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. 548TA4011F01

Petitioners,

V.

FRANK'S CASING CREW & RENTAL TOOLS, INC.

Respondent.

On Appeal from the Fourteenth Court of Appeals

FRANK'S CASING CREW & RENTAL TOOLS, INC.'S POST-SUBMISSION BRIEF AND RESPONSE TO AMICUS CURIAE BRIEFS

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ATTORNEYS FOR RESPONDENT
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Frank's Casing Crew & Rental Tools, Inc. files this Post-Submission Brief and Response to Amicus Curiae Briefs. Frank's files this Brief to discuss issues raised at oral argument and issues raised in two amicus curiae briefs filed shortly before oral argument.

ARGUMENT

I. There is no express or implied agreement for reimbursement.

This Court must analyze whether Texas law recognizes an implied right of reimbursement for an insurer against its insured. Clause J of the policy provides a procedure to contest coverage that would have prevented Underwriters from being placed in its current situation. However, Underwriters chose not to follow that procedure, but instead asks the Court to remedy the circumstance it created by implying a new right of reimbursement. Because there is no express contractual right to reimbursement, the analysis is whether: (1) there is an implied-in-fact agreement; or (2) there is some basis to imply in law an agreement to reimburse. When all relevant factors are considered, including the public policy ramifications and the legal issues implicated, it is clear that reimbursement must be denied.

A. *Underwriters did not follow the procedure in the policy to contest coverage.*

At oral argument, Justice Johnson correctly noted that under Clause J of the policy (the Loss Payable Clause), Frank's must make a claim for any loss for which Underwriters may be liable within twelve months after (1) Frank's pays the loss or (2) Frank's' liability has been fixed either by a judgment or a written agreement between Frank's, the underlying plaintiff, and Underwriters. (C.R. 330). Once Frank's makes a

claim for indemnity and it is "proven in conformity with th[e] policy," Underwriters then has thirty days to decide whether to pay the claim.[1] (C.R. 330). Underwriters conceded at oral argument that it has thirty days after a claim is made to determine whether a claim was covered and should be paid.

Underwriters could have followed Clause J and determined coverage before deciding whether to pay a claim once the claim was presented as required under the policy. Clause J gave Underwriters the opportunity to determine whether a claim was in conformity with the policy before it had to pay the claim. *See Roundtable: Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools*, TEX. LAWYER at 10A col. 3 (Jan. 30, 2006) (copies previously filed with Court). Underwriters instead chose to follow a different course: Underwriters decided to pay the loss even though the policy did not require it to do so at that time and then seek reimbursement. This new course of action allowed Underwriters to further its own interests by paying the claim to preserve the settlement on the two-thirds of the claim Underwriters believed was covered. (*See* C.R. 457).

The policy as written gave Underwriters all of the protections it needed (and all of the protections it bargained for) to determine coverage. Underwriters did not follow the procedure in the policy that would have prevented it from being faced with the situation in which it now finds itself. The Court should not change the terms of the policy to allow

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[1] There is nothing in the policy that would vary Clause J because of a demand to pay the claim.

Underwriters to choose a new procedure for determining coverage. *See Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003) (courts should strive to give effect to the written expression of insurance contracts); *see also Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987) (insurance policies are contracts).

B. *There is no contractual right to reimbursement.*

The issue before this Court is *not* whether coverage for the claims existed. The issue before the Court is whether there is a right to obtain reimbursement for a settlement an insurer paid when it is later determined that coverage did not exist. It is undisputed that the insurance policy does not contain a reimbursement provision.

C. *The lack of a meeting of the minds on Underwriters' request for reimbursement precludes an implied-in-fact agreement.*

Justice Johnson asked at oral argument whether there was an implied-in-fact agreement. An implied-in-fact agreement is one that "arises from the acts and conduct of the parties, it being implied from the facts and circumstances that there was a mutual intention to contract." *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972). To recover on an implied-in-fact theory, there must be proof of a meeting of the minds, "the essence of which is consent to be bound." *Id.* at 609 (citations omitted); *see also Texas Ass'n of Counties County Gov't Risk Management Pool v. Matagorda County*, 52 S.W.3d 128, 133 (Tex. 2000). There was no implied-in-fact agreement in this case.

