No. 02-0730

In the

Supreme Court of Texas

EXCESS UNDERWRITERS AT LLOYD'S, LONDON ET AL.,
Petitioners,

v.

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

On Petition for Review from the
Court of Appeals for the Fourteenth District of Texas

AMICUS CURIAE BRIEF OF PILCO, INC.
IN SUPPORT OF
RESPONDENT'S MOTION FOR REHEARING

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STATEMENT OF AMICUS CURIAE'S INTEREST

This brief is tendered by Pilco, Inc. in support of Respondent, Frank's Casing Crew & Rental Tools, Inc.'s Motion for Rehearing. Pilco, Inc. is not a party to this case and does not have a direct economic interest in the outcome of this case. The fees and expenses incurred in preparing this brief were paid by Pilco, Inc.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

In *Texas Ass'n of Counties v. Matagorda County*,[1] this Court held that an insurer, Texas Association of Counties County Government Risk Management Pool ("TAC"), could not obtain reimbursement from its insured, Matagorda County, for money TAC paid to settle a claim that was later determined to be excluded from coverage under the insurance contract between TAC and Matagorda County.[2] The decision was based on the fact that TAC did not have a right of reimbursement under the insurance contract and did not establish either an implied-in-fact or an implied-in-law right to reimbursement.[3]

[1] 52 S.W.3d 128 (Tex. 2000).

[2] *Id.* at 129.

[3] *Id.* at 129.

Now, four and one-half years later, this Court has effectively overruled *Matagorda County* by holding in *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*[4] either that the insured, Frank's, is estopped to deny the right to reimbursement demanded by the excess insurers, or that there is a right to reimbursement implied in the law (*i.e.*, a quasi-contract) whenever an insured sends a *Stowers*[5] letter to its insurer. This decision is troublesome, both legally and as a matter of policy.

The excess insurers in this case did not include a reimbursement clause in their insurance contract. That omission, however, did not stop them from demanding reimbursement from their insured. This Court has held that it was appropriate for the excess insurers to force their insured decide, while the insured was in trial in the underlying case, whether it would fund part of the settlement of the underlying case or risk losing subsequent coverage litigation and having to pay the entire settlement. The insured proceeded through the underlying case knowing that its contract with the excess insurers did not provide for reimbursement and that the excess insurers had the duty to either pay the settlement or establish that the policy did not provide coverage before paying the settlement. In other words, it adjusted its behavior based on a written contract, only to find out later that the contract contains a judicially-imposed, self-actuating provision favoring its insurance company.

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[4] 2005 WL 1252321, 48 Tex. Sup. Ct. J. 735 (Tex. May 27, 2005).

[5] *G.A. Stowers Furniture Co. v. American Indemn. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, opinion approved).

The extra-contractual right[6] favoring the insurer that this Court has now created is not supported under either an estoppel theory or a quasi-contract theory. And as a result of the creation of this new right, Texas' insureds will be placed at a serious disadvantage. If a person seeking insurance wishes to contract with the insurance company for the insurance company to have a right of reimbursement, the parties may do so, and the cost associated with the reimbursement right will be negotiated accordingly. But if insurance companies are granted this right as a matter of law, the parties' litigation strategy will evolve as follows. The insurer will attempt to settle claims at the earliest possible time, with little regard for the insured's liability, to minimize their litigation costs. The insured then will be compelled to acquiesce to a settlement of the underlying case without knowing whether the claim is covered. The insurance company then will sue their insured for reimbursement of monies paid out in the settlement. The insured left with a second round of litigation regarding the scenario it paid insurance premiums to cover in the first place. The *Excess Underwriters* decision will turn the finality and security of having insurance that many small to mid-sized Texas' companies rely upon into a false trapdoor of further litigation and liability. This decision is not good for business in Texas, unless you are in the insurance business.

This decision is not supportable under either an estoppel theory or a quasi-contract theory and it unfairly allocates risk between insurers and their insureds. This Court, therefore, should rehear *Excess Underwriters*, withdraw its May 27, 2005 opinion, and

[6] *See Matagorda County*, 52 S.W.3d at 132 (referring to TAC's attempt to create a reimbursement right as an attempt to "impose ... extracontractual obligations upon an insured ...").

hand down a new opinion following and applying its prior decision in *Matagorda County*, which correctly applies the law and fairly allocates risk between insurers and their insureds.

I.

