THE EFFECT OF EXCESS UNDERWRITERS AT LLOYDS, LONDON V. FRANK'S CASING CREW AND RENTAL TOOLS, INC. ON TEXAS INSURANCE SETTLEMENT PRACTICES

Melissa Marcus

I. INTRODUCTION

Consider the following scenario: While at work this morning, Charles Davis received a delivery. A man came to his office and handed him a stack of papers. Charles glanced over the papers and was horrified to discover that ZET Insurance Company ("ZET") was suing his business for $4 million dollars.

Charles is 60 years old and has spent his entire life working on commercial development projects in Austin, Texas. He started his own business, Davis Development, 25 years ago. Three years ago, Davis Development built several office buildings for Martin & Brown, L.L.P. ("Martin"). Shortly after the office buildings were completed, an interior wall to one of the offices collapsed, and Martin brought suit against Davis Development for the resulting damages.

Fortunately, Charles kept a general commercial liability policy on Davis Development with policy limits of $4 million dollars. The policy was purchased from ZET ten years before the Martin lawsuit, and the policy was renewed each year. When Charles received notice that his company was being sued by Martin, he forwarded the Martin petition to ZET.

Charles had several problems with ZET when he asked them to handle the Martin suit. Initially, ZET denied coverage for the Martin claims. Charles challenged this coverage determination, and worked with ZET until they finally agreed to provide Davis Development with an attorney to handle the lawsuit.

Martin offered to settle the lawsuit for $4 million dollars. When this settlement offer came to Charles's attention, knowing that a $4 million dollar settlement was within his policy limits, he urged the ZET attorney to settle the dispute. On January 12, 2006, ZET sent Charles a letter stating that, per his request, it would settle the lawsuit with Martin subject to a reservation of rights. Charles did not respond to the letter and that same

day, ZET settled the dispute with Martin for $4 million dollars.

Now, ZET alleges that the Martin settlement was not covered by the Davis Development policy. Is Davis Development liable to ZET for the $4 million dollar settlement with Martin?

Prior to the Texas Supreme Court's opinion in *Excess Underwriters at Lloyds London v. Franks Casing Crew and Rental Tools, Inc.*,[1] Davis Development could not be liable to its own insurance company under these circumstances because Davis Development would be aided by three Texas insurance principals: the anti-subrogation rule,[2] the *Stowers* doctrine,[3] and the voluntary payment defense to equitable subrogation.[4] These three principals of Texas insurance law historically served to protect insured's from coverage disputes with their insurance company.

In *Excess Underwriters at Lloyds, London*, the Texas Supreme Court

[1] 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321 (Tex. May 27, 2005).

[2] The anti-subrogation rule prohibits an insurer from seeking reimbursement against its own insured. *See* Stafford Metal Works, Inc. v. Cook Paint & Var. Co., 418 F. Supp. 56, 58-59 (N.D. Tex. 1976) (an insurer cannot subrogate itself against its own insured where the injury was caused by the negligence of the insured himself); *see also* Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U.S. 312, 320-325, 29 L. Ed. 873, 6 S. Ct. 750 (1886); Federal Insurance Co. v. Tamiami Trail Tours, Inc., 117 F.2d 794, 796 (5th Cir. 1941); Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000) (because of the special relationship between the insurer and its insured, there are good reasons to deny subrogation absent the insured's agreement to the settlement and to the later potential for reimbursement); Highway Ins. Underwriters v. J.H. Robinson Truck Lines, 272 S.W.2d 904 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.) (Galveston Court of Appeals denied the right of a liability insurer to reimbursement against its insured for amounts paid in settlement, reasoning that the insurer generally has no authority to settle an uncovered claim with insured's own funds); *See generally* 21 William V. Dorsaneo III, Texas Litigation Guide § 341.12 (2005).

[3] The *Stowers* doctrine imposes liability on insurance companies where the insurer wrongfully denies coverage for a claim that is covered under the insured's policy. The *Stowers* doctrine was created in 1929 by the holding in G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, judgm't adopted).

[4] The voluntary payment defense prohibits insurers from seeking equitable subrogation after the insurer voluntarily makes a payment in error. *See* Vogel v. Glickman, 117 F. Supp. 2d 572 (W.D. Tex. 2000), decision aff'd, 276 F.3d 729 (5th Cir. 2002), applying Texas law; First Nat. Bank of Kerrville v. O'Dell, 856 S.W.2d 410 (Tex. 1993); World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998), reh'g overruled, (Sept. 24, 1998); Matagorda County v. Texas Ass'n of Counties County Government Risk Management Pool, 975 S.W.2d 782 (Tex. App. Corpus Christi 1998), review granted, (June 24, 1999) and judgment aff'd, 52 S.W.3d 128 (Tex. 2000), reh'g of cause overruled, (Mar. 8, 2001); Crowder v. Benchmark Bank, 889 S.W.2d 525 (Tex. App. Dallas 1994), writ granted, (Mar. 30, 1995) and aff'd in part, rev'd in part on other grounds, 919 S.W.2d 657 (Tex. 1996), reh'g of cause overruled, (May 10, 1996).

dramatically changed the dynamics of Texas insurance settlement practices.[5] In all cases involving a coverage dispute, where the insurer defends the insured under a reservation of rights, the insured is now subjected to liability anytime the insured comments on the reasonableness of a settlement offer.[6] The Texas Supreme Court carved out an exception to the anti-subrogation rule, and established an insurer's implied reimbursement right against its own insured.[7] In coming to its decision, the Texas Supreme Court relied heavily on California insurance law, despite substantial differences between Texas and California insurance settlement practices.[8]

Shortly after the *Excess Underwriters at Lloyds, London* opinion was issued, the insured, Franks Casing Crew and Rental Tools, Inc. ("Frank's Casing Crew"), moved for the Texas Supreme Court to rehear oral argument on the case.[9] The Texas Supreme Court granted Frank's Casing Crew's Motion for Rehearing on January 9, 2006, and on February 15, 2006, the court reheard oral argument on *Excess Underwriters*. The court has not yet issued an opinion on the rehearing.

This Note focuses on the effect of *Excess Underwriters* on insurance settlement practices in Texas. First, this Note addresses the insurer's duty to settle and its right to reimbursement of uncovered settlement amounts prior to *Excess Underwriters*. Second, this Note explains the Texas Supreme Court's decision in *Excess Underwriters*. Finally, this Note contemplates that the Texas Supreme Court has two potential courses of action when it re-issues its opinion on *Excess Underwriters*.

First, the court may reverse *Excess Underwriters* if the court intends to

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[5] *See generally* 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321.