1. *There was no meeting of the minds.*

Here, the record shows that Frank's did not agree, impliedly or expressly, to reimburse Underwriters. When the underlying settlement negotiations occurred, Underwriters believed that two-thirds of the claim was covered under the policy[2] and pressured Frank's to contribute one-third of the settlement amount. (C.R. 457). Frank's refused. (C.R. 470). In fact, Frank's refused all of Underwriters' requests to contribute to the settlement or to reserve a right to later litigate coverage. (C.R. 457, 470, 685). When Underwriters at the last-minute added a claim for a reimbursement right, Frank's did not respond. (*See* C.R. 469, 472). In *Matagorda County*, the Court considered this very issue and found that, as a matter of law, these facts do not constitute a meeting of the minds necessary to form an implied-in-fact contract. *Matagorda County*, 52 S.W.3d at 133 (no implied-in-fact consent to reimburse where insured chose not to contribute to funding of settlement and "the record demonstrates that [the insured] consistently contested [the insurer's] coverage position and insisted that [the insurer] pay under the policy.").

Frank's did not agree to Underwriters' claimed reimbursement rights either expressly or by silence. Because there was no meeting of the minds between Frank's and Underwriters about reimbursement, an agreement for reimbursement cannot be implied.

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[2] In fact, Underwriters attempted to secretly settle two-thirds of the claim, leaving Frank's exposed on the remaining one-third. (C.R. 451, 519).

2. *Frank's' purported implied acceptance of the settlement funds with the condition of reimbursement does not create an agreement.*

Apparently knowing that these facts do not show a meeting of the minds sufficient to support an implied-in-fact contract, Underwriters suggested at oral argument that Frank's impliedly agreed to reimburse the settlement funds because it accepted the funds without objection as a "condition" of reimbursement. An implied-in-fact agreement cannot be supported on this theory for two reasons.

First, the lack of an objection to the "condition" of reimbursement is not enough to imply consent. It is undisputed that Frank's did not ask Underwriters to settle the claim *after* Underwriters set forth its alleged "condition" of reimbursement.[3] Instead, Frank's was silent. Silence and inaction do not show an agreement to be bound. *See Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 445 (Tex. 1982) ("the mere failure to object within a reasonable time to the interest charges, without more, could not establish an agreement between the parties. . . .").[4]

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[3] Underwriters' reservation of rights letters did not mention reimbursement. (C.R. 687-94, 697-98). Underwriters first claimed a reimbursement right immediately before it accepted the settlement and decided to pay the claim. (C.R. 470).

[4] Reliance on cases holding that a party may not accept the benefit without the burden of a contract is misplaced. Those cases do not involve the rule that mere silence and inaction are not sufficient to establish consent. They involve either affirmative action by the accepting party or an agreement that is already in place. *See, e.g., United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 364 (Tex. 1968) (involving contract that was accepted by performance; once offeree accepts by performance, offeror cannot withdraw offer); *W.H. Putegnat Co. v. Fidelity & Deposit Co. of Md.*, 29 S.W.2d 1005, 1006 (Tex. 1930) (surety affirmatively took over and completed a contract that contractor abandoned; company was bound by both benefits and burdens of contract taken over); *Daniel v. Goesl*, 341 S.W.2d 892, 895 (Tex. 1960) (partner who accepted all

Further, this "condition" cannot be unilaterally reserved. This "condition" is not a right that Underwriters can reserve because it is not a right that already exists in the contract. For a unilateral reservation of rights to be sufficient, the reservation must be of a right that already exists. For example, a reservation of rights letter on coverage simply shows an implied agreement that an insurer, by providing a defense to the insured, does not waive its coverage defenses stated in the contract. *See Western Cas. & Surety Co. v. Newell Mfg. Co.*, 566 S.W.2d 74, 76 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); *see also Matagorda County*, 52 S.W.3d at 132-33 (noting distinction between unilaterally reserving rights stated in the policy and a reimbursement right that is not stated in the policy).