In both *Excess Underwriters* and *Matagorda County*—

- the insured was sued and demanded coverage from its insurer;
- the insurer asserted that the claims in the underlying litigation were not covered by the policy in question;
- the insurer participated in the underlying litigation after giving the insured a reservation-of-rights letter;
- the plaintiff in the underlying litigation made a settlement demand within policy limits;
- the insured sent a *Stowers* letter to the insurer;
- the insured refused the insurer's demand to fund any part of the settlement;
- the insurer informed the insured that it intended to seek reimbursement and filed a declaratory judgment action against the insured before paying the settlement;
- the insurer paid the settlement;
- the insurance policy did not provide for a right of reimbursement;
- the insured never agreed to reimburse the insurer; and
- the insurer and insured agreed that the settlement was reasonable.[7]

Excess Underwriters and *Matagorda County* are distinct in four respects. First, the insurer in *Matagorda County* was the primary insurer while the insurer in *Excess*

[7] *Excess Underwriters*, 2005 WL 1252321 at * 1-2; *Matagorda County*, 52 S.W.3d at 129-30.

Underwriters was the excess insurer.[8] Second, the insurance company in *Matagorda County* had a right to settle without the insured's consent, while the insurer in *Excess Underwriters* did not.[9] Third, the insured in *Excess Underwriters* demanded that the insurer pay the settlement while the insured in *Matagorda County* "*Stower*ized" the insurer, but did not specifically demand the insurer pay the settlement.[10] Fourth, the insured in *Excess Underwriters* signed a settlement agreement in the underlying case providing that the insurer was preserving "any claims that exist presently" between the insurer and insured while the insured in *Matagorda County* did not sign the settlement agreement.[11] These distinctions, however, make no difference to the application of the law of quasi-contract and estoppel to the facts.

II.

A.

In *Matagorda County*, the Court analyzed the insured's quest for a reimbursement right under the rubric of determining whether the insurer, TAC, could demonstrate either an implied-in-fact or an implied-in-law contract.[12] For there to be an implied-in-fact contract, TAC had to demonstrate that its insured, Matagorda County, consented to its

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[8] *Excess Underwriters*, 2005 WL 1252321 at * 1.

[9] *Excess Underwriters*, 2005 WL 1252321 at * 3.

[10] *Excess Underwriters*, 2005 WL 1252321 at * 3.

[11] *Excess Underwriters*, 2005 WL 1252321 at * 2.

[12] *Matagorda County*, 52 S.W.3d at 131-35.

claim to a reimbursement right. ***"[A] meeting of the minds is an essential element of an implied-in-fact contract"***[13]

In *Matagorda County*, this Court held that TAC's reservation-of-rights letter, standing alone, could not create an implied-in-fact contract because the unilateral act of sending a reservation-of-rights letter could not reserve or create rights that did not exist in the contract.[14] On this point, *Matagorda County* and *Excess Underwriters* cannot be distinguished. Neither the primary insurer in *Matagorda County* nor the excess insurers in *Excess Underwriters* can create an implied-in-fact contract by sending a reservation-of-rights letter absent an express reimbursement right in the contract.

The insurer in *Matagorda County* argued that an implied-in-fact contract was created by the insured's silence in response to the reservation-of-rights letter.[15] This Court rejected that argument because "silence and inaction will not be construed as an assent to an offer."[16] Again, without the insured's acceptance of the insurer's offer to create a reimbursement right (a meeting of the minds), a reimbursement right cannot be implied in fact. It is even clearer that that there was no agreement for a reimbursement right in *Excess Underwriters* because the insured, Frank's, specifically rejected the insurer's offer to create that right.[17] In other words, the insured in *Excess Underwriters*

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[13] *Id.* at 133 (citing *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972).

[14] *Id.* at 131-32.

[15] *Id.* at 132.

[16] *Id.*

[17] *Excess Underwriters*, 2005 WL 1252321 at * 1.

specifically rejected the same offer the insured in *Matagorda County* rejected by silence. Either way, the offer was not accepted, thus eliminating an implied-in-fact contract.

Furthermore, an insured's agreement that a settlement is reasonable does not create an implied-in-fact reimbursement right because it "does not imply that [the insured] agreed to reimburse [the insurer] should [the insurer] decide to accept the settlement and then later prevail on its coverage defense."[18] Again, *Matagorda County* and *Excess Underwriters* cannot be distinguished on this point. In *Excess Underwriters*, the insured informed the insurer that the insured considered the settlement to be reasonable while, at the same time, disputing the insurer's claim to a reimbursement right.[19] Thus, the insured's position that the settlement was reasonable in *Excess Underwriters* put the insurer no closer to a meeting of the minds with its insured than did the insured's agreement as to reasonableness in *Matagorda County*.

