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/TA4011F01, 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 February 15, 2006

JUSTICE O'NEILL delivered the opinion of the Court, joined by CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE WILLETT.

JUSTICE HECHT delivered a dissenting opinion, joined by JUSTICE GREEN.

JUSTICE WAINWRIGHT delivered a dissenting opinion.

JUSTICE BRISTER did not participate in the decision.

On January 6, 2006, we granted respondent's motion for rehearing. We now withdraw our opinion issued May 27, 2005, and substitute the following.

In Texas, an insurer that settles a claim against its insured when coverage is disputed may seek reimbursement from the insured should coverage later be determined not to exist if the insurer "obtains the insured's clear and unequivocal consent to the settlement and the insurer's right to seek

reimbursement." *Tex. Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County*, 52 S.W.3d 128, 135 (Tex. 2000). In this case, which involves excess coverage, the insured consented to the settlement but not to the excess insurer's asserted reimbursement right. We must decide whether to recognize an exception to the rule in *Matagorda County* and imply a reimbursement obligation when the policy involves excess coverage, the insurer has no duty to defend under the policy, and the insured acknowledges that the claimant's settlement offer is reasonable and demands that the insurer accept it. Because none of these distinctions alleviates the concerns that drove the Court's analysis in *Matagorda County*, we decline to recognize such an exception. We further hold that the excess insurers failed to establish that Louisiana law regarding an insurer's right to reimbursement differs from Texas law. Accordingly, we affirm the court of appeals' judgment.

I. Background

Frank's Casing Crew & Rental Tool, Inc. fabricated a drilling platform for ARCO/Vastar. When the platform collapsed, ARCO sued Frank's Casing and several others. Frank's Casing had a $1 million primary liability policy, and excess coverage up to $10 million with Excess Underwriters at Lloyd's, London, and Certain Companies Subscribing Severally But Not Jointly To Policy No. 548/TA4011F01 (collectively "excess underwriters"). The excess policy did not require the underwriters to assume control of the defense or the settlement of any claims, but did give them the right to associate with defense counsel retained by Frank's Casing or the primary insurer if it was reasonably likely that the excess coverage layer would be reached. After Frank's Casing notified the excess underwriters of ARCO's claims, the underwriters issued reservation-of-rights letters asserting that coverage for ARCO's claims was "limited or negated" under the policy's terms.

The primary carrier retained defense counsel for Frank's Casing. As trial approached, ARCO offered to settle its claims against Frank's Casing for $9.9 million, an amount within the excess policy limits. Frank's Casing rejected the offer without passing it on to the excess underwriters. Two weeks before trial, the excess underwriters contacted ARCO directly, without Frank's Casing's knowledge, and attempted to settle claims the underwriters were willing to concede were covered. No agreement was reached. ARCO later made an $8.8 million global settlement offer to all of the defendants, about $7.55 million of which was allocated to Frank's Casing. The excess underwriters offered to pay two-thirds of this amount if Frank's Casing and its primary carrier would pay the balance, and further agreed to waive all coverage defenses if Frank's Casing accepted that proposal. Alternatively, the excess underwriters offered to pay $5 million and defer all coverage issues to be resolved in arbitration. Frank's Casing rejected both proposals, insisting that it was covered under the excess policy and therefore the underwriters were obligated to fund the entire settlement.

Shortly before trial, the excess underwriters retained counsel to associate with Frank's Casing and its primary carrier in defending against ARCO's claims. As trial began, it quickly became clear that Frank's Casing was ARCO's primary target, prompting Frank's Casing's in-house counsel to contact ARCO and solicit a settlement demand within the excess coverage limits. Frank's Casing's counsel suggested that something in the $7 million range would be reasonable. ARCO responded with a $7.5 million demand. Frank's Casing forwarded ARCO's demand to the excess underwriters with a letter suggesting that the settlement offer was a reasonable one that the underwriters should accept. The letter reiterated Frank's Casing's disagreement with the underwriters' coverage position, and stated that Frank's Casing was looking to the underwriters to fund the settlement. In their

response two days later, the underwriters agreed that the case should be settled, but noted that coverage issues remained. The underwriters offered to fund the entire settlement if Frank's Casing would agree to reserve those issues for resolution later. Frank's Casing rejected the underwriters' proposal, contending that the excess insurance policies obligated the underwriters to fund the settlement. In response, the excess underwriters advised Frank's Casing that they would pay $7.5 million to settle the claim, less any contribution from the primary carrier, and then seek reimbursement from Frank's Casing. Within hours, the underwriters contacted ARCO and orally accepted its settlement offer, and the primary carrier tendered its remaining policy limits of approximately $500,000. A written settlement agreement among ARCO, Frank's Casing, and the excess underwriters preserved "any claims that exist presently" between Frank's Casing and the underwriters. Before that agreement was executed, the excess underwriters filed this suit.