[6] *See generally id.*

[7] *See generally id.*

[8] *See* G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, judgm't adopted) (establishing an insurer's duty to settle all insurance claims where: (1) the claim is within the insurance policy's coverage; (2) the settlement price is a sum of money that does not exceed the monetary limits of liability coverage; (3) the settlement proposed will result in a full release [8] of the insured's obligation to the claimant; and (4) the terms of the proposal are such that a reasonable, prudent insurance carrier would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment coverage is clear); *contra* Blue Ridge Ins. Co. v. Jacobsen, 25 Cal. 4th 489, 502, 22 P.3d 313, 321, 106 Cal. Rptr. 2d 535, 544 (Cal. 2001) (insurer may not consider the issue of coverage in determining whether the settlement is reasonable).

[9] Motion for Rehearing, *Excess Underwriters at Lloyds London v. Franks Casing Crew and Rental Tools, Inc*., 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321 (2005) (No. 02-0730).

reaffirm its prior holding in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, where the court held that an insurer has no implied reimbursement rights after settling an uncovered claim with a third party tortfeasor.[10] This course of action is also consistent with the Texas anti-subrogation rule,[11] the *Stowers* doctrine,[12] and the voluntary payment defense to equitable subrogation.[13]

Alternatively, if the court reaffirms its opinion in *Excess Underwriters*, the court should clarify Texas insurance law by explicitly overruling its holding in *Matagorda County*.[14] The court should also modify the *Stowers* doctrine by expanding the scope of an insurer's duty to settle third party insurance claims, so that the doctrine is consistent with the *Excess Underwriters* opinion.

The Note advocates the position that *Excess Underwriters* should be

[10] 52 S.W.3d 128, 131 (Tex. 2000).

[11] *See* Stafford Metal Works, Inc. v. Cook Paint & Var. Co., 418 F. Supp. 56, 58-59 (N.D. Tex. 1976) (an insurer cannot subrogate itself against its own insured where the injury was caused by the negligence of the insured himself); *see also* Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U.S. 312, 320-325, 29 L. Ed. 873, 6 S. Ct. 750 (1886); Federal Insurance Co. v. Tamiami Trail Tours, Inc., 117 F.2d 794, 796 (5th Cir. 1941); Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000) (because of the special relationship between the insurer and its insured, there are good reasons to deny subrogation absent the insured's agreement to the settlement and to the later potential for reimbursement); Highway Ins. Underwriters v. J.H. Robinson Truck Lines, 272 S.W.2d 904 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.) (Galveston Court of Appeals denied the right of a liability insurer to reimbursement against its insured for amounts paid in settlement, reasoning that the insurer generally has no authority to settle an uncovered claim with insured's own funds); *See generally* 21 William V. Dorsaneo III, Texas Litigation Guide § 341.12 (2005).

[11] The *Stowers* doctrine imposes liability on insurance companies where the insurer wrongfully denies coverage for a claim that is covered under the insured's policy. The *Stowers* doctrine was created in 1929 by the holding in G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, judgm't adopted).

[12] *G.A. Stowers Furniture Co.*, 15 S.W.2d at 544.

[13] *See* Vogel v. Glickman, 117 F. Supp. 2d 572 (W.D. Tex. 2000), decision aff'd, 276 F.3d 729 (5th Cir. 2002), applying Texas law; First Nat. Bank of Kerrville v. O'Dell, 856 S.W.2d 410 (Tex. 1993); World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998), reh'g overruled, (Sept. 24, 1998); Matagorda County v. Texas Ass'n of Counties County Government Risk Management Pool, 975 S.W.2d 782 (Tex. App. Corpus Christi 1998), review granted, (June 24, 1999) and judgment aff'd, 52 S.W.3d 128 (Tex. 2000), reh'g of cause overruled, (Mar. 8, 2001); Crowder v. Benchmark Bank, 889 S.W.2d 525 (Tex. App. Dallas 1994), writ granted, (Mar. 30, 1995) and aff'd in part, rev'd in part on other grounds, 919 S.W.2d 657 (Tex. 1996), reh'g of cause overruled, (May 10, 1996).

[14] 52 S.W.3d 128, 131 (Tex. 2000).

reversed, and *Matagorda County* and *Stowers* should be reaffirmed. This course of action is preferable because it would avoid the confusion that would otherwise follow in reconciling the *Excess Underwriters* opinion with existing Texas insurance principals.

II. BACKGROUND

A. The Insurer's Duty to Settle Insurance Claims

1. Generally

Liability insurance policies generally vest the insurer with complete control over the defense and settlement of third party claims against the insured.[15] Policies ordinarily contain clauses providing that: (1) there shall be no action against the insurer except upon a final judgment against the insured; (2) the insurer shall have full control over the defense of any claim against the insured; (3) the insurer may make such investigation, negotiation and settlement of any claim or suit against the insured as the insurer deems expedient; and (4) the insured shall not settle any such claim except at his own expense.[16] The policies ordinarily do not obligate the insurer to accept an offer of settlement.[17] Consequently, a conflict of interest may arise between the insurer and the insured where a tortfeasor brings an action against the insured for an amount in excess of the policy limits and the tortfeasor offers to compromise such a claim for the policy limit or an amount slightly below the limit.[18]

The conflict arises because the insurer's primary aim is generally to minimize its payments, whereas the insured, in carrying liability insurance with stated limits, expects to have such an amount at his disposal if the circumstances justify its payment.[19] In order to alleviate this inherent conflict, most jurisdictions find that there is a fiduciary relationship between insurers and insureds which imposes a duty on insurers to use good

[15] Cindie Keegan McMahon, Annotation, Duty of Liability Insurer to Initiate Settlement Negotiations, 51 A.L.R.5th 701 (1997).

[16] *See* 6 AM. JUR. 2D *Proof of Facts* § 1 (2006).

[17] *Id*.

[18] *Id*.

