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 O'NEILL, concurring.

I agree that the excess underwriters are entitled to reimbursement under the circumstances presented in this case. As the Court notes, the insurers could not settle without their insured's consent under the parties' insurance agreements, and Frank's Casing not only consented to the settlement, but initiated it. For this reason, I join Part I and Part II, C and D, of the Court's opinion. I cannot join the remainder, however, for in my view the Court's opinion is unduly broad and based at least in part upon faulty assumptions.

The Court holds that an insured may be required to reimburse its insurer for settling claims that are ultimately determined to be outside the scope of coverage if the insured expressly agrees to the settlement. ___ S.W.3d at ___. In discussing that justification, the Court emphasizes that the

underwriters in this case could not settle without Frank's consent and distinguishes our decision in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), on that basis. ___ S.W.3d at ___. I agree because, when the insurance policy requires the insured's consent before a settlement may be reached, the insured has at least some control over whether to settle for the offered amount or continue the litigation, unlike the situation presented in *Matagorda County*. In *Matagorda County*, we expressed agreement with the approach other courts had taken in recognizing a reimbursement right when the insurer conveys a reasonable offer to the insured and gives the insured an opportunity to assume the defense. 52 S.W.3d at 134. In that instance, the insured retains a level of control similar to that which a consent-to-settlement clause confers. Because in *Matagorda County* the insurer had not given its insured the opportunity to assume its own defense, we did not expand on this approach. But it is analogous to the situation presented here, in which control of Frank's Casing's defense did not lie with the underwriters, and the underwriters had to obtain Frank's Casing's consent before settling the case. The implied reimbursement right that we recognize in Part II, C and D, is entirely consistent with our decision in *Matagorda County*.

Accordingly, I do not read the Court's opinion to decide that, absent a consent-to-settlement clause or the opportunity for the insured to assume its own defense, an insured necessarily assumes a reimbursement obligation merely by expressing agreement with the insurer's decision to settle a case. Those situations contrast with the allocation of power set out in the standard homeowner's or automobile liability policies, under which the insurer generally exercises exclusive control over settlement decisions. *See, e.g.*, *Texas Personal Auto Policy*, *available at*

http://www.adcusa.com/bain/F15.html (last visited May 26, 2005); *Rodriquez v. Tex. Farmers Ins. Co.*, 903 S.W.2d 499, 509 (Tex. App.–Amarillo 1995, writ denied); *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holdings approved); Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1118-19 (1990). Under those policies, the insurer may not unilaterally impose a right of reimbursement that does not appear in the policy with its insured. *See Matagorda County*, 52 S.W.3d at 134.

Although the case could be resolved on the basis I have just discussed, the Court ventures beyond. The Court also holds that a reimbursement obligation is implied "when an insured has demanded that its insurer accept a settlement offer that is within policy limits." ___ S.W.3d at ___. Citing *Stowers*, the Court reasons that an insured that has demanded that its insurer settle "is deemed to have viewed the settlement offer as a reasonable one." *Id.* at ___. But the Court's application of *Stowers*'s reasoning to this situation makes no sense. The *Stowers* test was designed to define the standard of care an *insurer* must abide by in deciding whether to accept a third-party claimant's settlement demand—it measures whether "the terms of the demand are such that an ordinarily prudent *insurer* would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994) (emphasis added). In sum, the *Stowers* test *presumes* coverage and simply has no application in determining an insurer's reimbursement right when coverage is disputed. *Id.* ("The *Stowers* duty is not activated by a settlement demand unless . . . the claim against the insured is within the scope of coverage . . . .").

Further, the Court's application of *Stowers* presumes that a settlement's reasonableness is measured solely by the insured's potential liability exposure irrespective of the insured's ability to pay. While that premise is certainly true when coverage is presumed, as *Stowers* contemplates, it doesn't square with reality when coverage doesn't exist. *See* Syverud, *supra*, at 1114 (noting that "most tort suits would be significantly less attractive to plaintiffs and their attorneys" without liability insurance). When a defendant lacks coverage, the uninsured's ability to pay becomes the paramount concern driving settlement discussions. If the uninsured has assets totaling $100,000, surely it would not behoove an injured plaintiff to seek a considerably larger but uncollectible judgment against him. Rather, the case will likely settle in the range of what the uninsured can pay irrespective of the amount of damages that the injured plaintiff sustained. 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. Accordingly, I would not hold, as the Court seems to, that an insured assumes a reimbursement obligation merely by asking its insurer to accept a settlement demand within policy limits.

On this disposition, at least, JUSTICE WAINWRIGHT and I are in agreement. However, I disagree with JUSTICE WAINWRIGHT's conclusion that Frank's Casing assumed a *contractual* reimbursement obligation in this case by acquiescing to the settlement of the underlying lawsuit. In settling the ARCO suit, both Frank's Casing and the excess carriers expressly sought to preserve their positions in the coverage dispute; in effect, they agreed to disagree on the reimbursement question and let the trial court decide the legal effect. This is a far cry from impliedly consenting to reimbursement under the common-law contract principles JUSTICE WAINWRIGHT purports to

follow, and ignores the parties' written agreement preserving "any claims that presently exist" between them. As JUSTICE WAINWRIGHT recognizes, the excess carriers benefitted from the settlement by eliminating potential *Stowers* liability in the event ARCO's claims were later determined to be covered, just as Frank's Casing benefitted by eliminating the possibility of a large verdict that might turn out not to be covered. Given the parties' explicit efforts to preserve their positions, it makes no more sense to say that Frank's Casing impliedly agreed to reimburse the excess carriers than it would to say that the excess carriers impliedly agreed to waive their coverage position. Just as an insured's acceptance of a defense the insurer proffers with a reservation of rights implies the insured's consent to the reservation, the excess underwriters' agreement to accept the settlement in light of Frank's Casing's reimbursement contest implied the insurers' consent to Frank's Casing's reservation of the reimbursement question.

Finally, I disagree with JUSTICE WAINWRIGHT's implication that our decision in *Matagorda County* eschewed common-law contract principles in determining reimbursement rights. Nothing could be further from the case. In *Matagorda County*, we acknowledged those principles would apply if their well-established elements were met. According to the seven justices who comprised the majority (JUSTICE O'NEILL delivered the opinion of the Court joined by CHIEF JUSTICE PHILLIPS, JUSTICES ENOCH, BAKER, ABBOTT, HANKINSON, and GONZALES), they were not met in that case. 52 S.W.3d at 129.

I agree that Frank's Casing had an implied-in-law reimbursement obligation because it consented to the settlement and the underwriters could not have settled without that consent. For

this reason, I join Part I and Part II, C and D, of the Court's opinion and concur in the court's judgment of reversal.

Harriet O'Neill
Justice

OPINION DELIVERED: May 27, 2005