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.

Appeal from the Court of Appeals of Texas, 14th District, Houston No. 14-01-00349-CV

BRIEF OF *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF EXCESS UNDERWRITERS

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Complex Insurance Claims Litigation Association ("CICLA"), is the entity on behalf of whom this brief is filed and is the source of the fee paid for the preparation of this brief. CICLA is a trade association of major property and casualty insurance companies. The membership of CICLA consists of the following companies or groups: ACE Group of Insurance and Reinsurance Companies; American International Group Insurance Companies; Chubb & Son, A Division of Federal Insurance Company; Continental Casualty Company; Hartford Insurance Group; Liberty Mutual Insurance Company; Royal & SunAlliance; Selective Insurance Company; St. Paul Fire & Marine Insurance Company; The Travelers Indemnity Company; Zurich American Insurance Company; and Farmers Insurance Group of Companies. CICLA members write a substantial percentage of the property casualty coverage written in Texas. Accordingly, CICLA is vitally interested in the legal issues presented in this case. In particular, CICLA appears as an *amicus curiae* here to assist the Court in determining the standards applicable to an insurer's ability to seek reimbursement from its policyholder for payment made to settle claims later determined to be excluded from coverage and to urge the Court to narrowly construe its holding in *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County,* 52 S.W.3d 128 (Tex. 2000).

CICLA has participated in numerous cases throughout the country, including cases in the Texas Supreme Court and the Texas Court of Appeals. In particular, CICLA's predecessor in interest, the Insurance Environmental Litigation Association ("IELA"),

participated as *amicus curiae* in *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000).[1]

CICLA respectfully submits that this Court should reverse the ruling below and find that Excess Underwriters is entitled to reimbursement of indemnity paid for non-covered claims. CICLA also respectfully asks the Court to limit *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000) to its facts.

IDENTITY OF THE PARTIES AND COUNSEL

CICLA adopts herein by reference the recitation of parties and counsel set forth in the Petition for Review.

STATEMENT OF THE CASE

This case presents important issues related to the ability of insurers to seek reimbursement from policyholders for payment made to settle claims later determined to be excluded from coverage. Specifically, this case affords an opportunity for this Court to further articulate its holding in *Texas Ass'n of Counties County Government Risk Mgmt. Pool v. Matagorda County*, 52 S.W.3d 128, 133-35 (Tex. 2000) to provide guidance on the standards needed to comply with *Matagorda*'s consent requirement and

[1] In addition, CICLA, and its predecessor in interest, IELA, have appeared as *amicus* in the following cases in Texas: *Grapevine Excavation, Inc. v. Maryland Lloyds, a Lloyds Insurance Co.*, 35 S.W.3d 1 (Tex. 2000); *National Union Fire Insurance Co. v. CBI Industries, Inc.*, 907 S.W.2d 517 (Tex. 1995); *Kelley-Coppedge, Inc. v. Highlands Insurance Co.*, 980 S.W.2d. 462 (Tex. 1998); *Gulf Metals Industries, Inc. v. Chicago Insurance Co.*, 993 S.W.2d 800 (Tex. App.—Austin 1999); *Tri County Service Co. v. Nationwide Mutual Insurance Co.*, 873 S.W.2d 719 (Tex. App.—San Antonio 1993); *Estate of H.H. Coffield v. Maryland Insurance Co.*, No. 22,769 & 22,770 (Tex. 20th Dist. Ct., Milan County 1993).

to ensure that insurers are granted a fair opportunity to receive reimbursement for settling any claims against their policyholders for which coverage may later be found not to exist.

In this case, the policyholder, Frank's Casing Crew & Rental Tools, Inc. ("Frank's") demanded coverage from its insurers for claims arising out of the collapse of an offshore platform. *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, No. 14-01-00349-CV, 2002 WL 1404705 (Tex. App.—Houston June 27, 2002)(attached hereto as Appendix Tab A). Upon receiving the claim, Excess Underwriters at Lloyd's ("Excess Underwriters") reserved its right on two separate occasions to assert various coverage defenses. *Id.* Excess Underwriter's policy did not contain a duty to defend. Frank's and its primary insurer controlled the defense of the case. *Id.* at *1. During trial, Frank's demanded that, under the *Stowers* doctrine, Excess Underwriters settle the claim. *Id.* at *1. Excess Underwriter's brought suit seeking a coverage determination and reimbursement of settlement funds.