Second, the record shows that Frank's did not have an adequate opportunity to either accept or reject the "condition" before Underwriters settled the underlying case. Underwriters informed Frank's of the new "condition" of reimbursement immediately before calling the plaintiff's lawyer in the underlying case and accepting the settlement demand.[5] (*See* C.R. 469, 472, 719). Underwriters sent its reservation of rights letter on

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terms of a partnership agreement, could not later take benefits of contract, but not burdens of contract); *Komet v. Graves*, 40 S.W.3d 596, 601 (Tex. App.—San Antonio 2001, no pet.) (employee accepted employment agreement by signing agreement after changes made and starting work); *see also Ashford Dev., Inc. v. USLife Real Estate Servs. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983) (new term of loan commitment was a counter-offer that was not accepted).

[5] Frank's did not impose the short time frame on Underwriters for responding to the settlement demand. The plaintiff in the underlying case imposed the time limit. (C.R. 464).

coverage to Frank's eleven months before the settlement, but attempts to reserve an extra-contractual right of reimbursement asserted a few hours before Underwriters accepted the settlement. Underwriters' eleventh-hour attempt to reserve a right of reimbursement is ineffective. Frank's did not agree to Underwriters' "condition" of settlement. Consequently, there can be no implied-in-fact contract.

D. ***The legal fiction of an implied-in-law agreement is also foreclosed.***

At oral argument, Justice Johnson asked whether there could be an implied-in-law contract when there is an express contract between the parties. Justice Johnson is correct that there can be no implied-in-law agreement in this case.

An implied-in-law contract is one that is not based on any contractual undertaking of the parties; it is an agreement implied by law without regard to whether the parties actually agreed to the contract. *See Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). Underwriters' restitution claims of unjust enrichment, quantum meruit, and money had and received are all species of an implied-in-law contract theory of recovery. *See id.* at 683-84; *see also Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 48 Tex. Sup. Ct. J. 735, 739 (May 27, 2005).

Where an express contract governs the subject of the dispute, an implied-in-law theory is unavailable. *Fortune Prod. Co.*, 52 S.W.3d at 684; *Lone Star Steel Co. v. Scott,* 759 S.W.2d 144, 154 (Tex. App.—Texarkana 1988, writ denied). Further, equitable quasi-contractual theories of recovery are available only when one party has obtained a benefit by fraud, duress, or by taking an undue advantage. *See Hubbard v. Shankle*, 138

S.W.3d 474, 487 (Tex. App.—Fort Worth 2004, pet. denied); *see also Pennell v. United Ins. Co.*, 243 S.W.2d 572, 576 (Tex. 1951) (insurer not entitled to credit for payments made to insured under policy because "money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability."). An implied-in-law theory is not available simply because it might appear just or expedient, or because it might avoid a windfall. *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 42 (Tex. 1992).

1. *The existence of an express contract bars an implied-in-law theory.*

Underwriters cannot rely on an implied-in-law contractual theory because there is an express contract between Underwriters and Frank's that governs the subject of the dispute. *See Fortune Prod. Co.*, 52 S.W.3d at 684; *Lone Star Steel Co.*, 759 S.W.2d at 154. As Underwriters conceded at oral argument, Clause J provides the procedure for Underwriters to contest and litigate coverage before paying a claim, which Underwriters did not follow. *See supra* pp. 2-3. The policy generally covers the subject matter of the dispute between the parties. *See Fortune Prod. Co.*, 52 S.W.3d at 684-85. The existence of the express contract thus precludes an implied-in-law theory. *Id.*

2. *There is no inequitable conduct.*

Underwriters has not alleged fraud, duress, or that Frank's took an undue advantage. Frank's acted to protect its interests under the policy. Frank's believed there was coverage and asked that Underwriters pay the ARCO/Vastar settlement as a covered

claim. (C.R. 461, 680, 685). Frank's purchased insurance for this very reason—to have Underwriters pay covered claims or decide, under the policy it wrote, whether claims are outside coverage. Under these facts, there can be no claim of unjust enrichment or quasi-contract. *See Hubbard*, 138 S.W.3d at 487; *see also Pennell,* 243 S.W.2d at 576.