[19] *Id*.

faith in settling claims against its insureds.[20]

The scope of the insurer's duty of good faith in the settlement of third party claims varies from jurisdiction to jurisdiction. Some jurisdictions broadly construe the insurer's duty to settle insurance claims and find that the insurer must affirmatively initiate settlement negotiations with a third party tortfeasor.[21] The rationale behind broadly construing the duty is to prevent insurers from frustrating the purpose of the policy by making

[20] *See e.g.*, Gibbs v. State Farm Mut. Ins. Co. (1976, CA9 Cal) 544 F2d 423, 1 Fed Rules Evid Serv 566; Coleman v Holecek (1976, CA10 Kan) 542 F2d 532; Garner v American Mut. Liability Ins. Co. (1973, 3rd Dist) 31 Cal App 3d 843, 107 Cal Rptr 604; Phoenix Ins. Co. v Florida Farm Bureau Mut. Ins. Co. (1990, Fla App D2) 558 So 2d 1048, 15 FLW D540; Powell v Prudential Property & Casualty Ins. Co. (1991, Fla App D3) 584 So 2d 12, 16 FLW D1309, review den (Fla) 598 So 2d 77; Guarantee Abstract & Title Co. v Interstate Fire & Casualty Co. (1980) 228 Kan 532, 618 P2d 1195, appeal after remand 232 Kan 76, 652 P2d 665; Commercial Union Ins. Co. v Liberty Mut. Ins. Co. (1986) 426 Mich 127, 393 NW2d 161; Rova Farms Resort, Inc. v Investors Ins. Co. (1974) 65 NJ 474, 323 A2d 495; Maine Bonding & Casualty Co. v Centennial Ins. Co. (1985) 298 Or 514, 693 P2d 1296; Shamblin v Nationwide Mut. Ins. Co. (1990) 183 W Va 585, 396 SE2d 766; Alt v American Family Mut. Ins. Co. (1976) 71 Wis 2d 340, 237 NW2d 706; Hamilton v. Maryland Cas. Co., 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128 (2002) (liability insurer owes an implied duty to accept reasonable settlement demands within the policy limits.); Snowden ex rel. Estate of Snowden v. Lumbermens Mut. Cas. Co., 358 F. Supp. 2d 1125 (N.D. Fla. 2003) (applying Florida law). See generally Cindie Keegan McMahon, Annotation, Duty of Liability Insurer to Initiate Settlement Negotiations, 51 A.L.R.5th 701 (1997).

[21] Gibbs v. State Farm Mut. Ins. Co., 544 F.2d 423 (9th Cir. 1976); Coleman v. Holecek, 542 F.2d 532 (10th Cir. 1976); Garner v. Am. Mut. Liability Ins. Co., 31 Cal. App. 3d 843, 107 Cal. Rptr. 604 (3rd Dist. 1973) (concluding that the liability insurer's duty to the insured requires the insurer to at least consider and determine whether settlement is in the best interest of its insured and that the insurer breaches its duty by failing to consider, accept, or make a reasonable settlement offer in bad faith); Phoenix Ins. Co. v. Florida Farm Bureau Mut. Ins. Co., 558 So. 2d 1048, (Fla. Dist. Ct. App. 1990); Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 1 (Fla. Ct. App. 1991); Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co., 618 P.2d 1195, *appeal after remand* 652 P.2d 665 (Kan. 1980); Commercial Union Ins. Co. v. Liberty Mut. Ins. Co., 393 N.W.2d 161 (Mich. 1986) (concluding that "bad faith" includes failing to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances. The court reasoned that "bad faith" exists when an insurer's actions are motivated by selfish purposes or by a desire to protect its own interests at the expense of its insured's interests); Rova Farms Resort, Inc. v. Investors Ins. Co., 323 A.2d 495 (N.J. 1974) (holding that an insurer has an affirmative duty to initiate settlement negotiations, unless there is no realistic possibility of settlement within the policy limits and the insured will not contribute to a settlement figure above the policy limits); Maine Bonding & Cas. Co. v Centennial Ins. Co., 693 P.2d 1296 (Or. 1985); Shamblin v. Nationwide Mut. Ins. Co., 396 S.E.2d 766 (W. Va. 1990); Alt v Am. Family Mut. Ins. Co., 71, 237 N.W.2d 706 (Wis. 1976).

settlement decisions which expose insureds to excess liability.[22] Some courts also find that the insurer is required to initiate settlement negotiations where it would do so on its own behalf, were its liability equal to its insureds.[23]

Other jurisdictions relieve the insurer of the affirmative duty to initiate settlement with a third party tortfeasor, but require that the insurer settle claims with third parties when the third party offers a reasonable settlement amount to the insurer.[24] For example, in California, if an insurer fails to accept a reasonable settlement offer within the policy limits, and the judgment exceeds the policy limits, the insurer risks liability for the entire judgment and any other damages incurred by the insured.[25] Under California insurance law, the insurer may not consider the issue of coverage in determining whether the settlement is reasonable.[26]

2. Insurer's Duty to Settle Covered Claims in Texas

In Texas, the courts have adopted a narrower construction of the insurer duty to settle insurance claims with third party tortfeasors. The first case to establish the insurer's duty to settle an insurance claim was *G.A. Stowers Furniture Co. v. American Indemnity Company*.[27] Under *Stowers*, the insurer's duty to settle an insurance claim arises only where: (1) the claim is within the insurance policy's coverage; (2) the settlement price is a sum of money that does not exceed the monetary limits of liability coverage; (3) the settlement proposed will result in a full release[28] of the insured's

[22] Cindie Keegan McMahon, Annotation, Duty of Liability Insurer to Initiate Settlement Negotiations, 51 A.L.R.5th 701 (1997).

[23] *See e.g.*, Kissoondath v. U.S. Fire Ins. Co., 620 N.W.2d 909 (Minn. Ct. App. 2001) (Insurer's duty to exercise good faith includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured.)

[24] Cindie Keegan McMahon, Annotation, Duty of Liability Insurer to Initiate Settlement Negotiations, 51 A.L.R.5th 701 (1997).

[25] Blue Ridge Ins. Co. v. Jacobsen, 25 Cal. 4th 489, 502, 22 P.3d 313, 321, 106 Cal. Rptr. 2d 535, 544 (Cal. 2001).

[26] *Id*.

[27] 15 S.W.2d 544 (Tex. Comm'n. App. 1929, judgm't adopted).

