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.

BRIEF OF AMICI CURIAE SHELL OIL COMPANY, MOTIVA ENTERPRISES LLC, BURLINGTON RESOURCES INC., TEMPLE-INLAND INC., AND BRAD FISH, INC.

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TO THE HONORABLE TEXAS SUPREME COURT:

AMICI CURIAE, SHELL OIL COMPANY, MOTIVA ENTERPRISES LLC, BURLINGTON RESOURCES INC., TEMPLE-INLAND INC. AND BRAD FISH, INC., submit this brief in support of RESPONDENT, FRANK'S CASING CREW & RENTAL TOOLS, INC. ("Frank's"), urging the Court to grant the Motion for Rehearing of Frank's, reconsider its opinion and reissue a new opinion as urged by Frank's.

STATEMENT OF INTEREST

Shell Oil Company and its affiliated companies are among the world's largest producers of oil and gas, both on land and at sea. Their activities span the globe and include transporting and trading oil and gas, marketing natural gas, producing and selling fuel for ships and planes, generating electricity and providing energy efficiency advice. The Shell group of companies operates in over 140 countries and territories and employs more than 112,000 people.

Motiva Enterprises LLC is an oil refining, lubricants and retail business operation owned by Shell and Saudi Refining Inc. It is headquartered in Houston, Texas. Motiva Enterprises refines and markets gasoline to approximately 9,400 Shell-branded and Texaco-branded gasoline stations and together Shell and Motiva Enterprises account for about 10 percent of the total U.S. refining capacity. Motiva Enterprises has refineries located in the Gulf Coast region of the country, including Texas.

Burlington Resources Inc. is one of the world's largest independent oil and natural gas exploration and production companies and ranks among North America's leading producers. Headquartered in Houston, Texas, Burlington Resources employs more than 2,200 people, with major offices in Calgary, London, Farmington, Midland, and Fort Worth. Burlington Resources currently has development programs under way in the Bossier and Barnett Shale trends in Texas, in addition to its activities in other regions of the country.

Temple-Inland Inc., based in Austin, is a major manufacturer of packaging and building products, with a diversified financial services operation. Temple-Inland has

about 18,000 employees and is the largest private landowner in Texas. In 2004 the company generated revenues of $4.75 billion. Temple-Inland is frequently involved in civil litigation as a defendant and therefore has an interest in this issue.

Brad Fish, Inc. is a large distributor of Sullair industrial air equipment. It has done business throughout the state of Texas since 1968, with its original location in Houston, and subsequent locations added in San Antonio and Harlingen. Brad Fish, Inc. sells and supports a full line of Sullair electric and diesel air compressors, air dryers, vacuum pumps and tools. Its customers are some of the largest manufacturing, construction, mining, industrial and oil and gas-related businesses in this State. In addition to sales and support, Brad Fish, Inc. also maintains fabrication shops at its Texas locations to design, fabricate and paint its engineered products to the specifications of its Texas customers.

Shell, Motiva Enterprises, Burlington Resources, Temple-Inland Inc., and Brad Fish, Inc. all conduct significant amounts of business in Texas and provide employment for many Texas citizens. All five companies are major purchasers of insurance and insurance-related services that are governed by Texas insurance law, and are frequently involved in civil litigation in Texas. Accordingly, all four companies have an interest in the clarity of rules governing the insurer-insured relationship and the obligations and rights of insurers and insureds in settling litigation.

