IN THE SUPREME COURT OF TEXAS

NO. 02-0730

EXCESS UNDERWRITERS AT LLOYD'S, LONDON AND CERTAIN COMPANIES SUBSCRIBING SEVERALLY BUT NOT JOINTLY TO POLICY NO. 548/TA4011FO1, 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

Argued September 24, 2003

JUSTICE HECHT, concurring.

I join fully in the Court's opinion and write separately only to say that while I agree distinctions can be found between this case and *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*,[1] in fact those distinctions are immaterial, and the rule in *Matagorda County* cannot survive today's decision for the reasons *Matagorda County* was wrongly decided.[2]

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

[2] *Id.* at 136-141 (Owen, J., joined by Hecht, J., dissenting).

The question in both cases is this: may a liability insurer accept a reasonable offer within policy limits to settle a claim for which coverage is disputed and, if the claim is later determined not to have been covered, obtain reimbursement from the insured. In the present case, we answer "yes"; in *Matagorda County*, the Court said "no". The Court sees two distinctions in the cases. In the present case, the insured (1) had the right to consent to any settlement and (2) demanded that the insurer accept the claimant's settlement offer. Neither of these things was true in *Matagorda County*, but neither distinction matters to the decision in either case.

The insured's right to consent to settlement does not matter because neither case is about a settlement forced on an insured. The insureds in both cases *wanted* the insurer to settle. The insured in *Matagorda County* "advised [the insurer] that the proposed settlement was reasonable and prudent, given the facts and circumstances of the case";[3] it simply refused to contribute to the settlement or to agree to reimburse the insurer's contribution if the claim were determined not to be covered. The insured never argued that it would have withheld consent to the settlement had it had that right under the policy. Right or no right, the insured in each case viewed the proposed settlement exactly the same way. The insureds' desire in both cases to "have their cake and eat it, too" has nothing whatever to do with a right to consent to settlement.

Nor does it matter to either case that the insured did or did not demand that the insurer accept the settlement offer. The insurer's duty to settle is triggered by a reasonable offer from the claimant[4]

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[3] *Id.* at 129.

[4] *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848-849 (Tex. 1994); G.A. *Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547-548 (Tex. Comm'n App. 1929, holding approved).

— which was made in each case — regardless of whether the insured demands that the offer be accepted. It is the existence of this duty and the severe consequences for its breach that forced the insurer in each case to accept the settlement offer and seek reimbursement from the insured. Now granted, it is harder to sympathize with an insured that, instead of sitting mute, *demands* that its insurer settle a claim and then denies its responsibility to fund the settlement when it is later determined that there was no coverage, but the insurer's responsibilities in both cases were exactly the same.

Since the present case cannot be distinguished from *Matagorda County* on any ground that matters, this case effectively overrules *Matagorda County*, as it should. "[A]n insurer has no duty to settle a claim that is not covered under its policy."[5] But to deny an insurer the option of accepting a reasonable settlement though coverage is doubtful and then seeking reimbursement from the insured if the claim is determined not to be covered forces on the insurer this choice: either fund the settlement and abandon all arguments that the claim is not covered, or refuse to fund the settlement and if the claim is determined to be covered, face liability for the full amount of the claim, even above policy limits,[6] plus statutory damages and attorney fees.[7] Since the cost of the latter option will almost certainly exceed the cost of settlement many times over, an insurer cannot afford to gamble. In both the present case and *Matagorda County*, the insurer ultimately prevailed on its arguments of no coverage. Yet the insurer in *Matagorda County* paid $300,000, and the insurer in

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[5] *American Physicians*, 876 S.W.2d at 848.

[6] *Id.* at 849.

[7] *See* TEX. INS. CODE art. 21.21, § 16A, art. 21.55, § 6.

the present case paid over $7 million, hoping for reimbursement, rather than take the chance that they were wrong about coverage. When insurers are forced to pay doubtful claims, the premiums paid by policyholders who have purchased coverage must be used to satisfy claims against policyholders who have not purchased coverage. The rule in *Matagorda County* thus allows a non-covered policyholder to extort payments not only from the insurer but from the insurer's other policyholders. The result in *Matagorda County* was especially egregious because it fell on the public: in effect, the Court allowed the Matagorda County Commissioners' Court to force the innocent and unknowing taxpayers of the risk pool's other member counties to pay for damages the members had not agreed to cover.