Both Frank's Casing and the excess underwriters filed a series of cross motions for partial summary judgment. The trial court initially granted the underwriters' motions on their right to reimbursement. It also granted their motions for partial summary judgment on coverage, and another concluding that the excess underwriters were entitled to $7,013,612 in damages on their reimbursement claim. Before a final judgment was entered, this Court issued *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, declining to recognize an implied-in-fact, an implied-in-law, or an equitable reimbursement right outside of the insurance policy's provisions. 52 S.W.3d at 128. In light of our decision, the trial court ordered Frank's Casing to file a motion for new trial only on the reimbursement issue. Frank's Casing filed the motion and the trial court granted it, withdrew its prior order, and signed a take-nothing judgment

in Frank's Casing's favor. The court of appeals affirmed. 93 S.W.3d 178. We granted the excess underwriters' petition for review to decide whether our decision in *Matagorda County* allows the underwriters to assert a reimbursement right under the circumstances presented.

II. Reimbursement Under Texas Law

In *Matagorda County*, we examined an insurer's asserted reimbursement right in similar, though not identical, circumstances. 52 S.W.3d at 129. There, the Texas Association of Counties (TAC) provided law-enforcement liability coverage to Matagorda County, but the policy excluded coverage for claims "arising out of jail." When three inmates who had been assaulted by other prisoners in the County's jail sued the County, TAC initially denied coverage based on the jail exclusion. After some negotiation, TAC agreed to pay defense costs, subject to a reservation of rights to preserve its coverage contest, and filed suit against the County seeking a declaratory judgment that the inmates' claims were not covered. Ultimately, the plaintiffs in the underlying suit offered to settle for $300,000, an amount within TAC's policy limits. Although the County did not dispute the reasonableness of the proposed settlement, the County refused to fund or contribute to it, insisting that the claims were covered. At this point, TAC issued a second reservation-of-rights letter, again reserving its right to continue to deny coverage, but adding a statement that it was not waiving "any of its rights to pursue full recovery of this settlement amount from the County . . . in the declaratory judgment action." *Id.* at 130. TAC settled the case, then amended its pending declaratory judgment action to seek reimbursement.

We held that, under the circumstances presented, TAC had not established a right to reimbursement. *Id.* at 133. First, we held that TAC could only reserve rights that were expressed

in the policy, and TAC's policy did not contain a right of reimbursement. *Id.* at 131 (stating "a unilateral reservation-of-rights letter cannot create rights not contained in the insurance policy"). Second, we held that neither the County's silence in response to TAC's reservation of rights, nor its failure to contest the settlement's reasonableness, were sufficient to create an implied-in-fact reimbursement obligation that did not appear in the policy. *Id.* at 132–33. Third, we held that TAC had not established a right to reimbursement under quasi-contractual theories of *quantum meruit* or unjust enrichment. *Id.* at 134–35. Finally, we held that an insurer could impose a reimbursement obligation on its insured by either drafting policies to specifically include a reimbursement right, or by obtaining the insured's "clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement." *Id.* at 135.

Our analysis in *Matagorda County* highlighted the dilemma faced by both insurer and insured when a claimant presents a settlement demand within policy limits and coverage is uncertain. *Id.* (stating "[w]e recognize that, however the issue is resolved, either insurers or insureds will face a difficult choice when coverage is questioned"). On one hand, an insurer that rejects a reasonable offer within policy limits risks significant potential liability for bad-faith insurance practices if it does not ultimately prevail in its coverage contest. *Id.*; *see G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holdings approved). Denying a reimbursement right in this situation in effect creates coverage in those cases where coverage is ultimately determined not to exist. At the same time, imposing an extra-contractual reimbursement obligation places the insured in a highly untenable position. *See Matagorda County*, 52 S.W.3d at 135. The insured is forced "to choose between rejecting a settlement within policy limits or accepting a

possible financial obligation to pay an amount that may be beyond its means, at a time when the insured is most vulnerable." *Id.* at 134.