Amici Curiae and other insured businesses in Texas face the difficult settlement issues addressed by the Court in its opinion and in this brief on an everyday basis. Major commercial litigation involves millions of dollars of insurance coverage. All too often, the availability of insurance is ***the*** driving force behind a complex lawsuit. It is the

insurance industry itself that injects insurance coverage issues into the fray through the issuance of a reservation of rights letter. The existence of purported coverage issues becomes a pervasive theme and can poison the tripartite relationship between the insured, insurance defense counsel and the insurer. The strategy vis-à-vis large insureds is patently obvious: by focusing on coverage issues, real or imagined, the insurer primes its insured to make a significant contribution of its own to settlement of the claim. In doing so, millions of dollars are saved by insurers, all at the expense of their insureds. Upholding a rule of law allowing ambiguous actions on the part of an insured to be portrayed as implied consent to reimbursement only serves to put besieged Texas businesses further at risk. Consequently, Shell, Motiva Enterprises, Burlington Resources, Temple-Inland Inc., and Brad Fish, Inc. have a strong interest in the outcome of this case. Amici Curiae are not parties to this appeal, but as Texas commercial insureds, they have an interest in the outcome of this motion for rehearing. This brief was filed by Amici Curiae acting through the undersigned independent counsel, who was paid a fee by them for the preparation of it.

ISSUE PRESENTED

> Allowing an insurer to seek reimbursement in the absence of express consent from its insured transfers the risks and uncertainties associated with the evaluation of settlement and insurance coverage from the insurer to the insured. Is this transfer contrary to existing Texas law as set out in the *Stowers*, *Griffin*, *Gandy* and *Matagorda County* opinions of this Court?

INTRODUCTION

The proposition that an insurer should not be obligated to pay amounts that are outside its coverage is not astounding. Nevertheless, the issues before the Court are rendered extremely complex for many Texas insureds, faced with the burden of not only defending against and settling an adversarial claim, but also the burden of defending against an adversarial insurer out to minimize its own settlement contribution. The Court's adoption of implied consent to reimbursement has only increased those burdens on Texas insureds.

The insuring agreements of most commercial policies obligate an insurer to pay only those sums that its insured is legally obligated to pay and to which the insurance applies. A logical extension of the insuring agreement would seem to include the proposition that if an insurer does pay an amount that is not otherwise covered under its policy, it should be entitled to be reimbursed by its insured. That somewhat facile proposition, though easy to state, is much more difficult to apply while preserving the rights of an insured under its policy and Texas law. This facile proposition is open to question from both a practical and a legal point of view.

The facts presented to the Court in this case represent a constantly occurring scenario for Texas insureds, particularly large ones with assets that they legitimately attempt to protect by purchasing insurance. As a practical matter, the result in this case allows reimbursement to play out to its most dangerous extreme, that is, a purported consent extracted from the insured during the pressure of settlement negotiations during a

heated trial. In that context, insurers are more likely to extort concessions from insureds, coercing contributions to settlement on the pretext of the existence of coverage issues and the possibility of drawn out coverage litigation to obtain reimbursement. Moreover, effective participation by insurance defense counsel in the evaluation of the reasonableness of a settlement demand will be chilled by the specter of misinterpretation of that participation as implied consent on behalf of their insured clients to reimbursement.

In concluding that consent to reimbursement in Texas need only be implied, the Court appeared to operate out of a concern for injured plaintiffs and their ability to recover from otherwise uninsured defendants. While that is a legitimate concern, that goal should not be achieved at the expense of Texas businesses that will not only face lawsuits seeking reimbursement from their insurers, but also will face inevitable demands from their insurers that they contribute to settlement. Those same insureds routinely see those demands in virtually every large commercial case that even remotely involves the possibility of a "coverage issue." Now, insurers out to find any deep pocket they can to contribute to a settlement, ***including*** their own insured, have another means to extract such a settlement contribution – implied consent to reimbursement.

In a legal sense, such results are contrary to the traditional protections previously afforded Texas insureds under the *Stowers, Griffin, Gandy* and *Matagorda County* cases. They cannot be squared with Texas insurance law. Perhaps this is the reason that only a bare majority of the justices on this Court joined in the majority opinion.