In sum, there is no implied-in-fact contract between Frank's and the excess insurers because an implied-in-fact contract requires a meeting of the minds and there was never a meeting of the minds between Frank's and the excess insurers.

B.

The insurer in *Matagorda County* was no more successful in showing an implied-in-law contract that it was in showing an implied-in-fact contract. The insurer "argue[d] that it [was] entitled to recover under the intertwined quasi-contractual theories of

[18] *Matagorda County*, 52 S.W.3d at 133.

[19] *Excess Underwriters*, 2005 WL 1252321 at * 1.

quantum meruit and unjust enrichment."[20] This Court rejected the argument, holding that "when coverage is disputed and the insurer is presented with a reasonable settlement demand within policy limits, the insurer may fund the settlement and seek reimbursement only if it obtains the insured's clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement."[21] Unfortunately, *Matagorda County's* analysis of implied-in-law contracts (quasi-contracts) is somewhat truncated. A further analysis is necessary and demonstrates why the insurers in *Excess Underwriters* should not have prevailed on a quasi-contract theory.

As this Court suggests in *Excess Underwriters*, the concepts of quasi-contract and implied-in-law contracts are synonymous.[22] A quasi-contract is distinguishable from a true contract because a quasi-contract is a legal fiction. It is an obligation imposed by law regardless of any actual agreement between the parties.[23] A related group of equitable theories—including unjust enrichment[24] and *quantum meruit*[25]—constitute the universe of quasi-contracts.

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[20] *Matagorda County*, 52 S.W.3d at 134.

[21] *Id.* at 135.

[22] *See Excess Underwriters*, 2005 WL 11252321 at *5 ("In cases such as the one present before us, an agreement to reimburse an insurer is implied in law. It is a quasi contract.") (footnotes omitted); *see also Ferrous Prod. Co. v. Gulf States Trading Co.*, 332 S.W.2d 310, 312 (Tex. 1960) (stating that contracts implied in law are more properly called quasi or constructive contracts, citing 17 C.J.S. Contracts § 6); *Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 386 (Tex. App.—Fort Worth, 2003, pet denied) (equating contracts implied in law and quasi contracts); *Ramirez Co. v. Housing Auth. of City of Houston*, 777 S.W.2d 167, 173 n. 12 (Tex. App.—Houston [14th Dist.] 1989, no writ) (same).

[23] *Fraud-Tech*, 102 S.W.3d at 386; *see also Ramirez*, 777 S.W.2d at 173 n. 12 ("an implied in law contract, or quasi-contract[,] ... is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity ...").

[24] *See, e.g., First Union Nat'l Bank v. Richmont Capital Partners I, L.P.*, --- S.W.3d ---, 2005 WL 1799326, *11 (Tex. App.—Dallas, Aug. 1, 2005, no pet. h.) ("Unjust enrichment claims are based on quasi-contract ..."); *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App.—Corpus Christi 2002, pet. denied) ("[unjust enrichment] can be applied where there is a failure to make restitution of benefits received under circumstances which give rise to an

Dozens of Texas appellate court opinions state that a party cannot recover under a quasi-contract theory (including an unjust enrichment or *quantum meruit* theory) if an express contract exists.[26] For this proposition, most courts rely on this Court's opinion in *Fortune Production Co. v. Conoco, Inc.*,[27] in which this Court states:

> Generally speaking, when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory .... That is because parties should be bound by their express agreements. When a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement.[28]

Additionally, because quasi-contract is an equitable doctrine, it is available when the opposing party has done something inequitable.[29] Again, literally dozens of opinions state that the quasi-contract theory of unjust enrichment is available only if the other

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implied or quasi-contractual obligation to repay ..."); *LaChance v. Hollenbeck*, 695 S.W.2d 618, 620 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (unjust enrichment belongs to the measure of damages known as quasi-contract or restitution).

[25] *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) ("*Quantum meruit* is an equitable remedy that is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.") (internal quotations and citations omitted).

[26] *See, e.g., Id.* ("A party generally cannot recover under *quantum meruit* when there is a valid contract covering the services or materials furnished."); *First Union*, 2005 WL 1799326 at *11 ("Unjust enrichment claims are based on quasi-contract and are predicated on the absence of an express contract controlling the circumstances."); *Atlantic Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 227 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) ("unjust enrichment claims are predicated on the absence of an express contract controlling the circumstances.") (internal quotations and citations omitted); *R. Conrad Moore & Associates, Inc. v. Lerma*, 946 S.W.2d 90, 96 (Tex. App.—El Paso 1997, writ denied) ("The unjust enrichment doctrine applies the principles of restitution to disputes which for one reason or another are not governed by a contract between the contending parties.")