[28] A release is an agreement in which one party agrees that a duty or obligation owed by the other party is discharged immediately on the occurrence of a condition. Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex.1993); Williams v. Glash, 789 S.W.2d 261, 264 (Tex.1990); Nat'l Union Fire Ins. Co. v. Ins. Co. of N. Am., 955 S.W.2d 120, 127 (Tex. App.-Houston [14th Dist.] 1997), aff'd, Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d

obligation to the claimant; and (4) the terms of the proposal are such that a reasonable, prudent insurance carrier would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment.[29] Where an insurer fails to settle a covered claim under *Stowers*, the insured has a private right of action, commonly referred to as a *Stowers* action, against the insurer.[30] The measure of damages includes the amount of the judgment that exceeds the limits of the insurer's liability set out in the policy of insurance.[31]

Texas statutory law also recognizes the duty of good faith and fair dealing in settling insurance claims. Both the Deceptive Trade Practices Act (DTPA) and also the Texas Insurance Code Chapter 541 (previously Article 21.21) provide for a private right of action by parties aggrieved by prohibited acts, including the insurer's failure to settle a covered insurance claim.[32] The statutory duties imposed on an insurer in handling a claim, particularly the obligation to make a good faith attempt at a prompt and fair settlement, and the common-law duty of good faith and fair dealing as it applies to settlement practices in the context of a first party claim, appear to co-exist.[33]

B. Insurer's Reservation of Rights

Where a tortfeasor asserts a cause of action against an insured, an insurer may opt to defend the insured in the action against the tortfeasor while reserving its rights to assert coverage defenses against the insured at a later date.[34] A reservation of the insurer's rights is appropriate where the insurer believes that the tortfeasor has alleged damages against the insured

692 (Tex.2000). A release extinguishes a claim or cause of action and bars recovery on the released matter. Dresser Indus., 853 S.W.2d at 508.

[29] Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 848-49 (Tex. 1994); Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 314 (Tex. 1994); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 608 (Tex. App.—Tyler 1984, ref. n.r.e.).

[30] 21 William V. Dorsaneo III, Texas Litigation Guide § 341.04 (2005).

[31] Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 848 (Tex. 1994); G.A. Stowers Ins. Co., 15 S.W.2d at 544-46.

[32] *See* 4 Texas Torts and Remedies § 70.31[1] (J. Hadley Edgar, Jr. & James B. Sales eds., 2005), *available at* LEXIS 4-70 Texas Torts and Remedies § 70.31.

[33] *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 55 n.4 (Tex. 1997) (noting that Chapter 541 does not pre-empt the common law duty of good faith and fair dealing.).

[34] *See* American Eagle Ins. Co. v. Nettleton, 932 S.W.2d 169, 174 (Tex. App.--El Paso 1996, writ den.).

that are not covered by the policy.[35]

The insurer may reserve its rights through a "reservation of rights letter."[36] A "reservation of rights letter" is a letter sent by the insurer and must notify the insured (1) of the coverage defenses the insurer may at some point rely on to deny coverage and (2) that its defense of the insured will not waive these defenses.[37] If the insured does not respond to the reservation of rights letter by refusing the defense under reservation of rights, the insured's silence will amount to consent and the insurer will not be estopped to raise its coverage defenses or be deemed to have waived its defenses.[38]

C. Equitable Subrogation

Subrogation is an equitable doctrine that may arise from the agreement of the parties or by implication and equity.[39] Some treatises refer to the doctrine as a legal fiction, imposed by the courts in order to avoid fraud or injustice.[40] Simply stated, it is a right of one who has paid an obligation that another should have paid to be indemnified by the other.[41] The purpose of the doctrine of subrogation is to prevent the unjust enrichment of the debtor who owed the debt that is paid.[42] The inquiry is whether the debtor would be unjustly enriched if subrogation does not occur.[43]

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[35] First Gen. Realty Corp. v. Maryland Cas., 981 S.W.2d 495, 501 (Tex. App.--Austin 1998, pet. denied); Rhodes v. Chicago Ins., a Div. of Interstate Nat., 719 F.2d 116, 120 (5th Cir. 1983). Coverage issues arise where the insurer determines that coverage for a claim is questionable, or alternatively, where the tortfeasor's petition against the insured includes both covered and noncovered claims.

[36] *See* Western Cas. & Sur. Co. v. Newell Mfg. Co., 566 S.W.2d 74, 76 (Civ. App.—San Antonio 1978, writ ref. n.r.e.).

[37] *Id*.

[38] *See id.* (citing Pac. Indem. Co. v. Acel Delivery Servs., Inc., 485 F.2d 1169 (5th Cir. 1973) (If the insured refuses to accept the offer of a defense under the insurer's reservation of rights, and so notifies the insurer, the insurer cannot stubbornly continue with the defense and still preserve its right to assert policy defenses.).

[39] Chase Manhattan Mortg. Corp. v. Cook, 141 S.W.3d 709 (Tex. App. Eastland 2004).

[40] First Nat. Bank of Houston v. Ackerman, 70 Tex. 315, 8 S.W. 45 (1888); Fleetwood v. Med Center Bank, 786 S.W.2d 550 (Tex. App. Austin 1990), writ denied, (Sept. 6, 1990).

[41] Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc., 106 S.W.3d 118 (Tex. App. Houston 1st Dist. 2002), reh'g overruled, (June 13, 2003).

[42] World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998), reh'g overruled, (Sept. 24, 1998).

[43] *Id*.

The doctrine of subrogation may be invoked to allow one party to assert rights of another party when there is no express assignment of the right.[44] In the context of insurance, the doctrine might arise where an insurer overpays its share of a loss.[45] The insurer's overpayment may be adjusted where the insurer asserts a right of subrogation.[46]

1. Defenses to Subrogation

In Texas, the doctrine of subrogation may not be invoked by a volunteer.[47] In the context of subrogation, a volunteer, is one who, in no event resulting from the existing state of affairs, can become liable for the debt, and whose property is not charged with the payment thereof and cannot be sold therefor.[48] Instead, the right to subrogation only arises where the subrogor was compelled to make a payment in order to preserve a legal right or property of its own.[49]

2. Subrogation Against the Insured

As a general proposition, an insurer is not permitted to assert a subrogation right against its own insured, this general prohibition is commonly referred to as the anti-subrogation rule.[50] One reason an insurer

[44] Pape Equipment Co. v. I.C.S., Inc., 737 S.W.2d 397 (Tex. App. Houston 14th Dist. 1987), writ refused n.r.e., (Dec. 16, 1987); Monk v. Dallas Brake & Clutch Service Co., Inc., 697 S.W.2d 780 (Tex. App. Dallas 1985), writ refused n.r.e., (May 7, 1986).

[45] Harris v. American Protection Ins. Co., 158 S.W.3d 614 (Tex. App. Fort Worth 2005).

[46] *Id*.

[47] Vogel v. Glickman, 117 F. Supp. 2d 572 (W.D. Tex. 2000), decision aff'd, 276 F.3d 729 (5th Cir. 2002), applying Texas law; First Nat. Bank of Kerrville v. O'Dell, 856 S.W.2d 410 (Tex. 1993); World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998), reh'g overruled, (Sept. 24, 1998); Matagorda County v. Texas Ass'n of Counties County Government Risk Management Pool, 975 S.W.2d 782 (Tex. App. Corpus Christi 1998), review granted, (June 24, 1999) and judgment aff'd, 52 S.W.3d 128 (Tex. 2000), reh'g of cause overruled, (Mar. 8, 2001); Crowder v. Benchmark Bank, 889 S.W.2d 525 (Tex. App. Dallas 1994), writ granted, (Mar. 30, 1995) and aff'd in part, rev'd in part on other grounds, 919 S.W.2d 657 (Tex. 1996), reh'g of cause overruled, (May 10, 1996).