We resolved this quandary in *Matagorda County*, determining that the risk of coverage uncertainties was best placed with the insurer. *Id.* We reasoned that "[r]equiring the insurer, rather than the insured, to choose a course of action is appropriate because the insurer is in the business of analyzing and allocating risk and is in the best position to assess the viability of its coverage dispute." *Id.* at 135. An insurer in this situation has a number of options. If the insurer assesses its coverage position as strong, it may refuse to participate in settlement and rely on its coverage action, leaving the insured to negotiate a settlement with its own resources. Or, an insurer may seek prompt resolution of its coverage dispute, a course we have encouraged insurers in this position to take. *Id.* at 135 (citing *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996); *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997)). Or, if an insurer's coverage position is difficult to assess, as is sometimes the case, the insurer can leverage the coverage dispute during settlement negotiations to lower the claimant's demand; by paying the negotiated claim, the insurer eliminates its own potential bad-faith liability, saves defense costs, and avoids protracted coverage litigation with its insured. Or, at the outset, the insurer may include a reimbursement right in the policy, which may yield a lower premium than a policy that does not contain such a right.

By contrast, recognizing an extra-contractual reimbursement right leaves insureds with fewer options and creates a number of potential problems. As we noted in *Matagorda County*, allowing an insurer to settle claims and then sue its policyholder "foster[s] conflict and distrust in the relationship between an insurer and its insured," a situation that has been widely rejected in

analogous contexts. *Id.* at 134; *see also Medina v. Herrera*, 927 S.W.2d 597, 604 (Tex. 1996). For example, courts have long declined to allow insurers to seek equitable subrogation against their insureds. *See Phonenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 312, 320–25 (1886). Strong public policy reasons support that rule:

> The fiduciary relationship between insurer and insured is fraught with conflicting interests . . . . [B]ecause of the fiduciary relationship, the insurer would be able to secure information from its insured under the guise of policy provisions available for later use in a subrogation action against the insured. [Further], the right to sue [its] own insured could be interpreted by an insurer as judicial sanction to breach the policy of insurance.

Stafford Metal Works, Inc. v. Cook Paint & Varnish Co., 418 F. Supp. 56, 58–59 (N.D. Tex. 1976) (citations omitted).

Several *amici* further warn that implying a reimbursement right would create a significant conflict for defense counsel during settlement discussions.[1] According to the *amici*, if an insured's acknowledgment of a settlement offer's reasonableness were to expose the insured to an extra-contractual reimbursement obligation, as the underwriters here contend it should, defense counsel's traditional role in evaluating and recommending settlement could end up advancing the insurer's interest over that of the insured, necessitating the insured's retention of its own coverage counsel during what may be a critical point in the proceedings. Indeed, the *amici* argue, with defense counsel

[1] We received *amicus curiae* briefs from United Policyholders; Pilco, Inc.; Shell Oil Co., Motiva Enterprises LLC, Burlington Resources Inc., Temple-Inland Inc., and Brad Fish, Inc.; the Texas Association of Defense Counsel; the Texas Civil Justice League; and Fred A. Simpson and Randall L. Smith, opposing a right to reimbursement under these circumstances. These *amici* argue generally that allowing reimbursement would distort the process of settling third-party liability claims and would allow insurers to extract contributions from their insureds that their policies do not support. The Complex Insurance Claims Litigation Association and the Property Casualty Insurers Association of America submitted briefs supporting the underwriters' right to reimbursement.

thus hindered from encouraging settlement, both the insured and the insurer will likely feel the need to hire their own "settlement counsel" to evaluate the case and formulate a strategy for the anticipated reimbursement litigation. Whether or not the concerns the *amici* voice are real or imagined, we believe they do portend significant distrust in the insurer/insured relationship during the settlement process should an equitable reimbursement right be implied.