The Court's opinion is simply bad for business in Texas. By filing this brief, Amici Curiae are not seeking to force insurers to provide coverage for otherwise questionable claims through coercive settlements. These cases arise on a regular and frequent basis, and this Court should decide this issue based on the commercial realities faced by Texas insureds. Therefore, Amici Curiae ask this Court to reconsider its opinion so that determinations of non-coverage can be made in an orderly fashion and after careful consideration. The proper time for such determinations is at an earlier stage, prior to the pressures of trial, rather than afterwards in seemingly never-ending coverage litigation spawned by the claim against the insured. Implying consent to reimbursement through the actions of the insured during settlement negotiations does not accomplish this purpose. In fact, if the coverage situation is resolved prior to trial of the underlying lawsuit, it is likely that more cases can be settled due to the lack of coverage of the insured defendant, coverage that in many instances is the only means whereby a judgment can be satisfied. Such a result is fair for insureds and insurers alike, and ultimately, is good for business in Texas.

SUMMARY OF THE ARGUMENT

Amici Curiae are representative of both large and small businesses whose operations are insured in Texas and are governed by Texas law. As such, they share the concerns of Texas commercial and industrial insureds over the potential scope of the Court's opinion that is the subject of the pending motion for rehearing. By upholding an insurer's right to reimbursement under the circumstances of this case, the Court has significantly altered the already uneasy dynamic that exists among the insurer, the

insured and its defense counsel in attempting to mediate and settle litigation against the insured where insurance coverage issues exist. As a result, considerable uncertainty has been shifted from the insurer to the insured.

Under longstanding practice in Texas under the *Stowers* doctrine, it was the insurer that bore the uncertainty as to a possible excess judgment in the event a lawsuit was not settled pursuant to a reasonable demand within the limits. Now, the Court's reasoning in *Frank's Casing* shifts considerable uncertainty to the insured where an insured's actions can be interpreted as implied consent to after-the-fact reimbursement. This new level of uncertainty arises from the subsequent coverage litigation and the ultimate determination of an obligation to reimburse its insurer, all of which does not occur until the heat of trial, or even after the settlement of the underlying lawsuit against the insured. It is not until then that the insured's ultimate liability – to its insurer, rather than the underlying plaintiff – will be decided in what amounts to a *de facto* subrogation suit by the insurer against its own insured. Such a suit is universally prohibited under the laws of most states, including Texas.

The potential for unwarranted contributions to settlements is of concern not only to large insureds, but also to smaller businesses and individual insureds, where the effect is equally, if not more, devastating. In order to protect themselves from a judgment against them by their insurer, insureds will be required to hire their own coverage counsel and litigation will drag on well beyond the settlement of the underlying lawsuit, none of which was bargained for by the insured when purchasing its policy protection from the insurer.

The court finds support for its result in vacuous California precedent that, based on principles not heretofore found in Texas law, directs the parties to ignore issues as to insurance coverage in the evaluation of the reasonableness of a *Stowers* demand. In contrast, such issues were of paramount concern in *Texas Ass'n of Counties County Gov't Risk Mgmt. Risk Pool v. Matagorda County,* 52 S.W.3d 128 (Tex. 2000). There, this Court previously set out a bright line test as to the circumstances under which reimbursement will be allowed: ***only*** where the insured gives its clear and unequivocal consent to both the settlement ***and*** the reimbursement. The potential for conflicts and coercion by the insurer rendered any consent short of an unequivocal agreement by the insured insufficient to overcome these concerns and support the right of reimbursement. Less than five years ago, these considerations were compelling to this Court in *Matagorda County.* They are every bit as compelling today so that the relief sought by Frank's should be granted.

ARGUMENT AND AUTHORITIES

I. EXISTING TEXAS LAW DOES NOT ALLOW AN INSURER TO SEEK REIMBURSEMENT OF A SETTLEMENT IN THE ABSENCE OF EXPRESS CONSENT FROM ITS INSURED

A liability insurer's duties and responsibilities toward its insured have always been recognized and scrupulously enforced by Texas courts. Beginning with *G. A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved), this Court imposed the duty upon an insurer to exercise reasonable care in responding to settlement demands within policy limits. Less than five years ago, in *Matagorda County*, this Court further held that an insured cannot seek reimbursement for

a settlement of non-covered claims from its insured in the absence of express agreement to the settlement and the insurer's right to seek that reimbursement. The Court's opinion in this case runs counter to that long line of cases and drastically modifies the dynamics of settlements involving non-covered claims. Unfortunately, this modification is accomplished at the expense of Texas insureds.

