

RECENT DEVELOPMENTS IN INSURANCE LAW

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I. INTRODUCTION

The purpose of the paper is to: (1) examine two Supreme Court decisions involving insurance law issued between December 2000 and December 2006; (2) discuss the changes in the Supreme Court's composition during that time frame; (3) speculate on the impact the changes on the Court have made on the outcome of those decisions as well as other important insurance issues the Court will decide in the future.

II. BACKGROUND

Between December 2000 and December 2007, the Texas Supreme Court has issued a significant number of opinions in which it decided important issues involving Texas insurance law. During that time frame, the Court's composition has also undergone significant changes. In December 2000, the Court members were Chief Justice Phillips, and Justices Hecht, Enoch, Owen, Baker, Abbott, Hankinson, O'Neill and Alberto Gonzales. By December 2006, only two of that Court remained-Justices Hecht and O'Neill. The other seven now sitting are Chief Justice Jefferson and Justices Wainwright, Brister, Medina, Green, Johnson and Willett.

III. MATAGORDA COUNTY

Probably the most talked about insurance issue at the Texas Supreme Court is that of an insurer's right of reimbursement from the insured if the insurer settles with a third party and then the insurer's no-coverage claim is subsequently upheld.

On December 21, 2000, in a case of first impression, the Court held that the insurer had no right of reimbursement of a settlement it paid to a third party after it was later determined that the claim that the insurer settled was not covered. *See Tex. Ass'n of Counties, County Gov't Risk Mgmt. Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000). In *Matagorda County*, the policy did not provide for reimbursement

to the insurer under those circumstances. The Court concluded that the insurer's unilateral reservation of rights letter could not create reimbursement rights that weren't in the insurance policy. The Court further held, as a general rule, silence and inaction cannot be construed as an assent to an offer. Finally, the Court held that the insurer that settled an uncovered claim was not entitled to reimbursement from the insured on theories of equitable subrogation, *quantum meruit*, or unjust enrichment.

Justice O'Neill delivered the majority opinion, joined by Chief Justice Phillips and Justices Enoch, Baker, Abbott, Hankinson and Gonzales. Justice Owen dissented, joined by Justice Hecht.

IV. FRANK'S CASING

On May 27, 2005, the Court decided *Excess Underwriters at Lloyd's London v. Frank's Casing Crew and Rental Tools Inc.*, 2005 WL 1252321 (Tex.), 48 Tex. Sup. Ct. J. 735. The issue in *Frank's Casing* was the same as that in *Matagorda County*. That is, whether an insurance carrier that disputed coverage but settled third party claims against their insureds were entitled to recoup the settlement payments from their insured when it was subsequently determined that the claims against their insured were not covered. In *Frank's Casing*, there was not an express agreement allowing reimbursement. Both the trial court and the court of appeals agreed that the carrier had no right of reimbursement and that *Matagorda County* controlled.

However, the Court held that the facts in *Frank's Casing* were different, and thus *Matagorda County* did not control the outcome. The Court then concluded that although there was no express agreement for reimbursement, that the carrier was entitled to reimbursement because of estoppel or an agreement implied in law. The Court reversed and remanded the matter to the trial court to enter judgment for the carrier.

Justice Owen delivered the Court's opinion, joined by Chief Justice Jefferson and Justices Hecht, Medina and Green. Justice Hecht concurred and filed an opinion, and Justices O'Neill and Wainwright concurred

in part, and each filed an opinion. Justice Brister did not participate because he was the author of the court of appeals opinion.

In June 2005, Justice Owen left the Court to assume her position as a judge on the Fifth Circuit United States Court of Appeals. Later that summer, Governor Perry appointed Justice Willett as Justice Owen's successor. On January 6, 2006, the Court granted *Frank's* Motion for Rehearing. Justice Brister did not participate in the decision to grant the Motion for Rehearing. The case was re-argued February 15, 2006. But as of the date of this paper, the Court has not issued a new opinion.

The Court requires six votes to grant a motion for rehearing in a cause. On *Frank's* Motion for Rehearing, there were eight justices eligible to participate. The question, of course, is which six voted for rehearing?