E. *Frank's did not receive a windfall and denying reimbursement is fair.*

At oral argument, Chief Justice Jefferson stated that Frank's, in effect, received a windfall. Although the implied-in-law theory is not available merely to avoid a perceived windfall, *see Heldenfels Bros.*, 832 S.W.2d at 42, there was in fact no windfall to Frank's. A windfall typically speaks of an unexpected or unearned gain. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1355 (10th ed. 1994). There was no unearned gain or unjust enrichment to Frank's because Underwriters also benefited from the settlement. As Underwriters conceded at oral argument, Underwriters received benefits, among others, in the form of capped defense costs and capped liability for a potential higher verdict within policy limits or an excess judgment.[6] Further, there is no windfall because allowing reimbursement would work a detriment to Frank's. When the insurer decides to

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[6] Further, Frank's did not have complete control of the settlement negotiations when the ARCO/Vastar settlement was made. The additional lawyer Underwriters hired to defend Frank's confirmed that at the time he was hired, the primary policy limits had been effectively tendered, which placed potential exposure in Underwriters' layer of coverage: "[T]he amount that Arco/Vastar was claiming was well in excess of the primary layer and that, as a result, the primary insurer was essentially tendering its limits into the case and that effectively all the money in the case was going to be coming out of [Underwriters]." (C.R. 1429). Underwriters ultimately finalized the settlement itself by calling the plaintiff's lawyer directly and agreeing to fund the settlement. (C.R. 470, 472).

accept a settlement demand that is within policy limits, the insurer fixes the liability that will later be charged against the insured in a reimbursement action. The settlement was higher because of the possibility that Frank's had insurance coverage for the ARCO/Vastar claim.[7] Also, while the settlement may be an amount that is objectively reasonable, it may still be an amount that the insured could not pay with its own funds.

Reimbursing Underwriters in this case actually provides a windfall to Underwriters. Underwriters would receive an implied reimbursement right that was not in the policy and not bargained for. The insurer would receive this new right without a commensurate reduction in the premium.

The new rule the Court created allows reimbursement to prevent a perceived unfairness. The perceived unfairness does not exist. The burden is on the insurer, not the insured, to resolve the coverage dispute early. If the coverage dispute is resolved before the underlying suit is settled or reaches judgment, the reimbursement question disappears. Here, Underwriters questioned coverage by sending a reservation of rights letter to Frank's eleven months before the case was settled. (C.R. 687, 697). During that time, Underwriters could have attempted to resolve the coverage dispute, but it made no effort to do so. Nor did it follow Clause J of the policy to determine coverage before deciding whether to pay the claim. By failing to resolve the coverage dispute, Underwriters—not Frank's—created the reimbursement question. Perceived unfairness is not a reason to

[7] Insurance in fact played a role in this case. The amount of insurance coverage available to Frank's affected the way the plaintiffs and co-defendants in the underlying case looked at Frank's. (C.R. 1440).

alter parties' rights stated in a contract. *General Am. Indem. Co. v. Pepper*, 339 S.W.2d 660, 661 (Tex. 1960).

Denying reimbursement to Underwriters in this case is fair. Underwriters knew its policy did not contain a reimbursement provision. Underwriters could have put such a provision in its policy, but chose not to do so. This Court should not imply a right of reimbursement that is not in the policy.