A. The Court's Opinion Upsets the Dynamics of the *Stowers* Relationship Under Texas Law

Essentially, the Court has created a mechanism for an insurer to file a *de facto* subrogation lawsuit against its own insured, contrary to the law of Texas and nearly every other jurisdiction. *Matagorda County*, 52 S.W.3d at 134. Subrogation against the insured by its own insurer may occur under the guise of reimbursement, particularly due to the vague circumstances set out by the Court in its opinion under which implied consent to reimbursement will be found. Such *de facto* subrogation is obviously a major concern to Texas insureds with substantial assets who nevertheless paid significant premiums to their insurers to transfer the risk of such a claim to the insurance company, rather than retaining it.

1. Insurance Coverage Issues Drive the Settlement Process

The Court's opinion strikes at the heart of the *Stowers* doctrine, i.e., the evaluation of the reasonableness of the plaintiff's settlement demand. Despite the fact that the complex issues that arise in a case such as this one stem from and arise out of issues relating to coverage for the allegations made against the insured in the underlying lawsuit, the Court inexplicably states that issues as to insurance coverage should play no

role in a determination of the reasonableness of a settlement demand. This aspect of the case is nothing short of contrary to both Texas law and certainly the practice of insurers, insureds, defense counsel and plaintiff's counsel alike in evaluating and making a *Stowers* demand. In other words, it ignores reality.

At some point in the negotiations, insurance coverage invariably must be considered despite the Court's vision of a pristine determination of reasonableness divorced from the realities of insurance coverage. As early as in the reservation of rights letter, where the insurer agrees to defend, but nevertheless sets out the policy provisions pursuant to which coverage may eventually be denied, coverage is interjected into the mix. The more complex the case, usually the more complex the reservation of rights, and in many large claims, the insurers in Texas attempt to make a unilateral reservation of the right to seek reimbursement. Now, with the possibility of fabricating implied consent to that reimbursement, insurers are sure to include such a provision in the reservation of rights letter as to every claim, large or small, in the hope that an insured will impliedly consent to it.

Both insurers and insureds use the existence of an insurance coverage issue to lower the value of the plaintiff's claim. Many settlement negotiations reach a turning point when the plaintiff is convinced that the defendant's insurance policy just might not cover the contemplated judgment, particularly where the insured lacks sufficient assets and a liability policy is the only hope to satisfy a judgment. In fact, many mediations and settlements of lawsuits against Texas insureds involve not only the underlying claim, but also include a companion mediation and settlement negotiation relating to coverage,

particularly in construction defect, toxic tort and other complex claims. Insurers and insureds address uncovered claims in settlement on an everyday basis by reducing settlement offers to take account of the uncovered portions of claims. They also refuse settlement offers that include non-covered claims, evaluating reasonableness based solely on the portions that are covered.

This Court in *Matagorda County* focused on the advantages for the insurer and the potential for abuse of the insured in extracting an implied consent to reimbursement. At the same time, the *Stowers* Doctrine, as applied by Texas courts, takes into consideration the fact that insurers everyday settle questionable claims against their insureds in order to fulfill their *Stowers* duty and to protect themselves from future liability for refusing a reasonable settlement offer should the claim later be determined to have been covered.

In the face of the standard practices of Texas insurers in addressing *Stowers* demands, the Court in its opinion relied upon California precedent, *Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal.4th 489, 22 P.3d 313 (2001) for the opposite proposition, that coverage issues are not considered in the determination of the reasonableness of a settlement demand against an insured. This unduly restrictive view of reasonableness borrowed from California simply does not comport with Texas practice or common sense. Even the Court could not escape references to coverage in its discussion of reasonableness by conceding that "even when a claim is covered," an insurer has no duty to accept a settlement offer within policy limits unless an ordinarily prudent person would accept it. Slip op. at 8, citing *Stowers*, 15 S.W.2d at 547. Nevertheless, the Court goes on to

conclude that if an offer is one that a reasonable insurer should accept, it is also one that a reasonable insured should accept if there is no coverage. Slip op. at 10. This statement is difficult to explain, let alone justify, due to the divergent interests of the insurer and the insured, particularly where coverage is an issue.

