TADC
THE TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC
An Association of Personal Injury Defense, Civil Trial & Commercial Litigation Attorneys—Est. 1960

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VIA FEDERAL EXPRESS
AIRBILL # 790737000600

Mr. Andrew Weber
Clerk
Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: No. 02-0730, *Excess Underwriters At Lloyd's London & Certain Companies Subscribing Severally, but not Jointly to Policy No. 548/TA4011F01 v. Frank's Casing Crew & Rental Tools, Inc.*

Dear Mr. Weber:

This letter brief is submitted by the Texas Association of Defense Counsel (TADC) in support of the Respondent, Frank's Casing Crew & Rental Tools, Inc.'s motion for rehearing. TADC strongly recommends that any right of reimbursement be based on an agreement between the insured and the liability insurer.

The TADC is an association of Texas attorneys whose practice is concentrated on the defense of civil tort lawsuits. In the defense of such cases, the defendants often have insurance, and TADC members have been retained by insurers to represent the insured. The TADC is devoted to the just and efficient administration of civil justice. To that end, it advocates a system of tort reparations in which (1) plaintiffs are fairly compensated for genuine injuries; (2) non-responsible defendants are exonerated without unreasonable cost; and (3) responsible defendants are held liable for appropriate damages.

Because TADC members are regularly involved in the settlement of cases, they regularly must comment on the wisdom of settlement to guide both the client and the insurer. In fact, the recommendation of defense counsel has traditionally played an important role in the settlement of lawsuits. If a coverage dispute exists, defense counsel already has a difficult task to identify potential conflicts of interest in order to advise the insured on whether to accept representation hired by the insurer. This process is normally done when counsel undertakes representation. The Court's ruling in this case means that retained counsel cannot know the full potential conflict at the outset of the case. A reimbursement dispute, like the one in this case, creates a new conflict during settlement discussions, a time when the insured can least afford the risk that retained counsel may be forced to either remain silent or to withdraw altogether.

TADC joins in the Brief filed by other amici in this case- Shell Oil Company, Motiva Enterprises, L.L.C., Burlington Resources, Inc., Temple-Inland, Inc. and Brad Fish, Inc. (Shell Brief). The Shell Brief notes that defense counsel has always been in the uncomfortable position of owing undivided loyalty to the insured, while receiving instruction and payment from the insurance company. Under the Court' opinion, the traditional role of defense counsel in evaluating and recommending settlement would now expose the insured to the risk that the insurer will demand reimbursement of the recommended settlement. Counsel's advice to settle has triggered a new conflict of interest; if counsel elects to remain silent on settlement, the client may argue this is malpractice. The client may feel that the potential conflict over reimbursement has caused counsel to shade the settlement evaluation to favor the insurer. If defense counsel makes a recommendation, he risks binding the insured on the issue of reasonableness – an issue critical to the right of reimbursement under the Court's opinion in this case. No doubt, claimants may make offers precisely to divide the client and counsel at those times when the client needs zealous advocacy, e.g., during trial.

One unintended consequence is to multiply the costs to settle suits involving potentially uncovered claims. The Shell Brief properly predicts an end to the traditional means of settling cases. Defense counsel selected by the insurance company will not be able to encourage settlement, but will be forced to keep their thoughts about the merits of cases to themselves (or share them only with clients). Both the insured and the insurer then must hire separate "settlement counsel" to evaluate the case and to posture for the anticipated reimbursement litigation. It is no longer the merits of the case that will matter nearly so much as whether the insured can be required to reimburse what is eventually paid. Insureds will have to concern themselves with the nuances of coverage during discovery, motion practice, and trial – constantly monitoring each development with an eye toward the reimbursement dispute down the road. A recent article vividly describes the changes wrought by the Court's original opinion on both insureds and their counsel. *See* Robert M. "Randy" Roach, Jr., *Unsettling the Dynamics of Settlement,* 68 TEX. B. J. 804, 807-8 (2005).

Another unintended consequence is the replacement of the usual suit over an assigned "bad faith"/*Stowers* claim with the new reimbursement suit. A settlement lays the foundation for a new adversarial claim between the insured and insurer, leaving the system no better off for settling the first case. Moreover, the insurance defense counsel may well become the focus of the ensuing litigation, a fact that may not be lost on counsel while defending the insured. Before,

counsel had only to worry about the consequence to the client if the insurer will not settle; now counsel must also worry about the risk to the client if insurer does settle the case.

The Court's opinion in this case surely sought to strike an equitable balance of interests between insurer and insured in suits alleging both covered and uncovered claims. However, the nonconsensual right to reimbursement upsets the process of preparing and trying cases to such a degree that it does more harm than good. Obtaining the insured's agreement to reimbursement is a bright line rule that preserves the rights of all parties without upsetting the posture of the parties that develops through the preparation of the case. It allows the parties to address this at the outset (1) when the insured is evaluating whether to accept a conditional defense, and (2) when counsel is evaluating what conflict of interests exists. It prevents claimants from strategically creating conflicts of interest by carefully timing their offers. And, it maintains the true adversarial positions of the parties – claimants on one side of the case; insureds and insurers on the other side of the case. Resolving such matters at the outset is a major step towards enabling the insurance defense lawyer to perform the duty of providing the client with a zealous, uncompromised defense.

TADC therefore urges the Court to grant the Motion for Rehearing, and to decide that the right to reimbursement for settling lawsuits is dependent on the insured's consent.

Respectfully submitted,

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