F. *The tentative draft of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 is inconsistent with Texas law.*

In its brief filed shortly before argument, Amicus Curiae Property Casualty Insurers Association of America (PCIAA) argues that support for the Court's new rule allowing reimbursement is found in a tentative draft of Section 35 of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT. (Brief of Amicus Curiae PCIAA at 5-6). PCIAA is incorrect. The tentative draft of Section 35 is based on insurance law that is different from Texas insurance law. The reporter expressly notes that the illustration PCIAA quotes is based on California law. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 at 261 (Tentative Draft No. 3 2004) ("Illustration 10 is based on *Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal. 4th 489, 22 P.3d 313 (2001).").

Illustration 10 of the tentative draft quoted by PCIAA also contains facts that differ from this case and from Texas law. In Illustration 10, the insurer has actually filed a declaratory judgment action before settlement discussions, but is unable to have the coverage dispute adjudicated before the underlying settlement demand must be accepted

or rejected.[8] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 at 255; *see also id.* at 246. In this case, Underwriters did not attempt to have the coverage dispute resolved in a declaratory judgment action before the settlement. It only sought to resolve the coverage dispute *after* it settled the claim against Frank's. (C.R. 472).

Further, Illustration 10 of the tentative draft assumes the California version of *Stowers* liability, in which the insurer cannot take coverage into account in deciding whether to pay a settlement demand. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 at 255. As Frank's pointed out in its motion for rehearing, an insurer in Texas does not face strict liability for failing to pay a claim based on a belief that there is no coverage. (*See* Motion for Rehearing at 4, 7). It must only act reasonably. Further, an insurer is liable for bad faith only if it knew or should have known that it was reasonably clear that the claim was covered. (*See* Motion for Rehearing at 4, 7). Section 35 of the tentative draft RESTATEMENT does not apply to this case.

II. A reimbursement right should not be implied, but should be an express provision bargained for in the policy.

In its brief filed shortly before oral argument, Amicus Curiae Complex Insurance Claims Litigation Association (CICLA) suggested that, because insurance policies only afford coverage for certain defined risks, it is not necessary to have an express provision

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[8] Although using *Blue Ridge* as its model, the draft RESTATEMENT ignores that in California an insurer generally cannot prosecute a declaratory judgment action before the underlying claim is resolved. 22 P.3d at 322-23.

for reimbursement in the policy. (*See* Brief of Amicus Curiae Complex Insurance Claims Litigation Association in Support of Excess Underwriters on Rehearing at 13-14). This argument is without merit. When Underwriters paid the settlement demand on a claim that it argued was not covered, it acted inconsistently with its right under the policy to pay only covered claims. Thus, to pay a disputed claim and then seek reimbursement, Underwriters is seeking a new right that is not included in the policy and one that should be bargained for rather than implied by this Court.

Underwriters suggested at oral argument that it would be impractical to list every contemplated claim or right in the policy. This argument should not persuade the Court. This Court should enforce only those rights that are set out in the policy. The federal government has recognized that a reimbursement right is one that cannot be implied from a policy. The federal motor carrier regulations mandate using an endorsement which provides that the policyholder must reimburse the insurer if the claim is later determined to be outside coverage. *See T.H.E. Ins. Co. v. Larsen Intermodal Servs.*, 242 F.3d 667, 673 (5th Cir. 2001). Thus, the right to reimbursement is contractual.

Underwriters stated at oral argument that its right to reimbursement is merely a remedy for its right to contest coverage and, without a right to reimbursement, it is a hollow right. However, as Justice Wainwright noted at argument, there is a difference between a right to contest coverage and a right to reimbursement after paying a settlement. The right to reimbursement after paying a settlement can only be based on a contractual right with a duty running to the insured, Frank's, to reimburse. Frank's had no

such duty under the policy. Underwriters has neither alleged nor proved that Frank's in any way breached the policy. There is no right to a remedy when there is no breach.