[48] Langston v. GMAC Mortg. Corp., 183 S.W.3d 479 (Tex. App. Eastland 2005).

[49] *Id*.

[50] *See* Stafford Metal Works, Inc. v. Cook Paint & Var. Co., 418 F. Supp. 56, 58-59 (N.D. Tex. 1976) (an insurer cannot subrogate itself against its own insured where the injury was caused by the negligence of the insured himself); *see also* Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U.S. 312, 320-325, 29 L. Ed. 873, 6 S. Ct. 750 (1886); Federal Insurance Co. v. Tamiami Trail Tours, Inc., 117 F.2d 794, 796 (5th Cir. 1941); Texas Ass'n of Counties

is prohibited from subrogating against its own insured is because such an action might create a conflict of interest and interfere with the fiduciary relationship between the insurer and the insured.[51] Another reason is that, because an insurer stands in the shoes of its insured, an insurer's attempt to subrogate against its own insured would be equivalent to the insured asserting a cause of action against itself, a theoretical problem.[52]

Despite these conceptual problems, the Texas Supreme Court is currently contemplating an exception to the anti-subrogation rule. Specifically, there is a debate as to whether an insurer should be permitted to seek reimbursement from its insured for settlement funds paid under a unilateral reservation of rights letter upon an adjudication of non-coverage. While it seems clear that an insurer may enforce a reimbursement clause that is set forth explicitly in the policy,[53] it is unclear whether an insurer may enforce a unilateral reservation of rights letter that purports to establish reimbursement rights absent the insured's assent.[54]

D. Reimbursement Rights

While there is a well-developed body of Texas case law that addresses

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County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000) (because of the special relationship between the insurer and its insured, there are good reasons to deny subrogation absent the insured's agreement to the settlement and to the later potential for reimbursement); Highway Ins. Underwriters v. J.H. Robinson Truck Lines, 272 S.W.2d 904 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.) (Galveston Court of Appeals denied the right of a liability insurer to reimbursement against its insured for amounts paid in settlement, reasoning that the insurer generally has no authority to settle an uncovered claim with insured's own funds); *See generally* 21 William V. Dorsaneo III, Texas Litigation Guide § 341.12 (2005).

[51] Highway Ins. Underwriters v. J.H. Robinson Truck Lines, 272 S.W.2d 904 (Tex.Civ.App.--Galveston 1954, writ ref'd n.r.e.), (the insurer generally has no authority to settle an uncovered claim with insured's own funds); Stafford Metal Works, Inc. v. Cook Paint & Var. Co., 418 F. Supp. 56, 58-59 (N.D. Tex. 1976).

[52] *Id*. *citing Stafford Metal Works, Inc.*, 418 F. Supp. at 58-59.

[53] *See e.g.*, Rural Mut. Ins. Co. v. Peterson, 134 Wis. 2d 165, 395 N.W.2d 776, 778-82 (Wis. 1986); Employers Mut. Cas. Ins. Co. v. Nicholas, 124 Colo. 544, 238 P.2d 1120 (Colo. 1951); Serv. Mut. Liab. Ins. Co. v. Aronofsky, 308 Mass. 249, 31 N.E.2d 837, 839-40 (Mass. 1941); *see also* Annotation, Validity and Construction of Liability Policy Provision Requiring Insured to Reimburse Insurer for Payments Made Under Policy, 29 A.L.R.3d 291 (1970); *see also* Nat'l Cas. Co. v. Lane Express, Inc., 998 S.W.2d 256, 265-66 (Tex. App.—Dallas 1999, pet. denied) (enforcing insurance policy clause requiring insured motor carrier to reimburse insurer).

[54] *See* Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000); *contra* Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools, Inc., 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321 (Tex. May 27, 2005).

the insurer's rights and duties in the context of settling third party claims, those rights and duties become murky when a coverage dispute arises. Specifically, an issue arises where the insurer funds a settlement that is subsequently found to be a non-covered claim. An insurer may wish to assert a subrogation right against its insured under these circumstances, however the Texas Supreme Court has vacillated over the past six years regarding its willingness to enforce such a right absent a contractual subrogation agreement between the insured and the insurer, providing for such a right.[55] This problem was first addressed by the Texas Supreme Court in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*.[56]

In *Matagorda County*, inmates brought suit against the County after three other inmates physically and sexually assaulted them with razorblades.[57] The County's insurer initially denied coverage for the claim pursuant to a jail exclusion clause in the policy.[58] The inmates subsequently offered to settle the lawsuit with the County for an amount within the County's policy limits.[59] The County's lawyer advised the insurer that the proposed settlement was reasonable and prudent, given the facts and circumstances of the case. The insurer agreed to fund the settlement subject to a reservation of rights.[60]

The insurer then sent a reservation of rights letter to the County which stated that the funding of the settlement was based solely upon its recognition of the exposure inherent in the litigation and its desire to avoid liability in excess of the policy limits.[61] The letter also stated that funding the settlement would not waive any of its rights to pursue full recovery of the settlement amounts from the County in a declaratory judgment action.[62] The County did not respond to the letter and the insurer funded the settlement.[63] The case proceeded to trial on the coverage dispute between

[55] *See* Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000); *contra* Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools, Inc., 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321 (Tex. May 27, 2005).

[56] *Matagorda County*, 52 S.W.3d at 129.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*. at 130.

[61] *Id*.

[62] *Id*.

[63] *Id*.

the County and its insurer. The Texas Supreme Court considered as a matter of first impression whether an insurer may seek reimbursement from its insured for settlement funds paid under a reservation of rights upon an adjudication of noncoverage.[64] The court held that the insurer was not entitled to reimbursement for settlement proceeds that were paid for uncovered claims because a unilateral reservation of rights letter cannot create rights that are not contained in the insurance policy.[65] The court recognized that the insurer would be able to recoup settlement proceeds if the policy expressly provided for reimbursement rights or if the insured consented to both the settlement and the insurer's right to seek reimbursement.[66]

III. EXCESS UNDERWRITERS AT LLOYDS V. FRANK'S CASING CREW & RENTAL TOOLS, INC.

Five years after its holding in *Matagorda County*, the Texas Supreme Court decided *Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools, Inc*. The court revisited the issue of whether an insurer may recoup settlement funds from its insured after a determination that the underlying claim was not covered by the policy.