[27] 52 S.W.3d 671 (Tex. 2000).

[28] *Id.* at 683.

[29] *See, Hubbard v. Shankle*, 138 S.W.3d 474, 487 (Tex. App.—Fort Worth 2004, pet. denied) (The equitable doctrines of unjust enrichment and quasi-contract allow for recovery of damages to prevent a party from obtaining a benefit from another by fraud, duress, unjust enrichment, or because of an undue advantage).

party has obtained a benefit by fraud, duress, or the taking of an undue advantage.[30] Furthermore, dozens of opinions note that unjust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall.[31]

In other words, based on this Court's holding in *Fortune Production* and other cases, and on the opinions of dozens of lower courts, a quasi-contract theory is not available to the excess insurers in this case. It is not available because the excess insurers' relationship with Frank's is governed by an express contract and recovery under an equitable theory is inconsistent with the express agreement between the parties. Furthermore, Frank's has done nothing inequitable, as is required to give rise to an equitable remedy. It did not commit fraud, impose duress on the excess insurers, or take advantage of them in any way. Frank's did nothing more than attempt to live by the terms of its express contract with the excess insurers. This Court, in contravention of its prior opinions,[32] has used an equitable doctrine—quasi-contract—to give recompense to the excess insurers for no other reason than it deems enforcement of the express contract between Frank's and the excess insurers to result in a windfall to Frank's. This is an

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[30] *See, e.g., Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied); *Pinnacle Data Services, Inc. v. Gillen*, 104 S.W.3d 188, 195-96 (Tex. App.—Texarkana 2003, no pet.); *Academy Corp. v. Interior Buildout & Turnkey Const., Inc.*, 21 S.W.3d 732, 741 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

[31] *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998); *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 42 (Tex. 1992); *Academy Corp.*, 21 S.W.3d at 741; *Austin v. Duval*, 735 S.W.2d 647, 649 (Tex. App.—Austin 1987, writ denied).

[32] *See HECI Exploration*, 982 S.W.2d at 891; *Heldenfels Bros.*, 832 S.W.2d at 42.

inappropriate use of an equitable doctrine. It does not cure an inequity; it readjusts the parties' contractual rights and obligations.

C.

The opinion in *Excess Underwriters* suggests that it is based in part on an estoppel theory. The opinion, however, does not state which estoppel theory is being used. According to the opinion—

> When Frank's Casing "*Stower*ized" the excess underwriters, it could not thereafter take the inconsistent position that the settlement offer was reasonable if the insurer bore the cost of settling but unreasonable if the insured ultimately bore the cost. Once an insured asserts that a settlement offer has triggered a *Stowers* duty, and the insurer then accepts that settlement offer or a lower one, the insured is estopped from asserting that the settlement is too financially burdensome for the insured to bear if it turns out the claims against the insured are not covered.

As this Court has explained in the past, the doctrine of equitable estoppel requires: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations.[33] The *Excess Underwriters* opinion does not discuss any of these elements. Frankly, most of the elements do not apply. Frank's does not appear to have made a false representation to the excess insurers at the time of the settlement, and does not appear to have concealed material facts from the excess insurers. Frank's only representation—if it can be called that—was that it would *not* agree to the excess insurers' demands for reimbursement. Additionally, nothing suggests that the

[33] *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515-16 (Tex. 1998) (citing *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991).

excess insurers lacked knowledge or the means of obtaining knowledge of the true facts. Indeed, with regard to whether the policy provides coverage, the excess insurers probably were in a better position than was Frank's to have complete knowledge.[34] Furthermore, the excess insurers could not possibly have detrimentally relied on an alleged representation made by Frank's that it would agree to reimburse the excess underwriters for the settlement because Frank's made no such representation. In fact, Frank's consistently said that it would *not* reimburse the excess underwriters.

The statement that Frank's "could not thereafter take the inconsistent position that the settlement offer was reasonable if the insurer bore the cost of settling but unreasonable if the insured ultimately bore the cost" appears to be inaccurate. Frank's does not appear to have ever taken that position. Given that Frank's never took this "inconsistent position," this ground for estoppel is not applicable.