Several *amici* also warn that recognizing a reimbursement right risks weakening the insurer's incentive to negotiate a settlement most favorable to its insured. Knowing that the insured will likely bear the ultimate payment obligation could incentivize the insurer to curtail attorney's fees and litigation expenses early in the proceedings by negotiating a quick settlement, with the added benefit of extinguishing any risk of *Stowers* liability. *See Stowers*, 155 S.W.2d at 547. The potentially protracted coverage/reimbursement litigation likely to follow would be at the insured's expense, even though the insured purchased insurance for the very purpose of hedging the risk and expense of future litigation.

The Court in *Matagorda County* weighed the varying risks that arise in this context and decided that insurers, on balance, are better positioned to handle them "either by drafting policies to specifically provide for reimbursement or by accounting for the possibility that they may occasionally pay uncovered claims in their rate structure." *Matagorda County*, 52 S.W.3d at 136. We decline to overrule that decision, and now turn to the underwriters' argument that the circumstances presented here are distinguishable and support their asserted right to reimbursement in this case.

III. Excess Underwriters' Reimbursement Theories

The excess underwriters contend that by soliciting the settlement demand and agreeing to be bound by it, Frank's Casing impliedly consented to reimburse the excess underwriters. The underwriters further claim an equitable reimbursement right under the doctrines of *quantum meruit* and *assumpsit*. Although we declined to recognize an implied or equitable reimbursement right in *Matagorda County*, the underwriters contend our decision was limited to the facts presented in that case. They maintain that the rationale underlying our decision does not apply here because the excess underwriters had neither the duty to defend nor unilateral control over settlement, factors they contend were critical underpinnings of our *Matagorda County* analysis. The underwriters also emphasize that, unlike the insurer in *Matagorda County*, their policy prevented them from settling the case without Frank's Casing's consent.

A. Implied-in-Fact Agreement

The excess underwriters argue that Frank's Casing impliedly agreed to reimbursement by taking an active role in procuring the settlement offer, and in demanding that the excess underwriters settle the claim. They also point to Frank's Casing's participation in the drafting and negotiation of the settlement agreement.

Undoubtedly, these actions demonstrate that Frank's Casing believed the claims should be settled, but they say nothing about Frank's Casing's agreement to a reimbursement obligation that does not appear in its policy. To the contrary, Frank's Casing's letters to the excess underwriters expressed continuing disagreement with the insurers' coverage position, indicated that Frank's Casing was looking to the excess underwriters to fund the entire settlement, and made clear that

Frank's Casing would seek recourse against the underwriters if the case was not settled and a judgment in excess of policy limits resulted. 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. The excess underwriters 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 carriers than it would to say that the 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. As we reaffirmed in *Matagorda County*, "a meeting of the minds is an essential element of an implied-in-fact contract." *Matagorda County*, 52 S.W.3d at 133 (citing *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972)). Frank's Casing's agreement to reimburse the excess insurers cannot be implied in light of its consistent position that the insurers alone were responsible for the claims.

The excess insurers contend, however, that Frank's Casing's agreement may be implied here because, unlike in *Matagorda County*, Frank's Casing's policy did not allow the insurers to settle without Frank's Casing's consent. In support, the underwriters cite the following policy language:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurers, shall have paid the amount of the underlying limits on account of such occurrence. *The Assured shall make a definite claim for any loss for which the Underwriters may be liable under this policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss*[2] *in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters.* If any subsequent payments shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.[3]

As we read this language, however, it describes when payment is due to the insured under the policy. Specifically, the insurer must pay Frank's Casing when the primary coverage layer is exhausted and Frank's Casing timely presents a claim for any excess amount for which it has been found liable as the result of a trial or a written agreement to which the parties acquiesced. In other words, the policy requires Frank's Casing to obtain the underwriters' consent to a settlement to receive payment under the policy. The policy language says nothing about the underwriters' reimbursement rights should they decide to negotiate a settlement of the claim.

B. Equitable Theories

The excess underwriters also claim a reimbursement right under the equitable theories of *quantum meruit* and *assumpsit*. Under the former theory, one who provides valuable services to another may establish that the service's recipient has an implied-in-law obligation to pay when the

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[2] The policy defines "ultimate net loss" as "the total sum which the Assured, or his Underlying Insurers as scheduled, or both, become obligated to pay . . . either through adjudication or compromise . . . . "

[3] The title of this clause is not clear on any portion of the record; Frank's Casing refers to it as a "Loss Payable" clause, a characterization that the excess underwriters do not dispute.

recipient has reasonable notice that the service provider expects to be paid. *See Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Under the latter, a cause of action arises when money is paid for the use and benefit of another. *See King v. Tubb*, 551 S.W.2d 436, 442 (Tex. Civ. App.—Corpus Christi 1977, no writ).

