Frank's Casing

1. **What the case is really about?** Frank's Casing is about an absurd and unjust result on the facts. A powerful insured - - Frank's - - makes a *Stower's* demand 2 minutes before midnight (i.e. trial). Frank's lawyer acts like so many Plaintiff's lawyers in Texas have acted before - - ***here insurance company - - show me the money! and do it NOW in that I have you (i.e. insurance company) over a barrel and there is nothing you can do about it!*** So the carrier paid 7 million dollars and said: this was wrong and the $$$ was not covered and we are going to try to get it back. Low and behold - - **NONE** of the 7 million $$$ was covered. Now what? The carrier has paid 7 million dollars for a claim that was NEVER covered.

2. The case gets to the Supreme Court. What is the Court to do in light of *Matagorda County* (Tex. 12/2000)? These following four options seem to be presented.

A. ***No Change. Rule for Franks.*** The Court could have said - - *Matagorda County* says that there is no real / true "contract" (i.e. by implied terms) and *Matagorda County* says that there is no right of reimbursement in the policy and no "quasi-contract" (i.e. estoppel or unjust enrichment) - - so the carrier paid 7 million dollars for something that was not covered and you (carrier) are out of luck. ***Result***: Texas law seems to stay the same as *Matagorda County*, and an absurd and unjust result would be left untouched.

B. ***Small to Minimal Change. Rule for the Carrier.*** Hold that there is an "implied" (i.e. actual) agreement in this case due to the fact that this excess policy required that an settlement had to be "fixed" by an "agreement", and in this case the "agreement" permitted reimbursement by Frank's "silence" at the time of the settlement. ***Result***: Absurdity is prevented. *Matagorda County* is not overruled, but the future impact of *Frank's Casing* is ***slight*** in that (a) most policies are not "consent" policies and (b) no insured will ever again be "silent" on these facts. This is what ***Wainwright*** wants to do. No "estoppel theory" or quasi-contract theory would be adopted.

C. ***Modest to Great Change. Rule for the Carrier.*** Overrule *Matagorda County sub silento* in that a quasi-contractual right of reimbursement is created even though (a) reimbursement is not in the policy; (b) and even where the policy has no consent requirements. ***Result***: *Frank's Casing* right of reimbursement is extended to **any** case where the insured "demands" a settlement. ***Problem*** - - the Court is creating an "equitable" right that is NOT in the contract. This "expansion" is directly contrary to what this Court has said is the law in many cases - - the Court would be creating a right that is **not** in the contract. This is what **4 Justices** want to do. ***Hecht*** would go further (***huge change***) and would simply hold that even a demand by the insured is not necessary for reimbursement - - only settlement plus ROR and no coverage. Hecht would overrule *Matagorda.*

D. ***Modest Change. Rule for the carrier.*** One further option that did not appear to be considered by the Court to rule for the carrier in this case (thus preventing absurdity), ***provided*** that the Court also materially modifies the *Stower's* cause of action and also any "bad faith" claims by holding that in any bad faith or *Stower's* claim or 21.21 claim - - whether the underlying claim had become "reasonably clear" or not includes a consideration by the carrier of the coverage issues. The jury would be instructed that they can and should consider on the reasonableness of the carrier's conduct whether coverage issues existed and how those issues were resolved. ***Result***: *Matagorda County* remains the law in general. Frank's must reimburse the carrier since this was a consent policy and there was an actual "contract". Prospectively, bad faith and Stower's law are changed so that there is more "balance" of power in *Stower's* demands - - the carrier can consider coverage and any jury at any later bad faith trial will be explicitly instructed as such. Justice Wainwright suggested some such outcome in his concurring opinion.

	Options	*Results from June 2005 Opinion* [Owen is now gone]	*Future? BRISTER WILD CARD*
A	*No Change.* *Rule for Franks. Matagorda* intact.	None.	Probably none.
B	*Small to Minimal Change. Rule for the Carrier.* *Matagorda* not overruled. Limited to "real contract" agreements.	Wainwright + 5 Justices (4 + O'Neill) Total: 6	6 ? Johnson? Willett? **B**
C	*Modest to Great Change. Rule for the Carrier.* Would create "quasi-contract" remedy. *Matagorda* not overruled.	4 Justices + O'Neill = 5 NO WAINWRIGHT	Johnson? O'Neill? Willlett? Plus 4? NEED ONE !! NO WAINWRIGHT **C**
Huge Change Hecht. Rule for Carrier. Overrule *Matagorda.*		Hecht Only.	Hecht Only.
D	Modest Change. Rule for Carrier. Do not overrule *Matagorda* *Change* "Bad Faith" rules.	None.	??? Unknown.

What "Duty" Does a Carrier Have to Respond to a Stower's Demand Where the Underlying Claim Is Not Covered but Where the Insured Has Exposure?

Am. Physicians Insurance. Exch. v. Garcia (Tex. 1994)

JUSTICE OWEN PART II- B.

We have said that the duty imposed by *Stowers* is to "exercise 'that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business." We have also said that the *Stowers* duty is viewed from the perspective of an insurer: "the terms of the demand are such that an ordinarily prudent insurer would accept it." Both statements are correct. . . . . The reasonableness of a settlement offer is not judged by whether the insured has no assets or substantial assets, or whether the limits of insurance coverage greatly exceed the potential damages for which the insured may be liable. It is an objective assessment of the insured's potential liability. When 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." (Emphasis Added)

Owen relies on: ***Am. Physicians Insurance. Exch. v. Garcia***, 876 S.W.2d 842, 848(Tex. 1994) (quoting *Stowers*, 15 S.W.2d at 547) and at page 849. Owen quotes the following language from *Garcia*. "The *Stowers* duty is not ***activated*** by a settlement demand unless three prerequisites are met:

(1) ***the claim against the insured is within the scope of coverage,***

(2) the demand is within the policy limits, and

(3) the **terms** of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment.".

HECHT FOOTNOTE 4

"The insurer's duty to settle is triggered by a reasonable offer from the claimant - - which was made in each case -- regardless of whether the insured demands that the offer be accepted." (Citing *Garcia*).

O'NEILL CONCURRENCE

"The *Stowers* test was designed to define the standard of care an insurer must abide by in deciding whether to accept a third-party claimant's settlement demand--it measures whether "the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." ***Am. Physicians Insurance. Exch. v. Garcia,*** 876 S.W.2d 842, 849(Tex. 1994) (emphasis added). In sum, ***the Stowers test presumes coverage and simply has no application in determining an insurer's reimbursement right when coverage is disputed.*** **Id.** ("The *Stowers* duty is **not** activated by a settlement demand unless . . . the claim against the insured is within the scope of coverage . . . .").

WAINWRIGHT CONCURRENCE

"This case raises a tangled mound of considerations. The Court deftly traverses the multitude of policies, incentives, and equities to reach a decision. See, e.g., ***Am. Physicians Insurance. Exch. v. Garcia***, 876 S.W.2d 842(Tex. 1994) . . . . ."