THE TRIAL OF THE *STOWERS* CASE

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The *Stowers* doctrine celebrated its 80th birthday in 2009. For almost a century, its principles and guidelines have governed settlement negotiations under liability policies and the liability of insurers that can result from those negotiations. However, in the 80 years that have passed, there have been very few *Stowers* cases that have actually been tried. Some of the more recent include *Texas Farmers Ins. Co. v. Soriano,*[1], *Am. Physician's Ins. Exch. v. Garcia,*[2] and *Trinity Univ. Ins. Co. v. Bleeker*.[3]

However, given the large number of *Stowers* demands sent every month, the number of cases that have actually been tried are miniscule. There are several reasons for the scarcity of trials. One is the risk adverse nature of many insurance companies. They simply do not want to put their fate in the hands of a jury. Second, many insurers do not want to have a jury opine or "grade their paper" on how they handled specific claims. In this case the repercussions from the mishandling of a claim would be minimized. Finally, in the more recent past, many plaintiff's counsel have not wanted to test the appellate waters on the legal peculiarities of *Stowers* cases and have adopted the view that discretion is the better part of valor and settled many of their cases. There are obviously many other reasons too numerous to list. These are some of the more obvious ones that leap out at one.

In the published decisions on *Stowers*, most, if not all, of the discussion has focused on the *Stowers* doctrine itself. What are the elements of a qualifying letter? What is the standard of care expected of an insurer? What damages are recoverable? There has been little, if no discussion of the procedural and technical aspects governing a *Stowers* trial. This paper will focus on those aspects. Some have been touched upon in the past. Some have not. To a certain extent the procedural discussion will necessitate discussion of the legal requirements of the *Stowers* doctrine and to the extent it so requires, the legal requirements will be addressed and expounded. However, that is not the focus or purpose of this paper. Many of the topics addressed have never been the focus of a published opinion. However, just because they have not been the focus of a published opinion does not mean they are not relevant or should not be addressed. One reason some of the issues have not been addressed in the past is that the concepts or principles embodied have only recently been developed by our courts and are still waiting application to situations such as the *Stowers* situation. Where authority is available, it will be cited. Much of the authority cited is analogous based upon application in other scenarios. Some is based upon actual application to *Stowers* cases.

One final disclaimer. I have tried three *Stowers* cases. Two to verdict and one settled during trial. Three trials in most areas of practice is not a lot. In the *Stowers* arena, it is more than many have tried. What follows is the result of trying those three cases and handling many others that resulted in settlement or dismissal by the trial court. If I have omitted or overlooked any procedural aspect, I would deeply appreciate any input from anyone who might read this article.

[1] 881 S.W.2d 312 (Tex. 1994)
[2] 876 S.W.2d 842 (Tex. 1994)
[3] 966 S.W.2d 489 (Tex. 1998)

I. FOCUS OF THE CASE

In any case, it is critical that the attorneys representing the parties start with an understanding of the issues in the case. This will govern their pleadings, the discovery, and the eventual trial in the case. For *Stowers* cases, the focus is fairly easy. The Texas Supreme Court has outlined the proof for the plaintiff and the issues that must be rebutted by the defendant. In *Am. Physician's Ins. Exch. v. Garcia*,[4], the Supreme Court outlined the *Stowers* case as follows:

> Generally, a *Stowers* settlement demand must propose to release the insured fully in exchange for a stated sum of money, but may substitute "the policy limits" for a sum certain. 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 ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's exposure to an excess judgment. A demand above policy limits, even though reasonable, does not trigger the *Stowers* duty to settle.

The court in *Texas Farmers Ins. Co. v. Soriano*,[5] contained the same quote but added a proviso at the beginning. The Court there stated that:

> To impose a *Stowers* duty on an insurer when there is a *single claim*, a settlement demand must propose to release the insured fully in exchange for a stated sum of money.

The implication from this language is that there may be additional considerations when there are multiple claimants and perhaps not enough insurance to settle all. This article will not deal with that situation or try to explore how the insurer's duties may be changed when there are multiple claimants. There have been many articles which have focused squarely on this issue and have addressed it in much more detail than could be addressed in this article. Nor will this article attempt to address the situation of the duties of a liability insurer where there are multiple insureds covered under the same policy and insufficient proceeds to obtain a release of each insured. That subject too has been the topic of other articles that have addressed it in much more detail than can be addressed in this article.