In *Excess Underwriters at Lloyds, London*, a third party brought suit against Frank's Casing Crew after a drilling platform fabricated by Frank's Casing Crew collapsed, causing injuries to the party.[67] Frank's Casing Crew had an excess coverage policy from various excess underwriters (the "Underwriters"), however the Underwriters denied coverage for claims alleged by the third party and agreed to defend the suit under a reservation of rights.[68]

At the request of Frank's Casing Crew, the third party made a settlement demand within Frank's Casing Crew's policy limits in order to *Stower-ize* the Underwriters.[69] The Underwriters agreed to fund the settlement of the

[64] *Id.* at 131.

[65] *Id.*; *see also* Shoshone First Bank v. Pac. Employers Ins. Co., 2 P.3d 510, 515-16 (Wyo. 2000) (rejecting the notion that the insurer could base a right to recover defense costs on a reservation letter and stating "we will not permit the contract to be amended or altered by a reservation of rights letter").

[66] *See Matagorda County*, 52 S.W.3d at 130-135.

[67] *Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools, Inc*., 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321, at * 2 (Tex. May 27, 2005).

[68] *Id.* at *3.

[69] *Id.* at *4.

case but only if Frank's Casing Crew would expressly agree to resolve the coverage issue at a later date.[70] Frank's Casing Crew refused.[71] The Underwriters then advised Frank's Casing Crew that it would pay the settlement, and seek reimbursement from Frank's Casing Crew if the coverage dispute was resolved in the Underwriters' favor.[72]

Following the settlement, the court determined that the underlying claims were not covered by the policy and the Underwriters brought suit against the insured for reimbursement of the settlement amounts that were paid on the insured's behalf.[73] On appeal, the Texas Supreme Court determined on original hearing that the Underwriters were entitled to reimbursement.[74] The court attempted to distinguish the facts of this case from *Matagorda County*.[75] The court stated that the primary concern in *Matagorda County* was that when an insurer has the unilateral right to settle, an insurer could accept a settlement that the insured considered out of the insured's financial reach, and the insured could be required to reimburse the insurer for that amount.[76] The court found that:

> . . . this concern is ameliorated in one of two circumstances:
>
> (1) when an insured has demanded that its insurer accept a settlement offer that is within policy limits; or
>
> (2) when an insured expressly agrees that the settlement offer should be accepted.
>
> In 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.[77]

Here, Frank's Casing Crew attempted to *Stower-ize* the Underwriters.[78]

[70] *Id.* at *5.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

The court reasoned that where there is a coverage dispute and an insured demands that its insurer accept a settlement offer within policy limits, the insured is deemed to have viewed the settlement offer as a reasonable one.[79] The court further opined that if the offer is one that a reasonable insurer should accept, it is also one that a reasonable insured should accept if there is no coverage because the insured knows that if the case is not settled, a judgment may be rendered against it for which there is no insurance coverage.[80] Accordingly, the court held that there is no prejudice to the insured when it is required to reimburse its insurer for settlement payments if it is later determined that there is no coverage.[81] The court also reasoned that insurance coverage should not be created where none exists merely because an insured could not afford to pay a judgment if the case were tried or to fund a settlement demand from an injured third party.[82] Instead, the insurer should be entitled to settle with the injured party for an amount the insured has agreed is reasonable and to seek recoupment from the insured if the claims against it were not covered.[83] The court held that the insured is in precisely the same position it would have been in absent any insurance policy, except that the insurer is the insured's creditor rather than the injured third party.[84]

In coming to its decision, the court relied heavily on California case law which is cited throughout the opinion.[85] The court adopted the implied reimbursement rule announced by the California Supreme Court in *Blue Ridge Ins. Co. v. Jacobson*.[86] The court also embraced the California Supreme Court's opinion that reimbursement rights encourage insurers to settle cases even when coverage is in doubt.[87] This inures to the benefit of the injured third parties because the risk that the insured lacks the resources to fund the settlement is shifted to the insurer and is lifted from the injured

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. at *15–18 (citing Blue Ridge Ins. Co. v. Jacobson 25 Cal. 4th 489, 106 Cal. Rptr. 2d 535, 22 P.3d 313 (Cal. 2001)).

[86] *See generally* 25 Cal. 4th 489, 106 Cal. Rptr. 2d 535, 22 P.3d 313 (Cal. 2001).

[87] *Excess Underwriters at Lloyds, London*, 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321, at *15 (citing Blue Ridge Ins. Co. v. Jacobson 25 Cal. 4th 489, 106 Cal. Rptr. 2d 535, 22 P.3d 313 (Cal. 2001)).

plaintiff who sued the insured.[88] Thus, the coverage dispute between an insured and its insurer can be resolved after the injured plaintiff is compensated, thereby reducing the risk to the injured plaintiff that the defendant may be financially unable to fully compensate the plaintiff.[89]

Frank's Casing Crew moved the Texas Supreme Court to rehear *Excess Underwriters at Lloyds, London*, attacking the court's reliance on California case law.[90] Specifically, Frank's Casing Crew argued that the court erred in adopting the California implied reimbursement rule because California and Texas insurance law are different in several material ways.[91] Most notably, the California rule conflicts with Texas insurance law under *Stowers*.[92] The Texas Supreme Court granted Frank's Casing Crew's Motion for Rehearing on January 9, 2006, and on February 15, 2006, the court reheard oral argument on *Excess Underwriters at Lloyds, London v. Franks Casing Crew and Rental Tools, Inc.*

IV. THE EFFECT OF EXCESS UNDERWRITERS ON TEXAS INSURANCE LITIGATION

A. The Problems Created by Excess Underwriters

Excess Underwriters fundamentally changes the balance between insurers and policy holders in handling and settling virtually every case where coverage is disputed because the opinion weakens the effect of the *Stowers* doctrine. While the *Stowers* duty is only triggered by a demand from the plaintiff that falls within the scope of a covered claim,[93] the *Excess Underwriters* opinion permits an insurer to invoke reimbursement rights any time the insurer defends a suit under a reservation of rights, and receives a *Stowers* demand that is endorsed by the insured, regardless of

[88] *Id*. at *15–16 (citing Blue Ridge Ins. Co. v. Jacobson 25 Cal. 4th 489, 106 Cal. Rptr. 2d 535, 22 P.3d 313 (Cal. 2001)).

