policy was issued and paid for in Louisiana, but the record cite does not support this claim. The excess policy does not state where it was issued, (*see* C.R. 315), and the record page cited by Underwriters pertains only to the primary policy—not the excess policy.

Underwriters claims that Texas has no interest in this litigation, (Petitioners' Brief on the Merits at 29), but ignores the fact that Underwriters chose to sue Frank's in Texas under the laws of Texas. (C.R. 2-11). Underwriters also never states what interest

[4] Texas law is similar on the mistaken payment issue. *See, e.g., County Mut. Ins. Co. v. Owen*, 804 S.W.2d 602, 605 (Tex. App.—Houston [1st Dist. 1991], writ denied).

Louisiana would have in this litigation. Louisiana has no interest in seeing that Underwriters recovers on their reimbursement claim against Frank's—Underwriters are not citizens of Louisiana. (C.R. 2). Underwriters failed to properly raise or support a choice of law analysis. The trial court properly applied Texas law to the reimbursement issue.

Finally, Underwriters claims that Louisiana law cannot be presumed to be the same as Texas law because Louisiana law is not derived from common law and the Louisiana Supreme Court has not ruled on the issue. (Petitioners' Brief on the Merits at 39). For the first time, Underwriters now claims that this Court must make an *Erie* determination of what the Louisiana Supreme Court would hold on the reimbursement issue. (Petitioners' Brief on the Merits at 39). Underwriters misunderstands the court of appeals' decision. The court of appeals did not presume that Louisiana and Texas law are the same based on the lack of authority from the Louisiana Supreme Court. The court of appeals held that Underwriters never met their burden of proving that Louisiana law is any different than Texas law. Slip op. at 4, 6.

Underwriters failed to preserve the choice-of-law issue because it did not properly raise the issue in the trial court. Even if it had preserved the issue, Underwriters failed to show that Louisiana law and Texas law are different on the reimbursement issue. Further, under a choice-of-law analysis of the state with the most significant contacts, the many relevant Texas contacts establish that Texas law applies to the reimbursement issue.

PRAYER

For these reasons, Respondent Frank's Casing Crew & Rental Tools, Inc. prays that this Court deny the Petition for Review or, if the Petition for Review is granted, that this Court affirm the judgments of the trial court and court of appeals.

Respectfully submitted,

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I certify that a copy of Respondent's Brief on the Merits was served on counsel of record by United States certified mail, return receipt requested, on the 23rd day of December 2002, addressed as follows:

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