Rather, the focus of this article will be on the straightforward *Stowers* case. Where there is one claimant making a claim against a single insured. It is those cases where the three factors first listed in *Garcia* are the focus and become the blueprint for pleading, discovery, and trial of the case.

II. PLEADING-PETITION

A. STANDING

In preparing for the trial of the *Stowers* case, one of the first issues that must be addressed is the standing issue. In most cases, it is not the insured who is bringing the action but the plaintiff. The law in Texas has been unwavering that an action for *Stowers* belongs only to the insured. *See Hernandez v. Great American Ins. Co. of*

[4] 876 S.W.2d 842 (Tex. 1994)
[5] 881 S.W.2d 312 (Tex. 1994)

N.Y.[6] Once a judgment has been obtained, the underlying plaintiff becomes a judgment creditor under the liability insurance policy. The fact that the underlying plaintiff is a judgment creditor and can sue the insurer under the policy does not give the plaintiff the right to sue under *Stowers*. That right can only come from the insured. Generally, that right is obtained by the underlying plaintiff in one or two ways. The first way that such a right may be obtained is by assignment. Under this procedure, the for adequate consideration, the plaintiff is assigned by written assignment the rights of the insured under the *Stowers* doctrine. Unlike causes of action such as legal malpractice, there is generally no public policy prohibiting assignment of a *Stowers* causes of action. One exception to this rule is the use of prejudgment assignments. If an assignment is contemplated, counsel for the underlying plaintiff should insure that all of the requirements of *State Farm Fire & Cas. Co. v. Gandy*,[7] have been addressed.

A second manner in which the underlying plaintiff may acquire standing to sue on the *Stowers* cause of action is through a turnover order. Once there is a judgment that has not been superseded, the underlying plaintiff may apply to the trial for an order turning over the *Stowers* cause of action. The turnover statute is specifically designed to facilitate the transfer of intangible choses in action such as a *Stowers* action. The appropriate steps must be followed in obtaining the turnover and the transfer of the cause of action should be reflected in an order of the trial court. Since a turnover is post-judgment, the constraints of *Gandy* would not be present. There are some limitations on the use of a turnover. At least one court of appeals has held that under certain circumstances, a turnover may not be available to the underlying plaintiff. *See Charles v. Tamez*.[8]

B. NAMED DEFENDANTS

Often it may be easy to get carried away on who is named in the lawsuit. In most circumstances, plaintiff's counsel has been dealing with a particular adjuster and may have a desire to make that adjuster's life as uncomfortable as possible by naming him or her in the *Stowers* case. This is not a good idea. The only entity that owes a *Stowers* duty is the insurer. Adjusters do not owe a duty under the *Stowers* doctrine. As a result, they are not proper defendants in the *Stowers* case. This does not mean they can never be sued. Under certain provisions of the Insurance Code, such as Chapter 541, the adjuster may be a party. However, it is the insurer that owes the duty under *Stowers* and not the adjuster.

C. ACTUAL DAMAGES

Texas law allows wide latitude in a *Stowers* cause of action. Because it is a tort action, the two components of proximate causation apply. They are 1) foreseeability and 2) cause in fact. This means that damages other than just the excess judgment may be recovered, provided they are foreseeable and the excess judgment was a cause in fact. Other damages include mental anguish (*but see Parkway Co. v. Woodruff*,[9] damage to credit, lost business opportunities, impact on future insurability, trigger of default events under loan covenants, etc. These damage, again, are the damages of the insured, not the plaintiff. If there is an assignment or turnover, it will

[6] 464 S.W.2d 91 (Tex. 1971)
[7] 925 S.W.2d 696 (Tex. 1996)
[8] 878 S.W.2d 201 (Tex.App.--Corpus Christi 1994, writ denied)
[9] 901 S.W.2d 434 (Tex. 1995)

be up to the underlying plaintiff to plead and prove damages that were sustained by the underlying defendant/insured, not the underlying plaintiff. There will also be the burden of showing that these damages would not have occurred if the case had been settled for the policy limits. In some events, the existence of the settlement would have had the same impact. If so, then the cause-in-fact element has not been satisfied.