The Honorable Jeff Work in the 189th Judicial District Court of Harris County, Texas initially ruled in favor of Excess Underwriters, finding that there was no coverage for the claims and ruling that Excess Underwriters was entitled to reimbursement of the settlement funds. Before entry of final judgment, however, this Court released its opinion in *Matagorda*. In light of *Matagorda*, the trial court withdrew its order granting summary judgment to Excess Underwriters and granted summary judgment in favor of Frank's with respect to reimbursement. *Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, No. 98-08295 (Feb. 12, 2002 Harris County, Texas)(attached hereto as Appendix Tab B).

Excess Underwriters appealed to the Fourteenth Court of Appeals at Houston.[2] Although the Texas intermediate appellate court affirmed the trial court's judgment and concluded that *Matagorda* barred reimbursement, the court recognized that by applying *Matagorda* to the facts of this case, it was placing Excess Underwriters in a no-win situation:

> *[w]e recognize 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. Thereafter the Underwriters had to pay if Arco's claims were *within* the policy but also had to pay *if they are not* within the policy because there was no right to reimbursement.

Excess Underwriters, 2002 WL 1404705, at *2 (emphasis added). The present appeal followed.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Texas Government Code § 22.001 (a) (6).

ISSUES PRESENTED

(1) Did the court below err in applying *Matagorda* to the facts of this case?

(2) Should this Court reexamine its holding in *Matagorda* and construe it narrowly?

[2] The Panel was composed of Chief Justice Brister and Justices Anderson and Frost.

STATEMENT OF THE FACTS

This case involves an insurance coverage dispute. Frank's notified its primary and excess insurers of claims arising out of its involvement in the collapse of an offshore drilling platform. *Excess Underwriters*, 2002 WL 1404705, at *1. After receiving notice of the claim, Excess Underwriters, whose policy did not contain a duty to defend, twice reserved its rights to assert coverage defenses. *Id;* Policy at PL 000061 (Appendix Tab C). Frank's and its primary insurer directed the defense. During trial, Frank's unilaterally contacted plaintiff's counsel to solicit a settlement demand within the excess policy limits. *Excess Underwriters*, 2002 WL 1404705, at *1. After receiving plaintiff's $7.5 million settlement demand, Frank's demanded that Excess Underwriters settle the claim pursuant to the *Stowers* doctrine, asserting that the demand was reasonable and covered by the insurance policy. *See American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d. 842, 849 (Tex. 1994)(defining *Stowers* duty under Texas law).

Excess Underwriters agreed to fund the settlement, which was in excess of the primary policy limits, conditioned upon its right to seek reimbursement if no coverage were found to exist. It contacted plaintiff's counsel and accepted the $7.5 million demand, reiterating these conditions and expressly preserving "claims that exist presently or may arise in the future." Settlement Agreement at 5 (Appendix Tab D). That same day, Excess Underwriters informed Frank's that it intended to seek reimbursement and filed a declaratory judgment action seeking a declaration that no coverage existed for Frank's claims under the excess policies, as well as reimbursement of the settlement funds. *Id*.

The next day, Frank's represented to the trial court that the underlying case had settled. Petition for Review at 7. Excess Underwriters' counsel expressly stated that as a condition of settlement, it was reserving all coverage defenses and would hold Frank's responsible for reimbursement if the claims were not covered. Frank's accepted the settlement funding, although it argued that settlement waived Excess Underwriters' coverage defenses. Petition for Review at 7. Frank's counsel took part in drafting the settlement agreement, which expressly carved out "any claims that exist presently or may arise in the future between Defendants, Frank's and Frank's Insurers." Settlement Agreement at 5.

SUMMARY OF ARGUMENT

The Court below erred in applying *Matagorda* to the facts of this case.[3] Here, unlike in *Matagorda*, the insurer did not have authority to settle, had no duty to defend, did not control the settlement, and had no choice but to agree to Frank's *Stowers* demand. *Excess Underwriters*, 2002 WL 1404705, at *1. Equally, unlike in *Matagorda*, where this Court found that the insurer had not obtained its policyholder's consent to reimbursement, in this case Frank's drafted and executed a settlement agreement containing a provision that specifically reserved coverage issues between Frank's and Excess Underwriters and carved out existing claims. As the court below recognized, by adhering to *Matagorda* and rejecting Excess Underwriters' claim for reimbursement, the court's decision produced a "disquieting" result (*id*. at 2) and placed Excess

[3] CICLA does not take a position on choice of law in this brief. If this Court finds that Texas law is applicable, CICLA urges the Court to find reimbursement is available and appropriate under Texas law.