Of paramount concern to the insured in this scenario is another type of "excess judgment," that is, an uninsured judgment in excess of its own assets. An insurer, now armed with the implied consent sanctioned by the Court's opinion, upon demand of its insured to settle (and in the process to protect the insured's limited assets), will pursue reimbursement in subsequent coverage litigation. As a result, the plaintiff will not drive the insured out of business, but its own insurer may do so by seeking reimbursement. Due to the de-emphasis upon the early resolution of the coverage dispute, the insured is placed at considerably more peril when it is forced to consent to reimbursement in the heat of trial.

Consideration of the special relationship between an insurer and its insured, for all intents and purposes, has been forsaken by the Court in favor of settling the claims of plaintiffs, regardless of whether the claim is paid by the insurer, or in reality, by the insured in a *de facto* subrogation action. This state of affairs ignores the reality that the existence of insurance coverage drives many lawsuits filed against Texas businesses and individuals.

Insurers and insureds alike have functioned within the *Stowers* framework without the imposition of an implied consent to reimbursement for many decades, with deserving plaintiffs recovering to the extent of available insurance coverage. There is no reason to

defeat the function of an insurance policy as a device to spread risk by transforming it into a financial instrument entitling the insurer to indemnity or reimbursement for paid claims for which the insured has paid substantial premiums. This is especially true where most liability policies provide little guidance on the issue of settlement.

2. The Court's Opinion Muddies *Stowers P*rocedures

The *Stowers* Doctrine and the basic concept of excess liability for an insurer due to its failure to settle a covered claim in response to a demand within policy limits is a cornerstone of Texas insurance law. The Court's opinion may create confusion as to the mechanics and application of the *Stowers* Doctrine. The Court, in its discussion of the settlement negotiations among Frank's, ARCO and the Underwriters, indicated it was Frank's that "Stowerized" the Underwriters by communicating ARCO's $7.5 million demand to Underwriters accompanied by Frank's own demand that the Underwriters accept it. Slip op. at 4. Moreover, the Court also stated that Frank's itself "Stowerized" the Underwriters by demanding that the Underwriters settle consistent with its *Stowers* duty. Slip op. at 8-9.

In contrast, under prior formulations of the *Stowers* Doctrine, an insurer is "Stowerized," or subject to potential excess liability, through the settlement demand of the plaintiff in the underlying lawsuit, not by the actions of the insured. This Court has stated:

> The *Stowers* duty is not activated by a settlement demand unless three prerequisites are met: (1) the claim against the insured is within the scope of coverage, (2) the demand is within the policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it,

> considering the likelihood and degree of the insured's potential exposure to an excess judgment.

American Physicians Ins. Exch. v. Garcia, 876 S.W.2d at 849.

As written, the Court's opinion places the insured between a rock and a hard place. It implies that the "Stowerization" of the insurer occurs upon a demand by the insured that the case be settled. Inexplicably, that same demand, according to the Court, can be used against the insured to demonstrate an implied consent to reimbursement. Such a state of affairs constitutes a dramatic departure from current *Stowers* practices where it is the demand of the plaintiff in the Underlying Lawsuit that triggers the *Stowers* duty of the insurer, and, with or without the input of the insured, the insurer must evaluate the reasonableness of the plaintiff's demand.

