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 TEXAS CIVIL JUSTICE LEAGUE IN SUPPORT OF RESPONDENT'S MOTION FOR REHEARING

Kent. R. Hance
State Bar No. 08881000
Jay B. Stewart
State Bar No. 19211125
HANCE SCARBOROUGH WOODWARD & WEISBART, LLP
111 Congress Avenue, Ste. 500
Austin, Texas 78701
512-479-8888 (telephone)
512-482-6891 (facsimile)

ATTORNEYS FOR AMICUS CURIAE TEXAS CIVIL JUSTICE LEAGUE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

STATE CASES

MISCELLANEOUS

STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is tendered by Texas Civil Justice League in support of Respondent Frank's Casing Crew & Rental Tools, Inc.'s Motion for Rehearing. Texas Civil Justice League is not a party to this case and does not have a direct economic interest in the outcome of this case. Frank's International, Inc., an entity that shares some common ownership with Respondent, is a member of the Texas Civil Justice League. The fees and expenses incurred in preparing this brief were paid by Texas Civil Justice League.

In the

Supreme Court of Texas

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

v.

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

AMICUS CURIAE BRIEF OF TEXAS CIVIL JUSTICE LEAGUE IN SUPPORT OF RESPONDENT'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Since 1986, the Texas Civil Justice League ("TCJL") has worked on behalf of its thousands of business and individual supporters to attempt to create a fair, efficient, and predictable civil justice system in Texas. TCJL did not undertake and sustain this effort for two decades because it was offended by runaway verdicts and excessive judgments in civil cases. Those verdicts and judgments were a symptom of the problem, not the cause of the problem. The problem was that the laws passed by the Texas Legislature and the decisions handed down by Texas's courts were creating an unbalanced, unfair, and unpredictable dispute resolution system. As a consequence, Texas's civil justice system was dissuading businesses from moving to Texas or expanding their existing operations in Texas. Therefore, TCJL has been involved in a twenty-year struggle, through

legislative and political advocacy, to correct imbalances in the civil justice system so that Texas can sustain and expand its economic base for the benefit of all Texas citizens. TCJL is concerned that the Court's recent decision in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew &Rental Tools, Inc.*, --- S.W.3d ---, 2005 WL 1252321, 48 Tex. Sup. Ct. J. 735 (Tex. May 27, 2005), takes a step back from predictability in the law related to business transactions in Texas and, therefore, a step back from the continuing effort to attain a fair, efficient, and predictable civil justice system in Texas.

A. *Matagorda County* Confirmed that there is No Equitable or Implied Right of Reimbursement in Insurance Contracts.

On December 21, 2000, in *Texas Ass'n of Counties v. Matagorda County*, this Court held that when an insurance contract does not specifically provide for a right of reimbursement, an insurer cannot obtain reimbursement from its insured after the insurer pays to settle a claim that is later determined to be excluded from coverage under the insurance contract unless the insurer "obtains the insured's clear and unequivocal consent to the ... insurer's right to seek reimbursement." 52 S.W.3d 128, 135 (Tex. 2000). *Matagorda County* applied contract and equitable principles to confirm that Texas law does not recognize an equitable or implied right of reimbursement in insurance contracts. *See id.* at 131-36. Stated differently — a right of reimbursement did not exist before *Matagorda County*, and a right of reimbursement did not exist after *Matagorda County*. The opinion notes, however, that insurers are free to contract around *Matagorda County* by amending their contracts to provide an explicit right of reimbursement. *Id.* at 136.

Matagorda County put insurers on notice that an extra-contractual right of reimbursement does not exist in Texas and, therefore, they must specifically include a

reimbursement right in their insurance contracts if they want that right. Similarly, *Matagorda County* put policyholders on notice that insurers may want to include a reimbursement right in their contracts and that policyholders should be prepared to negotiate with their insurers in regard to the premium to be charged if that right is included in the contract.