D. PUNITIVE DAMAGES

A pleading of gross neglect or intentional acts is not sufficient to plead a case for punitive damages in a *Stowers* case. The existence of gross neglect is not enough. The existence of intentional conduct alone will not suffice. More is required. The court in *Transportation Ins. Co. v. Moriel,* stated:

> In addition to conscious indifference, an insured who alleges gross negligence must prove that the insurer committed an act that was likely to cause serious injury. In essence, the issue in determining whether bad faith involved an independent likelihood of "serious injury" is whether the insurer engaged in the sort of outrageous behavior that the law seeks to punish. *Ware,* 359 S.W.2d at 899 ("The fact that an act is [tortious] is not of itself ground for an award of exemplary or punitive damages.").
>
> It may be easier to describe "serious injury" in a bad faith case by first saying what it cannot be. It cannot be the injury associated with the breach of contract. Other jurisdictions considering this issue uniformly require some serious injury that is independent and qualitatively different from the breach of the insurance contract. *Linthicum,* 150 Ariz. 326, 723 P.2d 675; *Borland,* 147 Ariz. 195, 709 P.2d 552; *Weisman,* 209 Cal. Rptr. at 173-74; *Newton,* 229 S.E.2d at 302; *Shimola,* 495 N.E.2d at 393; *Anderson,* 85 Wis. 2d 675, 271 N.W.2d 368; *Guarantee Abstract,* 652 P.2d at 668. Nor do mere inconvenience, annoyance, or delay satisfy this requirement. Some inconvenience accompanies the breach of any contract, and is not ordinarily considered punishable, even if the breach is intentional. *Jim Walter Homes*, 711 S.W.2d at 618. Although the bad faith breach of an insurance contract, unlike the breach of most contracts, may justify an award of consequential damages for mental anguish, *Arnold,* 725 S.W.2d at 168, the existence of mental anguish damages alone does not ordinarily warrant legal punishment. .
>
> . . . In general, though, an insurance carrier's refusal to pay a claim cannot justify punishment unless the insurer was actually aware that its action would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim--such as death, grievous physical injury, or financial ruin. *See, e.g., Silberg v. California Life Ins. Co.,* 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103 (1974) (holding carrier subject to punitive damages when it knew that its bad faith denial of health insurance claim for over two years caused great harm to the plaintiff, including denial of

> surgical treatment, inability to afford pain medication, failure of his small business, two nervous breakdowns, and repossession of plaintiff's wheelchair). The harm must be independent and qualitatively different from the sort of injuries that typically result from bad faith or breach of contract. *Jim Walter Homes,* 711 S.W.2d at 618; 359 S.W.2d at 899 [10]

The plaintiff in a *Stowers* case to plead for punitive damages must plead in most cases that he or she has suffered financial ruin. Again, the focus is not on the underlying plaintiff but on the insured/underlying defendant. There must be evidence of not just economic harm, but economic ruin in order for punitive damages to be awarded. Moreover, the harm must be independent and qualitatively different from damages that would ordinarily be recoverable from a breach of contract by the insurer.

III. PLEADINGS-ANSWER

A. STANDING

In its answer, the insurer should naturally raise standing or any other defense required to be pleaded under oath by TRCP 93. As stated earlier, the *Stowers* action belongs to the insured, not to the plaintiff. The defendant should always have this be one of the first areas of focus when an evaluation is being made of the *Stowers* case. In addition to standing, it is not uncommon for an insured or plaintiff to file suit against the wrong insurer. Most insurers are part of larger insurance holding companies. If the insurer that has been sued was not the insurer who issued the policy, this should be raised though it really is not a question of standing or capacity but a question of fact as to who the issuing insurer was.

B. COVERAGE ISSUES

In many cases, the reason for the failure to pay the money may turn on coverage. Under the Garcia case, the supreme court emphasized that there is a duty only to pay covered claims." We start with the proposition that an insurer has no duty to settle a claim that is not covered under its policy."[11] The insured did not buy insurance for claims falling outside the terms of the policy and, as a result, the insurer has no duty to pay them. Rule 94 of the TRCP requires terms of exclusion and terms of conditions to be pleaded by the insurer in order to raise them at trial. Therefore, it is incumbent upon the insurer to assess all terms of exclusion and terms of condition and raise them in its answer.