In sum, equitable estoppel requires inequitable conduct by the party to be estopped and a lack of knowledge by the disadvantaged party. Neither of these conditions exist here. Frank's does not appear to have done anything inequitable or inconsistent and did not have superior knowledge. Furthermore, the excess insurers could not possibly have relied on the purported inconsistent position taken by Frank's. Equitable estoppel, as recognized by this Court, does not provide a basis for creating an extra-contractual right in this case.

Alternatively, quasi-estoppel is an equitable doctrine that precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously

[34] *See Matagorda County*, 52 S.W.3d at 135.

taken.[35] The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.[36] The doctrine "essentially requires (1) a previous action and (2) a subsequent inconsistent action which is thereby sought to be estopped."[37] At least one court has noted that, "outside the statute of frauds context, quasi-estoppel has only been applied to bar a challenge to the validity of fully performed contracts."[38]

Again, Frank's has not asserted a right inconsistent with a position previously taken. As noted above, Frank's does not appear to have asserted that the settlement was reasonable if the excess insurers were required to pay it, but not reasonable if Frank's were required to pay it. It does not appear that Frank's took that position in its dealings with the excess underwriters at the time of the settlement or subsequently. Instead, it appears that Frank's took the position that the settlement was reasonable, the claim was covered, the excess insurers had an obligation to pay the claim, and the excess insurers did not have a right to reimbursement. Frank's actions have not been inconsistent and, consequently, the doctrine of quasi-estoppel does not apply either. Thus, there is not an estoppel doctrine that can support this Court's opinion in this case.

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[35] *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000).

[36] *Id.*

[37] *Mulvey v. Mobil Producing Texas and New Mexico Inc.*, 147 S.W.3d 594, 607 (Tex. App.—Corpus Christi 2004, pet. denied).

[38] *Parks v. Landfill Marketing Consultants, Inc.*, 2004 WL 1351545, *5 (Tex. App.—Houston [14th Dist.] June 17, 2004, pet. denied).

III.

This Court should be loath to create an extra-contractual duty, which, in reality, is an extra-contractual cause of action that can be brought by an insurer against its insured.[39] Furthermore, even if the application of a quasi-contract or estoppel theory were appropriate under the facts, it is inappropriate as a matter of policy. As this Court noted in *Matagorda County*, when coverage is questioned and there is no right of reimbursement in the parties' contract, either the insurer or the insured will be in a difficult position.[40] If *Matagorda County* is the law and a *Stowers* demand has been made, the insurer has three choices: deny coverage, settle the claim without hope of recovering the settlement amount from the insured, or refuse to settle and be exposed to the risk of having to pay a judgment in excess of the policy limits. If *Excess Underwriters* remains unchanged, the insurer is in a much better position because the insurer can pay a settlement and then litigate the coverage dispute with its insured, thus avoiding any chance of a judgment in excess of policy limits. It can "have its cake and eat it too."

Policy considerations dictate that the risk be placed on the party with the greatest ability to adjust its business to account for the risk—the insurer. As noted in *Matagorda County*, the insurer has a number of options. First, it can negotiate with its insured to have a right of reimbursement included in the contract. The insurer then will set its premium, and the insured will pay a premium, based on the existence of the right of

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[39] *See, e.g., Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988) (appending the extra-contractual duty of good faith and fair dealing onto insurance contracts).

[40] *See Texas Association of Counties v. Matagorda County*, 52 S.W.3d 128, 135 (Tex. 2000).

reimbursement. The insurer, not the insured, has the ability to change its contracts to provide for the right of reimbursement. Second, because it wrote the contract and doubtless has a broader knowledge of the meaning of insurance provisions, the insurer typically is in a better position than the insured to determine whether the contract provides coverage. Third, if the insurer truly believes that the contract does not provide coverage, the insurer can litigate the coverage issue by pursuing a declaratory judgment action before the underlying case is tried. In fact, this Court has specifically encouraged that course of action.[41] As between the insurer and insured, the insurer should be allocated the risk of assessing the viability of a coverage dispute.

CONCLUSION

The excess insurers are not entitled to reimbursement from Frank's under quasi-contract or estoppel if those doctrines are properly applied. Furthermore, the Court should not allocate the risk of assessing the viability of a coverage dispute on the insured because the insurer is in a better position to account for that risk. For these reasons, this Court should grant Frank's motion for rehearing, withdraw its May 27, 2005 opinion, and render judgment affirming the courts below instead.

[41] *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996).

September 2, 2005

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