B. *Excess Underwriters* Changed the Rules of the Game as to All Insurance Contracts.

On May 27, 2005, this Court effectively overruled *Matagorda County*.[1] *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.* holds that there is an extra-contractual reimbursement right hidden in insurance contracts, at least on some facts. 2005 WL 1252321, *5-6, 48 Tex. Sup. Ct. J. 735 (Tex. May 27, 2005). This extra-contractual right manifests anytime an insured sends a *Stowers*[2] letter to its insurer. *Id.* at *4. The result of *Excess Underwriters* is that insurance contracts negotiated both before and after the date the opinion in *Matagorda County* was handed down now contain a reimbursement clause that does not appear on the face of the contract. Clearly, as to insurance policies issued after the date *Matagorda County* was handed down, the parties to those contracts knew, or had the opportunity to know, when they entered into the contracts that Texas law does not provide an extra-contractual reimbursement right. As to contracts predating the opinion in *Matagorda County*, the parties had no reason to

---

[1] *See Excess Underwriters*, 2005 WL 1252321 at *7 (J. Hecht, concurring) ("neither distinction [identified by the Court between *Matagorda County* and *Excess Underwriters*] matters to the decision in either case" and, consequently, "the rule in *Matagorda County* cannot survive today's decision ...").

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

believe that their contracts contained an implied or equitable reimbursement right. Now, unless *Excess Underwriters* is revisited, that right may exist in all insurance contracts.

C. *Stare Decisis* Provides Predictability Critical to Business Dealings.

There are several reasons a court should follow its prior decisions. First, if a Court does not follow its own decisions, no issue can ever be considered resolved. *Weiner*, 900 S.W.2d at 320. "The potential volume of speculative relitigation under such circumstances alone ought to persuade us that stare decisis is a sound policy." *Id.* Second, a court should give due consideration to the settled expectations of litigants who have justifiably relied on the principles articulated by the court. *Id.* Finally, "the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process ...." *Id.*

Thus, "strong policies" support the practice of adhering to settled rules of law "'unless there exists the strongest reasons for chang[e].'" *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 215 (Tex. 2001) (J. Baker, concurring) (quoting *Benavides v. Garcia*, 290 S.W. 739, 740-41 (Tex. Comm'n App. 1927, judgm't adopted)). A court adheres to its precedents for reasons of efficiency, fairness, and legitimacy. *Id.* (quoting *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995)). Stare decisis "results in predictability in the law, which allows people to rationally order their conduct and affairs." *Utts v. Short*, 81 S.W.3d 822, 847 (Tex. 2002) (J. Owen, dissenting); *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000).

While the doctrine of stare decisis "does not stand as an insurmountable bar to overruling precedent," *Guiterrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979), a prior

decision should be disregarded only if adherence to the decision no longer furthers efficiency, fairness, and legitimacy and "the general interest will suffer less by such departure, than from a strict adherence" to the prior decision. *Lehmann*, 39 S.W.3d at 215 (J. Baker, concurring); *Benavides*, 290 S.W. at 740. "Stare decisis is, and should be, respected by any judge concerned with consistency and predictability in the law." Wallace Jefferson, *State Jurisprudence, the Rule of the Courts, and the Rule of Law*, 8 TEX. REV. L. & POL. 271, 275 (Spring 2004).

D. There was No Reason to Change the Rules of the Game.

There is no reason to back away from the holding in *Matagorda County*. Nothing compelling a change of law has happened in the four and one-half years that have elapsed between the day *Matagorda County* was handed down and today. *See, e.g., Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979) (disregarding long-established common law doctrine was proper because society had changed and a "new rule more attuned to the demands of a modern society" was warranted). It simply cannot be said that adherence to *Matagorda County* no longer furthers efficiency, fairness, and legitimacy and that the general interest will suffer less by departure from that decision than from a strict adherence to that decision.