[89] *Id*. at *16 (citing Blue Ridge Ins. Co. v. Jacobson 25 Cal. 4th 489, 106 Cal. Rptr. 2d 535, 22 P.3d 313 (Cal. 2001)).

[90] Motion for Rehearing, *Excess Underwriters at Lloyds London v. Franks Casing Crew and Rental Tools, Inc*., 48 Tex. Sup. Ct. J. 735, 2005 WL 1252321 (2005) (No. 02-0730).

[91] *Id*.

[92] *Id*.

[93] *See* G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, judgm't adopted).

whether the underlying claim is covered or not.[94] Consequently, it will now be virtually impossible for an insured to comment on the reasonableness of a plaintiff's *Stowers* demand because doing so will necessarily give rise to the insurer's implied reimbursement rights. This is a dramatic change from the former Texas insurance laws. The court presumes without justification that every time a policy holder calls upon an insurer to settle a disputed claim with insurance money, it is agreeing that it is willing and able to pay the same amount if the insurer ultimately prevailed in the coverage dispute.[95] Furthermore, the court indicated that "[r]eimbursement rights encourage insurers to settle cases even when coverage is in doubt."[96] The court opined that reimbursement rights benefit injured plaintiffs by shifting the risk of non-coverage and financial solvency from the plaintiff to the defendant-policyholder and its insurer.[97] This assertion ignores the practical effects of the court's opinion.

Prior to the opinion in *Excess Underwriters*, the insured's attorney was permitted to encourage the insurer to settle a claim after a *Stowers* demand was made by the tortfeasor. Under the present *Excess Underwriters* opinion, however, the insured's attorney must remain silent with respect to the *Stowers* demand and may not encourage the insurer to accept a settlement offer without waiving the insured-client's rights. Any comment by the insured's attorney regarding the settlement of the claim and acceptance of the *Stowers* demand necessarily subjects the insured-client to the insurer's reimbursement claims if there is a subsequent determination of non-coverage. Therefore, the insurance company will no longer receive pressure to settle claims from the insured and this will likely decrease the number of cases that settle, to the detriment of the injured plaintiff and the insured.

B. Support for the Matagorda County Approach

Prior to *Excess Underwriters*, the Texas Supreme Court rejected an implied reimbursement right for a number of reasons. The court properly found that the insurer, rather than the insured, is in the best position to

[94] *See Excess Underwriters at Lloyds London*, No. 02-0730, 2005 WL 1252321 at *3 (2005).

[95] *See id.* at *4 (stating that "[a]n insured who agrees to the settlement and benefits by having claims against it extinguished cannot complain that it must reimburse its insurer if the claims against the insured were not covered by its policy").

[96] *Id.*

[97] *Id.*

choose a course of action during an insurance coverage dispute because the insurer is in the business of analyzing and allocating risk.[98] Thus, the insurer can better asses the viability of its coverage dispute.[99] Now, the court has effectively shifted the risk of non-coverage and financial solvency from the plaintiff to the defendant/insured.

Furthermore, the Texas Supreme Court has permitted insurance companies to circumvent the insured's freedom to contract for reimbursement provisions. In *Matagorda County*, the court held that an insured's reimbursement rights would only be upheld where a reimbursement clause was provided within the policy.[100] There is no reason that an insurance company should not comply with the state contract laws and obtain the assent of an insured before asserting reimbursement rights.[101]

While few states have addressed the implied reimbursement question addressed in the *Excess Underwriters* opinion,[102] of those states that have addressed the issue, the majority view is that an insurer can obtain reimbursement of settlement funds if certain prerequisites are met.[103] The minority view is that reimbursement is limited to circumstances in which there is an express agreement, stating that the insurer is entitled to reimbursement if there is an adjudication of non-coverage.[104]

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[98] Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000).

[99] *Id*.

[100] *Id*.

[101] Many jurisdictions have upheld the enforcement of reimbursement clauses contained in the insurance policy. *See* Rural Mut. Ins. Co. v. Peterson, 134 Wis. 2d 165, 395 N.W.2d 776, 778-82 (Wis. 1986); Employers Mut. Cas. Ins. Co. v. Nicholas, 124 Colo. 544, 238 P.2d 1120 (Colo. 1951); Serv. Mut. Liab. Ins. Co. v. Aronofsky, 308 Mass. 249, 31 N.E.2d 837, 839-40 (Mass. 1941); *see also* Annotation, Validity and Construction of Liability Policy Provision Requiring Insured to Reimburse Insurer for Payments Made Under Policy, 29 A.L.R.3d 291; *see also* Nat'l Cas. Co. v. Lane Express, Inc., 998 S.W.2d 256, 265-66 (Tex. App.—Dallas 1999, pet. denied) (enforcing insurance policy clause requiring insured motor carrier to reimburse insurer).

[102] *See* Blue Ridge Ins. Co. v. Jacobsen, 106 Cal. Rptr. 2d 535, 535 (2001); Matagorda County, 52 S.W.3d at 128; Med. Malpractice Joint Underwriting Ass'n of Mass. v. Goldberg, 680 N.E.2d 1121, 1121 (Mass. 1997); Mt. Airy Ins. Co. v. Doe Law Firm, 668 So.2d 534, 534 (Ala. 1995); Val's Painting and Drywall, Inc. v. Allstate Ins. Co., 126 Cal. Rptr. 267, 267 (Ct. App. 1975). *See generally* Insurance Law-Franks Casing's Effect on Reimbursement of Settlement and Defense Costs in Texas, 73 Def. Couns. J. 365.

[103] Insurance Law-Franks Casing's Effect on Reimbursement of Settlement and Defense Costs in Texas, 73 Def. Couns. J. 365, 368 *citing* Robert H. Jerry, The Insurer's Right to Reimbursement of Defense Costs, 42 ARIZ. L. REV. 13, 70 n. 220 (2000).