C. ACTUAL DAMAGES

The insurer should carefully examine the damages that are sought and if they are not recoverable, should, though probably not required, raise that issue in its pleading. For example, as stated earlier, an insurer only has a duty to settle those damages covered by the policy. If the policy limits are $1m and there was an offer to settle for $250k and the jury returned a verdict of $350k actual damages and $850k punitive, it would appear that the *Stowers* doctrine may be in play. However, if the punitive damages are not covered by the terms of the policy, there is no *Stowers* case. The damages covered by the policy ($350k) do not exceed the policy

[10] *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 23-24 (Tex. 1994)

[11] *Am. Physician's Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848 (Texas 1994)

limits ($1m). Therefore, the *Stowers* doctrine is not invoked.

> We start with the proposition that an insurer has no duty to settle a claim that is not covered under its policy.[12]

This was the precise situation in *St. Paul Fire & Marine Ins. Co. v. Convalescent Services, Inc.*[13] There the court held that there was no *Stowers* situation triggered since the covered damages did not exceed the policy limits. The issue of whether a reasonable insurer would or would not have accepted the settlement demand is not even reached.

D. PUNITIVE DAMAGES

A defendant who is defending an insurer in a *Stowers* case must take care to make sure that the correct pleadings are in place for a claim for punitive damages which, in most cases, is present. While at least one court's of appeals case has held that the cap on punitive under Chapter 41.008 is a cap and does not have to be pleaded,[14] another court of appeals has held that it must be pleaded where facts exist that would allow the plaintiff to plead and prove one of the cap busting provisions under Chapter 41.008.[15] It is doubtful that one of the cap busting provisions under Chapter 41.008 would apply in a *Stowers* case. However, out of an abundance of caution, it is recommended that insurers plead the capping provisions of Chapter 41.008 until that issue is resolved by the Texas Supreme Court.

IV. DISCOVERY-PLAINTIFF

From the plaintiff's perspective, the broader the discovery, the better. In most cases against insurers, be it bad faith, *Stowers*, or other types of cases, one of the first strategies is to show that the insurer did not follow their own guidelines or the guidelines required by the State of Texas. In this connection, one of the first items that should be requested is the claims handling manual. It does not mean that you will get it, but it should be requested. There should be focus on what provisions, if any, exist for dealing with settlement offers, particularly settlement offers for policy limits where there is exposure in excess of the policy limits. Is there a committee process that must be followed? Was the process followed? Did certain people in the committee recommend that policy limits be tendered? If so, they will be some of the first individuals that are deposed. In many instances, the front line adjuster will recommend the demand be accepted, only to be overruled by someone in a position above him or her. In this situation, there should be focus on the amount of knowledge and information that was possessed by the front line file handler. Generally, he or she will be in a much better position to know the ins and outs of the file-particularly the damages-than someone in a much higher position.

A second issue that must be explored is the reserve. Some courts will allow the reserve to be discovered (Pride) while others will not.[16] The reserve information can be

[12] *Id.*

[13] 193 F.3d 340 (5th Cir. 1999)

[14] *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730 (Tex. App.—Houston [14th Dist.] 1998, no pet.)

[15] *Wackenhut Corrections Corp. v. De La Rosa*, No. 13-06-00692-CV, 2009 Tex. App. LEXIS 2262 (Tex. App.—Corpus Christi-Edinburg April 2, 2209, no pet. h.)

[16] *Pride Transportation v. Continental Casualty Co.*, Civil Action No. 4:08-cv-007-Y; In the United States

of vital importance. Depending if the reserve is set at a high or low level, the argument can be spun either way. If the reserve was set too low, the argument is that the settlement offer was not accepted because someone had not done their job in properly setting the reserve and to accept the offer would be to admit that the reserve had been improperly set and that someone had not done their job. On the other hand, if the reserve is at a high level, the argument will be that someone in the company knew of the exposure presented by the case and knew that an appropriate reserve should be set. The argument is that the reserve is one of the most important, thought-out decisions in the case. The posting of the reserve is a legal requirement. It is a decision that the insurer does not take lightly. It is to insure that there will be adequate funds available to pay the claim when the time comes. In most companies, the higher the reserve, the more approvals that are required. If the reserve was $1m, in all probability, two to three people were required to approve the posting of a reserve of that level. If two to three people have agreed that a reserve of a particular level was required, why couldn't the same two to three people see that the settlement offer was one that a reasonably prudent insurer should accept?