Matagorda County confirmed that Texas law does not recognize an equitable or implied right of reimbursement in insurance contracts. It provided a clear basis for insurers and insureds to rationally order their conduct and affairs. There is no policy reason supporting the overruling of *Matagorda County* in respect to insurance policies issued either before or after the opinion in *Matagorda County* was handed down. If this

Court determines that the law in regard to reimbursement rights in insurance contracts should be changed, that decision should be applied prospectively only and the opinion in *Excess Underwriters* should be rewritten accordingly. Insurance policies issued before the date *Excess Underwriters* was handed down should not be judicially amended to provide an extra-contractual reimbursement right.

The only reason to overrule *Matagorda County* is to help this particular insurer avoid having to pay a claim that it might not otherwise have to pay. The result, however, will be to disturb the settled expectations of the parties to all insurance contracts that do not currently have an explicit reimbursement right. Stare decisis is "the cornerstone of our judicial system" and should not be ignored "simply because the result [the court] desires cannot be achieved by following established precedent." *Perry v. Del Rio*, 66 S.W.3d 239, 258 (Tex. 2001) (J. Baker, dissenting).

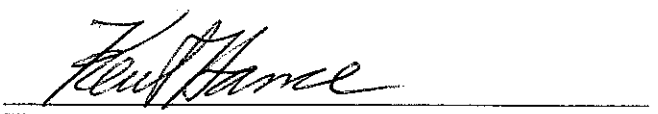
CONCLUSION

Chief Justice Jefferson recently observed that the voters of Texas changed the Texas Supreme Court from one "in dire need of reformation ... in which no new cause of action was turned away into a court that has been largely hailed as stable, predictable, and ***faithful to precedent***." 8 TEX. REV. L. & POL. at 274 (emphasis added). Chief Justice Jefferson's observation hints at one of the cornerstones of a fair and efficient civil justice system — courts must be faithful to precedent unless time and circumstance requires otherwise. The Court's decision in *Excess Underwriters* strays from faithfulness to precedent and, in so doing, strays from one of the cornerstones of a fair and efficient civil justice system, to the detriment of all Texans. It is for this reason that Texas Civil Justice

League believes that Frank's Casing Crew and Rental Tool, Inc.'s motion for rehearing should be granted and the May 27, 2005 opinion in this case withdrawn.

Dated: October 6, 2005

Respectfully submitted,



Kent. R. Hance
State Bar No. 08881000
Jay B. Stewart
State Bar No. 19211125
HANCE SCARBOROUGH WOODWARD & WEISBART, LLP
111 Congress Avenue, Ste. 500
Austin, Texas 78701
512-479-8888 (telephone)
512-482-6891 (facsimile)

Attorneys for Amicus Curiae, Texas Civil Justice League

CERTIFICATE OF SERVICE

I certify that on this the 6th day of October, 2005, a copy of this Amicus Curiae Brief of Texas Civil Justice League was served by first class mail on:

J. Clifton Hall III
Westmoreland Hall, P.C.
2800 Post Oak Blvd., 64th Floor
Houston, Texas 77056

J. James Cooper
Gardere Wynne Sewell & Riggs, L.L.P.
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
Attorneys for Petitioners

William Fred Hagans
Hagans, Bobb & Burdine, P.C.
3200 Travis, Fourth Floor
Houston, Texas 77002

Warren W. Harris
Bracewell & Giuliani LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770
Attorneys for Respondent

Shawn Stephens
Locke Liddell & Sapp L.L.P.
600 Travis, Suite 3400
Houston, Texas 77002-3095
Attorneys for Amicus Curiae Complex Insurance Claims Litigation Association

E. Lee Parsley
E. LEE PARSLEY, P.C.
100 Congress Avenue, Suite 240
Austin, Texas 78701
Attorney for Amicus Curiae Pilco, Inc.

G. Andrew Veazey, Esq.
Huval Veazey Felder & Aertker, LLC
101 Feu Follett, Suite 101
Lafayette, LA 70598-0948

John N. Ellison, Esq.
Jocelyn A. Gabrynowicz, Esq.
Anderson Kill & Olick, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103

Amy Back, Esq.
Law Offices of Amy Bach
42 Miller Avenue
Mill Valley, CA 94941
Attorneys for Amicus Curiae United Policyholders