We held in *Matagorda County* that TAC could not recover on either *quantum meruit* or an unjustment enrichment theory, a quasi-contractual doctrine that closely resembles *assumpsit*. The excess underwriters argue that *Matagorda County* does not govern because Frank's Casing sought a settlement demand from ARCO and demanded that the underwriters pay it. They also contend that their status as excess insurers with no duty to defend distinguishes this case from *Matagorda County*. Neither of those distinctions, however, allays the concerns underlying our analysis in *Matagorda County*.

The parties' respective positions were no less firmly drawn in *Matagorda County* than in this case. There, it was clear that "the County was looking to [TAC] to settle . . . without a contribution from [the County]." *Matagorda*, 52 S.W.3d at 133 (internal quotations omitted). We fail to see how Frank's Casing's suggestion that ARCO submit a settlement demand within policy limits meaningfully distinguishes the decision. In *Matagorda County*, we concluded that "when coverage is disputed and the insurer is presented with a reasonable settlement demand within policy limits, the insurer may fund the settlement and seek reimbursement only if it obtains the insured's clear and unequivocal consent to the settlement *and* the insurer's right to seek reimbursement." *Id.* at 135 (emphasis added). We did so because "[o]therwise, the insured is forced to choose between rejecting a settlement within policy limits or accepting a possible financial obligation to pay an amount that

may be beyond its means, at a time when the insured is most vulnerable." *Id.* That fundamental concern is unaffected by the fact that the excess underwriters had no duty to defend.

There is an additional reason that the excess underwriters are not entitled to a reimbursement right. That is, "[w]hen a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement." *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). Here, the insurance policies spell out the parties' respective obligations in great detail. As set out above, the excess underwriters were not liable under the policy until the primary coverage was exhausted, Frank's Casing had provided timely notice, and Frank's Casing had become liable for a judgment either as the result of a trial or a settlement to which the excess underwriters had agreed. To recognize an equitable right to reimbursement would require us to "rewrite the parties' contract [or] add to its language," *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003), which we decline to do.

C. Other States

The excess underwriters also urge us to overrule *Matagorda County* and follow the decisions of the California Supreme Court in *Blue Ridge Insurance Co. v. Jacobsen*, 22 P.3d 313 (Cal. 2001), and a Florida appellate court in *Colony Insurance Co. v. G & E Tires & Service, Inc.*, 777 So. 2d 1034 (Fla. Dist. Ct. App. 2000). In *Blue Ridge*, the California Supreme Court implied a reimbursement obligation in favor of a liability insurer that funded a settlement of claims ultimately determined not to be covered. *Blue Ridge*, 22 P.3d at 314. The California court distinguished our decision in *Matagorda County* on the basis that California provides a much more limited opportunity to resolve coverage issues before the underlying lawsuit is resolved than does Texas. *Id.* at 322–23.

Moreover, the legal background underlying *Blue Ridge* differs significantly from Texas law. An insurer in Texas cannot be held liable under *Stowers* for failing to settle a claim that is not covered. *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994). Under California law, however, an insurer may not consider whether claims are covered in evaluating settlement demands. *Blue Ridge*, 22 P.2d at 318.

In *Colony Insurance*, the Florida appeals court held that a liability insurer's reservation of rights letter, coupled with the insured's acceptance of a defense, entitled the insurer to reimbursement for defense costs it had paid. 777 So. 2d at 1039. We held in *Matagorda County*, however, that a unilateral reservation-of-rights letter could not create a reimbursement obligation not contained in the insurance contract. *Matagorda County*, 52 S.W.3d at 131. As we have noted, to follow *Colony Insurance* would require us to overrule *Matagorda County,* which we decline to do.