Underwriters in the untenable position of accepting the settlement or facing bad faith liability. Under that approach, Excess Underwriters, and other insurers transacting business in Texas would be required to pay not only for claims within their policies, but also for claims not covered under the policies.

This case therefore presents an issue of universal importance and interest to insurers. *Matagorda* is not applicable to the facts present here. This case requires a different result. Permitting recoupment of costs for claims that an insurer is determined to have had no duty to defend or indemnify gives effect to the expectations of the parties and protects the integrity of the insurance mechanism. In addition, permitting the insurer to advance such costs subject to recoupment is a reasonable and desirable way to ensure the policyholder's interests are protected until a coverage determination can be made. Denying reimbursement on the other hand, not only ignores the coverage provisions of the policy, but also allows the policyholder to obtain the benefits of coverage it never purchased. Numerous courts agree that an insurer is entitled to reimbursement where the insurer timely notifies a policyholder of its intention to accept a reasonable settlement offer subject to its right to later seek reimbursement. Here, the insurer went further, declaring in open court at the time of settlement that it intended to pursue reimbursement and entering a settlement that explicitly preserved "claims that exist presently or may arise in the future." Further, the insurer had not controlled the defense and settlement of the claim. This Court, therefore, should vindicate basic principles of law and equity which require reimbursement here.

ARGUMENT

I. *MATAGORDA* IS DISTINGUISHABLE ON ITS FACTS.

The facts of *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000) differ significantly from the facts of this case. Accordingly, the court below erred in applying *Matagorda* here to deny Excess Underwriters' the right to reimbursement.

In *Matagorda,* the insurer's policy contained a duty to defend and that insurer controlled the defense of the underlying case. The insurance policy at issue allowed the insurer to settle any claim without the policyholder's consent. *Matagorda*, 52 S.W. 2d at 130. The insurer sent a reservation of rights letter to its policyholder reserving its right to seek reimbursement. The policyholder did not respond to the letter, and its insurer settled the claims. The settlement agreement released the policyholder from any and all claims and released all claims against the insurer. *Id*.

Try as it might to twist the facts, Frank's has not and cannot show that its situation is analogous to that of the policyholder in *Matagorda*. In this case, Excess Underwriters did not have settlement authority, its policy contained no duty to defend, and its policy required Frank's consent to settlement. Moreover, unlike the policyholder in *Matagorda*, Frank's did not remain silent when informed that its insurer intended to settle. To the contrary, Frank's actively participated in drafting the settlement agreement. Unlike the settlement agreement in *Matagorda* which released *all* claims, the settlement agreement drafted by Frank's reserved coverage issues between Frank's and Excess Underwriters and carved out "any claims that exist presently" between itself and Excess Underwriters.

Settlement Agreement at 6. Prior to the execution of the settlement agreement, Excess Underwriters had twice reserved its rights on various coverage issues. At the time the settlement agreement was executed, therefore, these issues remained outstanding and Excess Underwriters was entitled by the very terms of the settlement agreement to seek reimbursement from Franks' for claims as to which coverage was found not to exist. These dissimilar facts render *Matagorda* inapposite, and this Court should find that Excess Underwriters is entitled to reimbursement.

In *Matagorda*, this Court ruled 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 from the policyholder for claims later determined to be excluded from coverage if the insurer obtains the policyholder's "clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement." *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d at 128. The *Matagorda* Court premised its decision on its finding that the policyholder's silence in response to the insurer's reservation of rights letter did not create an implied contract to reimburse the insurer. Unlike in *Matagord*a, in this case the settlement agreement executed by Frank's explicitly preserved Excess Underwriters' right to pursue existing claims, such as the right to reimbursement. Thus, even if the Court applies *Matagorda* to this case, it should find that Excess Underwriters is entitled to reimbursement.

In *Matagorda*, the policyholder did not respond to its insurer's unilateral reservation of rights. In this case, Excess Underwriters did not make a unilateral claim to

reimbursement. The settlement agreement between the parties specifically reserved and carved out existing claims between Frank's and Excess Underwriters. Frank's was an active participant in the negotiation, drafting, and execution of that settlement agreement. Frank's should be kept to the bargain it made.