B. The Court's Opinion Fosters New Conflicts Within the Tripartite Relation Between the Insured, Defense Counsel and the Insurer

The awkward and uneasy position of insurance defense counsel in the tripartite relationship has always been recognized under Texas law. Nevertheless, the defense counsel's responsibility and loyalty is owed to the insured. *Employers Cas. Co. v. Tilly*, 496 S.W.2d 552 (Tex. 1973); *State Farm Mut. Automobile Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998). Defense counsel has historically been "caught in the middle," but nevertheless serves as a primary source of information for the insurer in evaluating the reasonableness of a settlement demand from the plaintiff. In that instance, defense counsel is usually instrumental in advising his or her client, the insured, as to the reasonableness of the settlement and whether to demand that the insurer settle.

According to the Court's opinion, the implied right of reimbursement arises when an insured demands that its insurer accept a settlement offer that is within policy limits. In view of the potential after-the-fact liability for the client—the insured—arising out of subsequent litigation over coverage and the right to reimbursement, it will not be surprising that defense counsel will be hesitant to perform such an evaluation. Likewise, the insured and its own counsel may be hesitant to make a demand upon the insurer to settle in light of the possibility that such a demand will be regarded as an implied consent to reimbursement. Thus, insurers will be left to evaluate the reasonableness of a settlement in a vacuum, without the input of those most intimately involved in the litigation, the insured and its defense counsel. Uninformed acceptance or rejection of settlements will benefit no one—neither the insurer nor a Texas insured. Silence in the face of a *Stowers* demand from the plaintiff is much more likely in the case of insureds with substantial assets, the insureds that are more likely to be involved in the handling of the underlying litigation, and thus, in the best position to provide input into the settlement determination.

Another potential source of conflict for defense counsel is the use of the threat of reimbursement at mediation and later during subsequent settlement negotiations if the case does not settle at mediation. It is quite likely that such a threat could be used to extract a settlement contribution as a matter of course from an uninformed insured even where the insurer has no ultimate intention to litigate coverage in a subsequent coverage action. Likewise, insurers will undoubtedly rely on the threat of future reimbursement to coerce an agreement from their insureds to contribute to the costs of defense based upon

the presence of purported allegations against their insureds in underlying lawsuits. Such a situation leaves defense counsel in a precarious position, vis-à-vis the interest of the insured client versus the insurer's adjuster. Again, many of these issues can be avoided by the timely filing of a declaratory judgment action in the event the insurer is serious about contesting coverage for the claim.

C. The Court's Opinion Upsets the Dynamics Between the Insured and its Insurer in Matters of Settlement and Coverage Evaluation

As previously discussed, implying the consent of the insured to reimbursement under the circumstances set out in the Court's opinion radically upset the dynamics that have developed over time as to the settlement of claims involving questionable insurance coverage. The upset and departure from these dynamics runs counter to the interests of Texas insureds.

1. The Ultimate Burden is Now on the Insured to Evaluate Reasonableness of the *Stowers* Demand

The Court's opinion interjects additional and unnecessary uncertainty into the determination to settle a claim for which coverage issues exist. Unfortunately, those uncertainties have, for the most part, been transferred from the insurer to the insured, a party less equipped to make that evaluation, as set out by this Court in *Matagorda County*, 52 S.W.3d at 135. Since this Court's holding in *Stowers*, the burden has been placed upon the insurer to determine the reasonableness of a settlement within its limits and to evaluate coverage. It is the insurer that bears the risk of negligent failure to settle a covered claim, with its damages including not only those assessed within the limits of its policy, but also in excess of its limits.

Whether intentionally or not, it is now the insured that bears the burden to evaluate the reasonableness of a settlement and the availability of coverage where the insurer insists on reimbursement. In transferring that burden to the insured, the Court significantly weakened the constraints placed upon an insurer by *Stowers* when settling a lawsuit filed against its insured. Those constraints were reiterated by the Court in *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994), in that the insurer is to decide whether the terms of the settlement demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. In *Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656, 659 (Tex. 1987), the Court further held that an insurer's duty to its insured extends to the full range of an agency relationship, including investigation, preparation for defense of a lawsuit and trial of the case in addition to reasonable attempts to settle.