IV. The Dissents

Justice Hecht would impose an equitable reimbursement obligation on Frank's Casing that is not found in its policy, supplementing the terms these sophisticated parties negotiated based on an unjust-enrichment theory. Justice Wainwright, recognizing that the equities presented cut both ways, does not agree that a reimbursement right may be implied in law; instead, he would apply one in fact, as a matter of law, based on Frank's Casing's acquiescence in the settlement, even though both parties expressly reserved their respective positions on the coverage/reimbursement question. On indistinguishable facts, we rejected both of those theories in *Matagorda County*. 52 S.W.3d at 131–35. In "rewrit[ing] the parties' contract . . . [because they] believe we should," *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 208 (Tex. 2004) (Hecht, J., dissenting), and

eschewing our own precedent, the dissenting justices would, in the words of one *amicus curiae*, "take[] 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 ," Amicus Curiae Brief of Texas Civil Justice League in Support of Respondent's Motion for Rehearing, at 2.

In *Matagorda County*, this Court drew a bright-line rule disallowing reimbursement on an equitable unjust-enrichment theory because insurers are in a superior position to evaluate the risks stemming from a coverage dispute and can expressly allocate that risk by delineating reimbursement rights in their policies. 52 S.W.3d at 135–36. Justice Hecht's approach would undermine both the predictability that our decision in *Matagorda County* provided and the "strong public policy in favor of preserving the freedom of contract." *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007). Just a few months ago, we concluded that an insured could not rely on the equitable "made-whole" doctrine to supplant a contractual subrogation clause. *Id.* at 645. We warned that courts "should not by judicial fiat insert non-existent language . . . into parties' agreed-to contracts . . . ." *Id.* at 649 n.41. The Court proclaimed itself "loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards," *id.* at 649, and reaffirmed the reasoning that supported our holding in *Matagorda County*: "insurers are well equipped to evaluate and reduce risk by, for example, 'drafting policies to specifically provide for reimbursement,'" *id.* (quoting *Matagorda County*, 52 S.W.3d at 136).

Justice Hecht attempts to limit our decision in *Matagorda County* to its facts, arguing the concerns that drove our decision there do not exist in this case and, even if they did, an equitable

remedy could be fashioned to do equity in accordance with general restitution principles. While his dissent asserts that the remedy could be limited to avoid "unfairness," it offers little guidance as to the remedy's boundaries. He hints that the concerns underlying *Matagorda County* do not apply because Frank's Casing is "a substantial business." Under Justice Hecht's construct, then, whether an insured faces a reimbursement obligation would have to be decided on a case-by-case basis: insureds with less economic heft than Frank's Casing but more than Matagorda County might or might not be on the hook, depending upon how a court might view the "equities" presented. Justice Hecht's approach would breed uncertainty and "promote litigation rather than settle it." *Gandy*, 925 S.W.2d at 709.

Justice Wainwright's approach is similarly untenable. Agreeing with the Court that the circumstances would not support a reimbursement right implied in law, he would imply one in fact — as a matter of law. As in *Matagorda County*, however, the record here affirmatively demonstrates just the opposite. Frank's Casing's repeated insistence on its coverage position and on the excess underwriters' obligation to fund any settlement, and its express reservation of the question, belie any meeting of the minds — "an essential element of an implied-in-fact contract." *Matagorda County*, 52 S.W.3d at 133. Just as in *Matagorda County*, Frank's Casing "consistently contested [the excess underwriters'] coverage position and insisted that [they] pay under the policy." *Id.* Undoubtedly, the parties agreed that the case should be settled. But the excess underwriters' own letter to Frank's Casing advising that it would contact ARCO and attempt to settle noted that the underwritershad "asked Frank's to contribute to the settlement [and] Frank's ha[d] refused ." Furthermore, though Justice Wainwright contends that Frank's Casing's agreement to the settlement constituted a manifestation of assent to the terms on which it was offered, there is uncontested

evidence that the excess underwriters first mentioned reimbursement in a letter it sent to Frank's Casing just hours before they contacted the plaintiffs and settled the case. Frank's Casing's assent cannot be inferred under these circumstances. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(a) (1981) (noting that assent may only be inferred "[w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them"). We held on nearly identical facts in *Matagorda County* that "there was no meeting of the minds" between the insurer and its insureds. *Id.* Given the parties' explicit efforts to preserve their respective positions on the coverage/reimbursement question, it makes no more sense to conclude 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.