A Florida Court of Appeals reached the same conclusion in *Colony Insurance Co. v. G & E Tires & Service, Inc*., 777 So. 2d 1034 (Fla. Dist. Ct. App. 2000). In that case, the court reversed a lower court ruling refusing to award an insurer reimbursement for defense costs incurred in defending a policyholder, where the trial court found that no coverage existed under the policy. The court noted that the insurer had agreed to defend the policyholder under a reservation of rights that included a right to reimbursement of defense costs if it was subsequently determined that the claims were in fact excluded under the policy. The court found that by accepting the offer of defense subject to the insurer's reservation of rights, the policyholder also accepted the terms of the offer, including potential for reimbursement. The court reasoned that "[a] party cannot accept tendered performance while unilaterally altering the material terms on which it is offered." *Id*. at 1039 (citing Restatement (Second) of Contracts §69 (1981)). *See also Blue Ridge Ins. Co. v. Jacobsen*, 22 P.3d 313, 317 (Cal. 2001)("By accepting the insurer's defense under [a reservation of rights], the insured is deemed to have accepted this condition.").

In the instant case, as in *Colony Insurance*, Frank's accepted Excess Underwriters' agreement to fund the settlement *subject to* Excess Underwriters' right to seek reimbursement if no coverage was found to exist. Having accepted Excess Underwriters'

offer subject to Excess Underwriter's conditions, Frank's cannot seek to benefit by "unilaterally altering the material terms" of the agreement. *Colony Insurance*, 777 So. 2d at 1039.

Accordingly, under the facts of this case, *Matagorda* notwithstanding, Excess Underwriters is entitled to reimbursement. For these reasons, CICLA respectfully submits that this Court reverse the lower court's ruling.

II. IMPORTANT POLICY CONSIDERATIONS FAVOR THE RIGHT TO REIMBURSEMENT.

A. Refusing Insurers The Right To Reimbursement Creates An Unfortunate Catch-22 For Insurers.

As the Court of Appeals acknowledged, applying *Matagorda* to deny reimbursement in this case places all insurers in an unenviable position by forcing insurers to pay for claims *regardless* of whether they fall within the policy coverage, or face liability:

> *[w]e recognize 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. Thereafter the Underwriters had to pay if Arco's claims were *within* the policy but also had to pay *if they are not* within the policy because there was no right to reimbursement.

Excess Underwriters, 2002 WL 1404705, at *2 (emphasis added). Contrary to the "disquieting" result reached below, this Court should hold that insurers must be given a fair opportunity to seek reimbursement for claims that are not covered. Clearly, under the facts here, that right should be enforced.

In declining to follow *Matagorda*, the California Supreme Court aptly characterized the insurer's dilemma as a Catch-22:

> were we to conclude insureds could, as in this case, refuse to assume their own defense, insisting an insurer settle a lawsuit or risk a bad faith action, but at the same time refuse to agree the insurer could seek reimbursement should the claim not be covered, the resulting Catch-22 would force insurers to indemnify noncovered claims. If an insurer could not unilaterally reserve its right to later assert noncoverage of any settled claim, it would have no practical avenue of recourse other than to settle and forego reimbursement. An insured's mere objection to a reservation of right would create coverage contrary to the parties' agreement in the insurance policy and violate basic notions of fairness.

Blue Ridge Ins. Co. v. Jacobsen, 22 P.3d 313, 321 (Cal. 2001).

The need to allow insurers the right to seek reimbursement for non-covered claims is particularly compelling here because the *Stowers* duty imposed under Texas law requires insurers to accept reasonable settlement demands that are within policy limits. *See Am. Physicians Ins. Exch. v. Garcia,* 876 S.W.2d. 842, 849 (Tex. 1994)(defining *Stowers* duty under Texas law). If the insurer fails to accept a reasonable settlement demand, the policyholder may thereafter recover from the insurer the entire amount of the judgment in excess of the policy limits. *Stroman v. Fid. & Cas. of N.Y.*, 792 S.W.2d 257, 260 (Tex. App.—Austin 1990). Under *Matagorda*, when the insurer cannot obtain the policyholder's express consent to right of reimbursement, it could face the dilemma of either accepting coverage now for a potentially non-covered claim or risk the real possibility of liability for bad faith later. This not only would create a no-win situation for the insurer but also give policyholders every incentive not to consent to reasonable

settlement demands. Given the insurer's duty to accept reasonable settlement offers under the *Stowers* doctrine, policyholders will be encouraged to withhold consent in hopes of obtaining coverage through the backdoor.