In contrast to this long line of cases, the Court's opinion has the potential to severely weaken that protection. Now, it is the insured that will face the ultimate liability arising out of the settlement of claims for which coverage is questionable. Rather than the insurer taking those same coverage issues into account in its evaluation as a prudent insurer, the insured will be forced to evaluate those same coverage issues as part of its determination of whether to demand that its insurer accept a settlement offer or agree that the settlement offer should be accepted, thereby implying consent to reimbursement. Placing the insured in this position, whether it be a large commercial entity or an individual insured, lacks justification in the prior case law, particularly under the Court's

careful analysis in *Matagorda County*. That analysis resulted in a clear and unequivocal rejection of implied consent to reimbursement unless the insured clearly and unequivocally consents to the settlement and the insurer's right to seek it.

2. The Departure From the *Stowers* Line of Cases is Unwarranted and Places Texas Insureds at Risk

In its opinion, this Court offered no substantial justification to depart from the *Stowers* line of cases at the expense of Texas insureds. For example, the Court states that reimbursement rights encourage insurers to settle cases even when coverage is in doubt, inuring to the benefit of injured third parties. In addition, when an insurer settles a claim for which coverage is in doubt, the risk that the insured lacks the resources to fund a settlement is shifted to the insurer and is lifted from the injured plaintiff who sued the insured. Slip op. at 11. On the surface, it may appear that where an insurer is entitled to seek reimbursement from its insured, that it may be amenable to settling more claims for the benefit of injured parties. However, the basic assumption behind this rationale cannot survive scrutiny. Settlement by an insurer of a claim with a right to seek reimbursement from its insured does not transfer the risk that the insured will lack assets from the injured plaintiff to the insurer. Rather, it simply transfers that risk from the insurer back to the insured in the form of a coverage lawsuit filed against it by its own insurer.

While this Court found some salutary effect in the payment of injured plaintiffs, frequently, lawsuits for which there is questionable insurance coverage may also involve questionable causes of action seeking questionable damages. Under prior practice, all of these considerations went into the determination by the insurer whether to settle within

limits. Now, insureds will be hesitant to provide any input into the settlement determination, lest their actions be viewed as implied consent to reimbursement transferring all risk back to them, a state of affairs clearly outside the contemplation of most Texas insureds when they purchase liability coverage.

3. Prompt Resolution of Coverage Disputes is Now Discouraged

Perhaps the dynamic of prior practice that will suffer the most under the Court's opinion is the principle announced by this Court in *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1995), that the insurer should undertake a good faith effort to adjudicate coverage issues prior to the adjudication of the underlying lawsuit. Moreover, in *Farmers Texas County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997), the Court further held that the duty to indemnify is justiciable before the insured's liability is determined in the underlying lawsuit, where the insurer has no duty to defend and the same reasons that negate the duty to defend likewise negate any possibility that the insurer will ever have a duty to indemnify. The duty to indemnify includes settlement of claims against the insured.

This Court, through the encouragement of early resolution of coverage issues prior to trial of the underlying lawsuit set out a mechanism to avoid precisely the problem that arises from permitting insurers to seek reimbursement, that is delaying until the eleventh hour and extracting of an agreement to reimburse from the insured. Such an agreement will be easier to obtain during the heat of trial and the looming possibility of an uncovered judgment against the insured. The twin mechanisms of the *Stowers* doctrine and a timely declaratory judgment action to determine coverage significantly reduce the

possibility of an insurer being able to strong arm its insured into agreeing to reimbursement, particularly insureds with the financial wherewithal to fund reimbursement.

D. The Court's Opinion Will Result in an Increase of After-the-Fact Coverage Litigation

Under the *Gandy/Griffin* line of cases, an insurer is obligated to undertake a good faith effort to resolve coverage disputes at early stages of the proceedings. It goes without saying that the Court's opinion will most likely result in a tendency on the part of insurers to hold off on such suits in the hopes of obtaining reimbursement from their insureds for questionable claims, especially where the insured is solvent and has assets. Once again, as this Court in *Matagorda County* observed, this scenario creates an advantage for an insurer in extracting consent to reimbursement.