[104] Insurance Law-Franks Casing's Effect on Reimbursement of Settlement and Defense Costs

The *Excess Underwriters* court cited case law from the majority jurisdiction, but ignored significant distinctions between Texas insurance law[105] and that of the majority jurisdiction.[106] Most notably, the court cited California decisions without noting the distinctions between California and Texas insurance laws.[107] For example, in California, the implied right to reimbursement is appropriate because there is a duty on the part of the insurer to settle all insurance claims, regardless of whether those claims are covered.[108] In Texas, however, the *Stowers* doctrine only imposes a duty on the insurer to settle a claim where that claim is covered by the insurance policy.[109] Therefore, in cases like *Matagorda County* and *Excess Underwriters*, where the third party tortfeasor attempted to *Stower-ize* the insurer, the *Stowers* demand did not actually give rise to a duty on the part of the insurer to settle the claim at issue because in both cases, the claim at issue was not covered by the policy.[110] If the insurer failed to pay the claim in either of these cases, the insurer would suffer no adverse effect if the claim resulted in a judgment that exceeded the policy limits because *Stowers* does not impose liability on insurers that fail to settle uncovered claims.[111] For this reason, it is unreasonable to permit an insurer to unilaterally invoke reimbursement rights, because the insurer does not have a duty to settle the uncovered claim in the first place.[112]

Furthermore, while the Texas courts enforce equitable subrogation rights,[113] the Texas courts also recognize that voluntary payments cannot give rise to such rights.[114] Under the *Stowers* doctrine, an insurer does not

in Texas, 73 Def. Couns. J. 365, 368 (citing Mt. Airy Ins. Co., 668 So.2d at 538).

[105] Prior to *Excess Underwriters*, Texas adopted the minority jurisdiction position, holding that there is no implied right to reimbursement. *See* Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County, 52 S.W.3d 128, 131 (Tex. 2000).

[106] *See* Blue Ridge Ins. Co. v. Jacobsen, 106 Cal. Rptr. 2d 535, 535 (2001).

[107] *See Excess Underwriters*, 2005 WL 1252321 at *4-5.

[108] *See* Blue Ridge Ins. Co. v. Jacobson, 25 Cal. 4th 489, 106 Cal. Rptr. 2d 535, 22 P.3d 313 (Cal. 2001).

[109] G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, judgm't adopted).

[110] *See id*.

[111] *See id*.

[112] *See id*.

[113] Pape Equipment Co. v. I.C.S., Inc., 737 S.W.2d 397 (Tex. App. Houston 14th Dist. 1987), writ refused n.r.e., (Dec. 16, 1987); Monk v. Dallas Brake & Clutch Service Co., Inc., 697 S.W.2d 780 (Tex. App. Dallas 1985), writ refused n.r.e., (May 7, 1986).

[114] Vogel v. Glickman, 117 F. Supp. 2d 572 (W.D. Tex. 2000), decision aff'd, 276 F.3d 729

have a legal duty to make payments for non-covered claims.[115] Thus, the insurer who pays a non-covered claim is arguably making a voluntary payment.[116] Because the insurer's payment to a third party tortfeasor for a noncovered claim is voluntary,[117] the insured should be able to assert a defense to any equitable subrogation right asserted by the insurer, thereby avoiding the harsh consequence of the *Excess Underwriters* opinion.[118]

C. Reconciling the Current Excess Underwriters Opinion with Stowers

If the court decides to stand by the opinion in *Excess Underwriters*, the scope of the *Stowers* doctrine should be broadened and require that an insurer settle all claims that are within policy limits, regardless of whether those claims are covered by the policy. This modification is consistent with

(5th Cir. 2002), applying Texas law; First Nat. Bank of Kerrville v. O'Dell, 856 S.W.2d 410 (Tex. 1993); World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998), reh'g overruled, (Sept. 24, 1998); Matagorda County v. Texas Ass'n of Counties County Government Risk Management Pool, 975 S.W.2d 782 (Tex. App. Corpus Christi 1998), review granted, (June 24, 1999) and judgment aff'd, 52 S.W.3d 128 (Tex. 2000), reh'g of cause overruled, (Mar. 8, 2001); Crowder v. Benchmark Bank, 889 S.W.2d 525 (Tex. App. Dallas 1994), writ granted, (Mar. 30, 1995) and aff'd in part, rev'd in part on other grounds, 919 S.W.2d 657 (Tex. 1996), reh'g of cause overruled, (May 10, 1996).

[115] *See* Langston v. GMAC Mortg. Corp., 183 S.W.3d 479, 479 (Tex. App. Eastland 2005).

[116] Under the *Stowers* doctrine, there is no adverse legal consequence to an insurer who fails to settle a non-covered claim. *See* G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, judgm't adopted). Because the insurer cannot become liable for the debt arising from a non-covered claim, the insurer who pays a non-covered claim makes a volunteer payment. *See Langston*, 183 S.W.3d at 479.

[117] *See Langston*, 183 S.W.3d at 479.

[118] This contrasts sharply with California insurance laws. *See generally* Blue Ridge Ins. Co. v. Jacobson, 25 Cal. 4th 489, 106 Cal. Rptr. 2d 535, 22 P.3d 313 (Cal. 2001). In California, the court adopted an implied reimbursement right because a California insurer is obligated to settle all claims, whether they are covered or not. *See id*. Therefore, the California insurer is obligated to make payment of non-covered claims, and could not be subjected to the voluntary payment defense set forth in Texas. Vogel v. Glickman, 117 F. Supp. 2d 572 (W.D. Tex. 2000), decision aff'd, 276 F.3d 729 (5th Cir. 2002), applying Texas law; First Nat. Bank of Kerrville v. O'Dell, 856 S.W.2d 410 (Tex. 1993); World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App. Fort Worth 1998), reh'g overruled, (Sept. 24, 1998); Matagorda County v. Texas Ass'n of Counties County Government Risk Management Pool, 975 S.W.2d 782 (Tex. App. Corpus Christi 1998), review granted, (June 24, 1999) and judgment aff'd, 52 S.W.3d 128 (Tex. 2000), reh'g of cause overruled, (Mar. 8, 2001); Crowder v. Benchmark Bank, 889 S.W.2d 525 (Tex. App. Dallas 1994), writ granted, (Mar. 30, 1995) and aff'd in part, rev'd in part on other grounds, 919 S.W.2d 657 (Tex. 1996), reh'g of cause overruled, (May 10, 1996).

the Texas doctrine of equitable subrogation, and would align Texas insurance law with California insurance law, thereby reinstating balance between the rights of the insured and the insurer. The court should also clarify its ruling by explicitly overruling its prior holding in *Matagorda County*.[119] The cases directly conflict and cannot co-exist, despite the court's tenuous attempt to distinguish them.

V. CONCLUSION

The Texas Supreme Court should overrule *Excess Underwriters* and render a decision consistent with the holding in *Matagorda County*. This course of action is consistent with the existing body of Texas case law, including the anti-subrogation rule, the voluntary payment defense to the doctrine of equitable subrogation, and also the *Stowers* doctrine which has stood since 1929. The insurer is in the business of analyzing and allocating risk and is in the best position to asses the viability of its coverage dispute. If an insurance company wishes to enforce reimbursement rights, it should be forced to do so through an express contractual provision.

[119] 52 S.W.3d 128, 131 (Tex. 2000).