Moreover, Underwriters' remedy is provided for in Clause J. Underwriters chose to fund the settlement—knowing it did not have a contractual right to reimbursement—when the contract did not require it to indemnify Frank's until certain conditions were met. (*See* C.R. 330). If Underwriters wanted to litigate the coverage question before it was required to pay the claim, it could have followed Clause J. *See supra* pp. 1-3. This Court should not imply an extra-contractual right for Underwriters here when Underwriters itself was a cause of its own circumstances.

CICLA also argues that Frank's and the other amici curiae "ignore the commercial realities" because insurers, even with this new right to reimbursement, will still try to resolve coverage disputes early for many reasons, "including fairness, reputational interests, their obligations under the law, the need for certainty, and the avoidance of costs and expenses related to prolonged claim-handling." (Brief of CICLA at 10). This rosy view of how insurers will conduct business with a new reimbursement right pales when viewed in light of how the business amici explain coverage disputes are really handled. (*See* Reply to Petitioners' Response to Motion for Rehearing at 1-6). CICLA's other arguments, (*see, e.g.*, Brief of CICLA at 5-7, 9-10, 12-13), ignore that an extra-contractual implied reimbursement right has not previously existed in Texas, yet the system has been working properly. *See Roundtable: Excess Underwriters at Lloyd's,*

London v. Frank's Casing Crew & Rental Tools, TEX. LAWYER at 11A col. 2 (Jan. 30, 2006).

III. ***Stare decisis* requires this Court to follow *Matagorda County*.**

Stare decisis promotes judicial efficiency and the even-handed, predictable, and consistent development of judicial principles, thus fostering the reliability of judicial decisions. "Adhering to precedent fosters efficiency, fairness, and legitimacy. More practically, it results in predictability in the law which allows people to rationally order their conduct and affairs." *Grapevine Excavation v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) (citations omitted). *Stare decisis* contributes to the actual and perceived integrity of the judicial process. *See* Amicus Curiae Brief of Texas Civil Justice League at 4-5.

Stare decisis applies with "particular force" in contract and insurance cases because reliance interests are involved. *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 193 n.3 (Tex. 1968). Courts have a "profound obligation to give recently decided cases the strongest presumption of validity." *Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 153-54 (1981) (Stevens, J., concurring). A recent example of this principle is found in Justice Johnson's concurring opinion in *In re The Honorable Karen Angelini*, 49 Tex. Sup. Ct. J. 376, 378 (Feb. 24, 2006) (orig. proceeding) (Johnson, J., concurring). ("Further, although I joined Justice Wainwright in dissenting from the Court's decisions in *Francis* and *Holcomb* and still believe that those

cases were wrongly decided, the cases are now precedent of this Court. Thus, I cannot join his dissent.").

Matagorda County resolved whether a reimbursement right would be implied in fact or in law when an insurance contract does not expressly provide a reimbursement right. The differences between *Matagorda County* and this case are immaterial. There have been no intervening developments in the law or public policy that undermine *Matagorda County*'s reasoning. *Matagorda County* provides a workable, bright-line rule that insurers and insureds can use to manage their conduct and affairs. *Stare decisis* compels this Court to follow *Matagorda County* and deny Underwriters' request to create an extra-contractual reimbursement right.

CONCLUSION

Matagorda County considered all of the competing interests and reached a balance under the contract and under Texas insurance law. Allowing a reimbursement right will remove from the insurer the burden to get an early resolution of the coverage dispute. Changing the law on reimbursement will also affect several other areas of Texas insurance law. Whether to allow reimbursement is a complex analysis that must consider all of the relevant factors, including both the public policy ramifications and the numerous legal issues implicated.

PRAYER

For these reasons, Frank's respectfully requests that this Court vacate its opinion of May 27, 2005, and affirm the court of appeals' and trial court's judgments. Alternatively, Frank's requests that the Court remand the case to the trial court. Frank's also requests any further relief to which it may be entitled.

Respectfully submitted,

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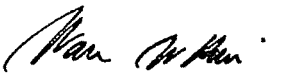

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