Protracted coverage litigation will likely result from the Court's opinion. As was the case here, insurers, having not addressed coverage adequately, will file coverage suits against their insured and those suits will drag on long after the underlying claim is resolved. An overall increase in coverage litigation is foreseeable, resulting in an insured having to hire its own coverage counsel in connection with many of those claims. The necessity to retain their own coverage counsel is often a shock for smaller unsophisticated insureds that believed they were purchasing "litigation insurance" and a defense from their insurer when they purchased their liability policy. There is no entitlement to defense counsel from the insurer when the insurer files a *de facto* subrogation lawsuit against its own insured in an attempt to obtain reimbursement.

As a result, settlement of the underlying lawsuit will no longer put an end to litigation and judicial finality is sacrificed. For smaller individual insureds, the emotional drain of litigation will continue, and for larger insureds, the drain on the business in terms of personnel and money, will correspondingly continue. Since the duty to indemnify is based on the actual facts surrounding the claim, the coverage suit will likely, in effect, amount to a trial of the underlying lawsuit in order to decide the issues that impact on the insurer's duty to indemnify. All of these effects are contrary to the legitimate reasons why insureds purchase insurance, that is the transfer of the risks of litigation to a third party insurer in exchange for their premiums.

E. Texas Law Recognizes the Superior Position of the Insurer Vis-à-vis its Insured in Matters of Settlement and Coverage Evaluation

Liability insurance policies do not provide for a right of reimbursement for settlement of claims outside the coverage of the policy. The policy before the Court in this appeal does not contain such a provision. Absent such a provision, this Court held that a right of reimbursement cannot be unilaterally created in a reservation of rights letter and that the policy contract cannot be amended in that manner. *Matagorda County*, 52 S.W.3d at 132. In rejecting such a unilateral reservation of the right to seek reimbursement, this Court held that only where there is a separate agreement with the insured is an insurer allowed to settle and then seek reimbursement.

The principle underlying this Court's rejection of a unilateral right to seek reimbursement, or the finding of an implied consent to such reimbursement, is the fact that an insurer is in a best position to assess both the pros and cons of settling, as well as

to bear the risk of settlement of a non-covered claim. Placing the risk upon 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. *Matagorda County*, 52 S.W.3d at 135. Nevertheless, where one party to a transaction enjoys an advantage, there is always the danger of overreaching. This Court perceived the danger that sanctioning a unilateral reservation of the right to reimbursement by insurers could lead to the extraction or coercion of reimbursement arrangements from their insureds.

As with anything, exerting such an advantage is often a matter of timing, and the insurer's attempted reservation of the right to reimbursement through the insured's purported implied consent are often sought shortly before, or even during trial, as was the case in *Frank's Casing*. Alternatively, in some cases, an insurer may see an advantage to settling a claim earlier in the proceeding in order to avoid paying the considerable costs of continuing to fund the defense of a complex claim against its insured. In such a situation, the insurer may be tempted to make a larger settlement with the prospect of obtaining reimbursement from its own insured. An insured facing a potentially devastating loss may be placed in the unenviable position of choosing whether to potentially hand the keys to its business to the plaintiff if it continues to litigate, or to its own insurer in the event it consents to settlement and a right of reimbursement.

PRAYER

Amici Curiae, Shell Oil Company, Motiva Enterprises LLC, Burlington Resources, Inc., Temple-Inland Inc. and Brad Fish, Inc., request that the Court grant the Motion for Rehearing of Respondent, Frank's Casing Crew & Rental Tools, Inc., vacate its opinion of May 27, 2005, and affirm the judgments of the court of appeals and the trial court, or in the alternative, remand the case to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Brief of Amici Curiae Shell Oil Company, Motiva Enterprises LLC, Burlington Resources Inc., Temple-Inland Inc., and Brad Fish, Inc. has been served upon the following counsel certified mail, return receipt requested, on the ____ day of September, 2005.

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