

EVEN WITHOUT EXPRESS AGREEMENT BY INSURED, INSURER HAS RIGHT TO RECOUP UNCOVERED PORTIONS OF SETTLEMENT FROM INSURED

Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.

The Texas Supreme Court recently addressed the question of when, if ever, an insurer has a right to recoup a portion of a settlement from its insured. *Excess Underwriters at Lloyd's, London and Certain Companies Subscribing Severally but not Jointly to Policy No. 548/TA4011FO1 v. Frank's Casing Crew & Rental Tools, Inc.* (Tex., May 27, 2005). The Court had previously discussed that question in *Texas Ass'n of Counties County Gov't Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000).

In *Frank's Casing*, the insured had an excess insurance policy through Lloyd's of London. When a drilling platform that it constructed collapsed, it was sued by ARCO, the party for whom it had constructed the platform. The excess insurer ultimately negotiated a settlement, to which Frank's Casing agreed pursuant to a consent-to-settle clause in its policy. The Supreme Court found that an insurer that pays to settle claims that are not covered under the policy has a right to recoup the portions of the settlement attributable to uncovered claims in at least two circumstances: (1) when an insured has demanded that its insurer accept a settlement offer that is within policy limits and (2) when an insured expressly agrees that the settlement offer should be accepted. The Court wrote that "[i]n these situations, the insurer has a right to be reimbursed if it has timely asserted its reservation of rights, notified the insured it intends to seek reimbursement, and paid to settle claims that were not covered." A right to reimbursement will arise if the insured asserts that a settlement offer has triggered a "Stowers" duty. It will also apparently arise in a situation in which the insurer has notified its insured of a reasonable settlement offer and given the insured the opportunity to assume its defense. The Court found that an agreement by the insured to reimburse the insurer is quasi-contractual, one implied by law.

In a concurrence, Justice Hecht, who joined in the five-person majority (in portions of which the other two justices hearing the case joined) emphasized that an insurer cannot seek reimbursement if it unilaterally settles a claim for an unreasonable amount or in circumstances actually prejudicing the insured.

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