Justice Wainwright's concurring opinion argues that when "the insurer gives notice of its intention to recoup [a settlement] payment in a timely reservation of rights letter or makes reimbursement a term or condition of a subsequent agreement", an agreement for the insured to reimburse the payment is implied in fact.[8] I agree with this, of course, and said so in *Matagorda County*,[9] but the Court in *Matagorda County* expressly rejected that view.[10] *Matagorda County* cannot survive reasoning in JUSTICE WAINWRIGHT's concurring opinion.

Justice O'Neill's concurrence argues that "absent a consent-to-settlement clause or the opportunity for the insured to assume its own defense, an insured [does not] necessarily assume[]

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[8] *Post* at ___.

[9] *Matagorda County,* 52 S.W.3d at 140 (Owen, J., joined by Hecht, J., dissenting) ("If in the case before us, the County had demanded that the Association settle the *Coseboon* litigation after receiving the reservation-of-rights letter, I would hold that an implied-in-fact agreement arose, even if the County maintained that there was no obligation to reimburse.").

[10] *Id.* at 129, 131-133.

a reimbursement obligation merely by expressing agreement with the insurer's decision to settle a case."[11] Why an insured should assume an obligation to reimburse an insurer's settlement of a non-covered claim when the insured has the right to consent to settlement and does so, but not when he consents though he has no right to do so, is baffling. What possible difference can the right to consent make if the insured *in fact* consents? The insured's obligation to reimburse an insurer's settlement of a non-covered claim depends entirely on the reasonableness of the settlement.

Justice O'Neill's concurrence argues that the reasonableness of a settlement depends on the availability of insurance or the defendant's ability to pay. It is true, of course, that a claimant is often willing to settle his claim for less than its fair value when there is no insurance coverage and the defendant's assets are limited, although that is certainly not always the case. From this observation, Justice O'Neill's concurrence concludes that it is somehow wrong to saddle an insured with an obligation to reimburse a settlement paid by the insurer when coverage was in doubt, because the claimant might have agreed to a lesser settlement, and one within the insured's means, had coverage been determined not to exist. Even if one accepts that a claimant would take less to settle a non-covered claim than to settle a claim for which coverage was disputed, Justice O'Neill's concurrence cannot explain how the insured is disadvantaged by an obligation to reimburse the settlement in the latter instance. Suppose P's claim is worth $10X but P is convinced that he can extract only $1X from D, who is not covered by insurance, so P settles with D for $1X. D pays $1X. But suppose D's liability might be covered by insurance, so the insurer decides to pay P the reasonable value of the

[11] *Post* at ___.

claim, $10X, and seek reimbursement from D if coverage issues are later resolved in the insurer's favor, rather than face liability for much more than $10X if coverage issues are resolved in D's favor. How much does D pay the insurer if there is found to be no coverage? $1X — that's all D has. Justice O'Neill's concurrence seems to imagine — one cannot tell for sure — a defendant of limited means who can negotiate a settlement with the claimant that is less than his ability to pay, but there is no reason to suppose that a claimant would demand less in settlement from a defendant, known to be uninsured, than the insurer would demand in reimbursement from the defendant for settling a claim later determined not to be covered. A defendant who cannot pay the claimant more than $1X cannot reimburse his insurer more than $1X. Justice O'Neill's concurrence states: "I just do not believe that an insured that calls upon its insurer to settle a disputed claim necessarily agrees it is willing and able to pay the same amount in the event the insurer ultimately prevails in its coverage dispute."[12] The statement is, of course, correct; the would-be insured agrees to nothing regarding his willingness and ability to pay. But it is also irrelevant. The exposure of the defendant of limited means to his insurer is no greater than it would be to the claimant.

Perhaps it is necessary to stress, again, that no one suggests that an insurer may unilaterally settle a claim for an unreasonable amount, or in circumstances that actually (rather than hypothetically) prejudice the insured, and then force reimbursement from the insured. Neither the present case nor *Matagorda County* involved such a situation. The Court has never been cited to a case involving such a situation. In the off-chance that such a situation could arise, statutory

[12] *Post* at ___.

prohibitions against unfair practices by insurers offer full relief: actual damages, additional damages, and attorney fees.[13]

An insured should not be allowed to unreasonably withhold consent to settlement to force the insurer to pay a claim and abandon coverage issues at the risk of incurring stiff statutory liabilities. An insurer's right to recoup from its insured the amount paid to settle a claim depends on two things: the reasonableness of the settlement, and coverage. That is the essence of today's decision.

Nathan L. Hecht
Justice

Opinion delivered: May 27, 2005

[13] *See* TEX. INS. CODE art. 21.21, § 16A, art. 21.55, § 6.