CICLA respectfully submits that this Court limit *Matagorda* to its facts. Certainly, a right to reimbursement should be permitted in cases like this one where the insurer preserved "existing claims" against the policyholder and never controlled the defense. Moreover, CICLA urges this Court to allow insurers to preserve the status quo more generally by allowing a reimbursement right until courts can resolve coverage disputes.

Numerous courts across the country agree that recognizing a right to reimbursement is appropriate. These courts have consistently held that an insurer is entitled to reimbursement when the insurer did not have a duty to defend the asserted claims and where it timely reserved its rights to recoupment and provided adequate notice to the policyholder of the possibility it would seek reimbursement. *See, e.g., Grinnell Mut. Reins. Co. v. Shierk*, 996 F. Supp. 836, 839 (S.D. Ill. 1998)(finding insurer was entitled to reimbursement where policyholder "was fully apprised that Grinell reserved its right to seek reimbursement in the event that it was later determined that it had no duty to defend"); *Resure, Inc. v. Chemical Distributors, Inc.,*927 F. Supp. 190, 194 (M.D. La. 1996)(finding insurer was entitled to reimbursement where the "reservation [of rights] specifically referred to the possibility that [the insurer] might seek reimbursement from any and all costs of defense" and where "[t]here [was] nothing in the record to suggest CDI objected to the reservation."); *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083,

1089 (Colo. 1991) ("[t]he appropriate course of action for an insurer who believes that it is under no obligation to defend, is to provide a defense to the insured under a reservation of rights to seek reimbursement should the facts at trial prove that the incident resulting in liability was not covered by the policy, or to file a declaratory judgment action"); *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F. Supp. 1169, 1172 (D. Minn. 1996) (where an insurer properly meets its duty to defend "and subsequently successfully challenges policy coverage, it should be entitled to the full benefit of such a challenge and be reimbursed for the benefits it bestowed, in good faith, to its insured.").

Similarly, in *Buss v. Superior Court,* 939 P.2d 766 (Cal. 1997), the California Supreme Court held that an insurer has a right to reimbursement of costs incurred to defend non-covered claims. In so ruling, the court explained:

> Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs….The insurer therefore has a right of reimbursement that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual. As stated, under the law of restitution such a right runs against the person who benefits from "unjust enrichment" and in favor of the person who suffers loss thereby. The "enrichment" of the insured by the insurer through the insurer's bearing of unbargained-for defense costs is inconsistent with the insurer's freedom under the policy and therefore must be deemed "unjust."

Id. at 776-777.

B. Permitting Reimbursement Does Not Create Conflicts Between the Insurer and Its Policyholder And Does Not Force the Insured To Choose Between Rejecting The Settlement And Accepting A Financial Obligation It Cannot Meet.

In attempting to justify its reliance on *Matagorda*, the court below asserted that *Matagorda's* harsh result was warranted because it was "necessary to avoid conflicts between insurer and insured, and to protect the insured from having to choose between rejecting the settlement or accepting a financial obligation it could not pay." *Excess Underwriters*, 2002 WL 1404705, at *2. The right to reimbursement, however, does not contribute to either of these scenarios.

To the contrary, permitting reimbursement for claims an insurer has no duty to defend gives effect to the expectations of the parties and protects the integrity of the insurance underwriting process. It is a reasonable and desirable way to ensure the policyholder's interests are protected until a coverage determination can be made. Moreover, if an insurer is able to recover fees related to the defense of uncovered claims, it will have every incentive to provide the policyholder with a defense. As the California Supreme Court recently observed, allowing insurers to seek reimbursement of settlement amounts paid for non-covered claims:

> encourages insurers to defend and settle cases for which insurance coverage is uncertain. In so doing, it transfers from the injured party to the insurer the risk that the insured may not be financially able to pay the injured party's damages.

Blue Ridge Ins. Co. v. Jacobsen, 22 P.3d 313, 321 (Cal. 2001). Thus, far from placing the insurer and its policyholder at odds, the right to reimbursement eliminates an unfair windfall to the policyholder whose conduct was not insured and who is financially able to

pay absent insurance coverage. Reimbursement also protects the rights of the insurer who steps forward to provide a defense to the underlying action and to indemnify a settlement when coverage is unresolved.

C. Filing A Declaratory Judgment Action, Drafting Different Policy Provisions, Or Raising Premiums Does Not Adequately Protect Insurers And Actually Harms Other Policyholders.