V. Choice of Law

The excess underwriters argue alternatively that Louisiana law recognizes a reimbursement right, and that state's law should apply to this case because Frank's Casing's principal place of business is in Louisiana, the policy was issued through a Louisiana insurance agency, and the underlying incident arose from work Frank's Casing performed in Louisiana. Frank's Casing contends that the excess underwriters never requested that the trial court apply Louisiana law to the reimbursement issue, and also never established that it differs from Texas law. We agree with Frank's Casing.

The excess underwriters never requested that the trial court apply Louisiana law to the reimbursement issue or clearly asserted that Louisiana law applies. Instead, a footnote in their motion for summary judgment simply alluded to Louisiana law "[t]o the extent [it] might apply to this case," and then cited two Louisiana statutes, Louisiana Civil Code articles 2055 and 2298, and

two cases, *Edmonston v. A-Second Mortgage Co.*, 289 So. 2d 116 (La. 1974), and *E.F. Minyard v. Curtis Products, Inc.*, 205 So.2d 422 (La. 1967), generally allowing recovery for unjust enrichment. Neither the statutes nor the cases cited specifically addressed an insurer's right to reimbursement from its insured when it settles a claim that is ultimately determined not to be covered, absent an express agreement.[4] In addition, after this Court issued its decision in *Matagorda County*, the excess underwriters again briefly cited general Louisiana unjust-enrichment law in their response to Frank's Casing's motion for reconsideration of the trial court's partial summary judgment on reimbursement. After arguing at length that *Matagorda County* did not govern reimbursement in this case, they added a final three-paragraph section entitled "Louisiana Law Governs Excess Underwriters' Right to Reimbursement." They still did not ask the trial court to apply Louisiana law, however, but instead merely argued that Louisiana law would allow reimbursement "[t]o the extent this Court finds Louisiana law controlling." Even if the excess underwriters had clearly requested the court to apply Louisiana law, we cannot tell from the authorities they have cited how a Louisiana court would resolve the issue before us. As the party advocating the application of Louisiana law, the excess underwriters bore the burden of establishing that it differed from Texas law to overcome the presumption that it is the same as Texas's. *See Gevinson v. Manhattan Constr. Co. of Ok.*, 449 S.W.2d 458, 465 n.2 (Tex. 1969); *see also Unocal Corp. v. Dickinson Res. Inc.*, 889 S.W.2d 604,

[4] In *Edmonston*, for example, the court held that a widow who had unwittingly conveyed a home worth more than $24,000 to a mortgage company to satisfy a $5,178.24 second mortgage could recover under Louisiana's unjust-enrichment statutes. 289 So.2d at 122. In *Minyard*, the court considered when limitations had run on a subcontractor's claim to recover from a product supplier amounts it had paid to compensate the contractor for defective caulking. 205 So. 2d at 638. The court merely equated the subcontractor's claim seeking indemnity with an unjust-enrichment claim in determining the appropriate limitations period. *Id.* at 650, 653. In response to Frank's Casing's motion for reconsideration of the trial court's partial summary judgment on reimbursement, the excess underwriters cited a suit in which a court held that an insurer was not liable for statutory bad-faith penalties because the insurer had sought reimbursement of settlement costs. *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5th Cir. 1992). In reversing the penalties, the Fifth Circuit noted that the the insured had stipulated that it would be liable to reimburse the insurer if coverage was resolved in the insurer's favor. *Id.* at 1177.

607 n.2 (Tex. App.—Houston [14th Dist.] 1994), *writ denied per curiam*, 907 S.W.2d 453 (Tex. 1995).[5] Because they have not, we presume that the outcome would be no different under the foreign state's law.

VI. Conclusion

We hold that the excess underwriters have not established a right to reimbursement under Texas law, nor have they established that the application of Louisiana law would produce a different result. Accordingly, we affirm the court of appeals' judgment.

Harriet O'Neill
Justice

OPINION DELIVERED: February 1, 2008

[5] The excess underwriters contend that the presumption that another state's law is the same as this state's does not apply because Louisiana law is not based on the common law, citing 29 AM. JUR. 2d *Evidence* § 259 (2002). Neither we nor any other Texas court has recognized this distinction. In fact, we recently indicated that the presumption would normally apply in a case involving Louisiana law. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 685 (Tex. 2006).