Unfortunately, absent the right to reimbursement, insurers cannot "protect themselves" by filing a declaratory judgment action, redrafting their policies, or increasing premiums to account for non-covered claims. *Excess Underwriters*, 2002 WL 1404705, at *2. Although insurers can and do seek guidance from the courts regarding their coverage obligations, that guidance often is not rendered quickly enough to eliminate situations where amounts must be advanced to defend or indemnify an underlying claim. Moreover, insurers cannot anticipate all possible interactions of fact and policy text and should not be required to rewrite their policies to effectuate expectations that reasonably exist under current policy language. Similarly, raising premiums would have the unintended and undesirable result of burdening all policyholders.

First, the proposition that insurers simply seek a declaratory action when faced with this situation is both unrealistic and impracticable. Response to Petition at 9. As an initial matter, under Texas law, the insurer may not even have the option to pursue an early declaratory judgment. *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) (holding that under certain narrow circumstances, an insurer may pursue a declaratory judgment prior to resolution of the underlying claim). In addition,

insurers have no control over when claimants will make a settlement offer in an underlying claim nor how long an offer will remain open. A reasonable claimant will not necessarily stand on its offer to a defendant with possible insurance rights. Nor can insurers control how promptly courts may rule if declaratory actions are pursued. Indeed, coverage litigation often takes substantial time and resources to resolve. The parties must file pleadings, commence discovery, and file motions for summary judgment. If the court determines that a material dispute of fact exists, the parties must then go to trial. Even after the trial court resolves the dispute, the losing party may appeal, first to the Court of Appeals and then to this Court. Once the appeal process begins, the possibility remains that an appellate court may remand the action to the trial court only to start the process over again. In short, it is impossible to imagine a scenario where a claimant in an underlying matter would patiently stand on its offer for years while the judicial process runs it course to resolve a related coverage dispute.

Second, the suggestion that insurers should redraft their policies to provide for a right of reimbursement ignores the commercial reality of insurance contracts. Under existing contract terms, neither party reasonably expects insurers to pay for any claim, covered or not, so long as a settlement demand is made before a coverage suit can be resolved. CICLA submits that the existing policy language does not reasonably lead to the conclusion that insurers will advance funds with no right to reimbursement when a claim is not covered. Moreover, as Judge Easterbrook observed:

> language always leaves *some* ambiguities, whether verbal (intrinsic) or situational (extrinsic). Drafters cannot anticipate all possible interactions of fact and text, and if they could the

> attempt to cope with them in advance would leave behind a contract more like a federal procurement manual than like a traditional insurance policy. Insureds would not be better off in the process. The resulting contract would not only be incomprehensible but also more expensive.

Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 976 (7th Cir. 1991).

Third, innocent policyholders should not be forced to bear the uncovered liability of others. Insurers assume certain contractually defined risks in return for premiums, which are calculated through actuarial science. Insurers are able to respond to random catastrophes because, on a large scale, the frequency of such events is reasonably predictable. By evaluating and distributing risks in this fashion, insurance allows individuals and businesses to engage in socially useful activities that would be impossible to undertake if the associated risks had to be borne alone. *See, e.g.*, Robert E. Keeton & Alan I. Widiss, *Insurance Law*, 12-13 (2d ed., West 1988). This important economic and social function is accomplished by means of the risk-for-premium exchange that is essential to the integrity of the underwriting process. Expanding the risk assumed by the insurer beyond that upon which the premium calculation was based necessarily undermines this process. *City of Edgerton v. Gen. Cas. Co.,* 517 N.W.2d 463, 477 n.26 (Wis. 1994) ("The original risk assessment becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for by the insurer in the contract of insurance.").

Requiring Texas policyholders to bear the costs of paying for uncovered claims is not only fundamentally unfair, it adversely affects the price and availability of insurance coverage for those who lack the resources to self-insure, most notably individuals and

small businesses owners. *See Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989) (disregarding policy terms would "requir[e] ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities."). The policyholders of Texas should not be required to absorb the premiums necessary to routinely pay for uninsured liability.

PRAYER

For the reasons stated above, *amicus curiae* Complex Insurance Claims Litigation Association prays that the Court reverse the appellate court's granting of summary judgment to Frank's on the issue of reimbursement and further respectfully asks the Court to narrowly construe *Matagorda*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Brief of *amicus curiae* Complex Insurance Claims Litigation Association ("CICLA"), was served on counsel of record by United States certified mail, return receipt requested, on this 2nd day of December 2002, addressed as follows:

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