V. **DISCOVERY-INSURER**

The focus of discovery by the insurer should be laser-like. The insurer's attorney should have a clear focus on what evidence is relevant. Obviously if the insurer is relying on a coverage defense, there should be and must be discovery into the coverage issue. In many cases, the coverage issue may be one of allocation. If the case is one involving a construction defect and there is one award, a second fact finder may be required to allocate what damages were due to the defective work of the insured or his subcontractors or perhaps what damage was done to non-defective work. The allocation will obviously depend upon the type of case involved and the policy provisions.

However, if the case is a pure *Stowers* case, the focus is more direct. Recall that under *Garcia*, the three-prong test is as follows:

> 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 ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. . . . A demand above policy limits, even though reasonable, does not trigger the *Stowers* duty to settle.[17]

It is prong three that we are addressing now–the terms of the demand are such that an ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's exposure to an excess judgment. In order to make this assessment, the jury must have the information that the insurer had AT THE TIME IT WAS MAKING THE DECISION TO ACCEPT OR REJECT THE OFFER. The time that the offer was made is critical in determining what evidence is relevant and what evidence should be discovered. If the settlement demand was made in the first thirty days of

District Court for the Northern District of Texas, Fort Worth Division, December 7, 2009.

[17] *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994)

the case, then the only evidence that is relevant is what was known to the insurer at that time. It is totally inappropriate to present a settlement demand to an insurer at the inception of the case and then judge the conduct in accepting the offer or rejecting the offer by what the insurer knew at the time the case went to trial. Evidence changes over time. Cases become better or worse depending upon the facts. The focus of the insurer's conduct must be based upon what was known at the time the offer was made–not what was discovered later or developed later.

Many of the astute plaintiff's lawyers are acutely aware of this limitation on discovery and evidence. As a result, when they present their settlement demand, they will include all of the evidence they have developed on liability and damages in order to be able to argue later that this was information that the insurer knew at the time it accepted or rejected the settlement demand. They will not attempt to hide any evidence. They will have all of their evidence presented nicely in a concise packet. In the *Stowers* case, the settlement packet will be Exhibit A. The cross-examination during discovery and during trial will focus on the packet of information presented in connection with the settlement demand. They leave no question as to what was known by the insurer. A plaintiff's counsel who believes he or she can hide the ball, make a settlement demand, and then be able to present the information later at a *Stowers* trial is sadly mistaken and may find that much of the evidence they intended to rely upon at the *Stowers* trial has been excluded because it had not been presented to the insurer at the time the settlement demand was made.

Another major issue for discovery is the discovery of net worth of the defendant with only a pleading of gross negligence to support it. Under *Lunsford v Morris*[18] a pleading was all that was required to support discovery of net worth of a defendant. The Texas Supreme Court is currently reviewing that decision in light of intervening facts and circumstance. *In re Jacobs*[19] is currently before the Texas Supreme Court. In that case, the defendant is arguing that more than a pleading should be required to support net worth discovery in a punitive damage case. The following arguments are being made in that case.

A. Trend Among States and Federal Courts is to Require Prima Facie Showing, or Demonstrated Factual Basis, of Punitive Liability Before Pretrial Discovery of Defendant's Net Worth

The Court has held that a defendant's net worth is relevant to the issue of punitive damages and is discoverable, without .the

[18] *Lunsford v. Morris*, 746 S .W.2d 471, 471-73 (Tex. 1988)

[19] *In Re Mark A. Jacobs, M.D., Debra C. Gunn, M.D., And Obstetrical and Gynecological Associates, P .A., Relators*; No. 09-0942, Supreme Court of Texas. Real Parties incorrectly assert that the net worth discovery at issue in this mandamus proceeding is "very limited, " and that deposition testimony on the topic was "narrowly circumscribed" by the court of appeals . (Real Parties ' Response to Petition for Writ of Mandamus, pp, 16-17) . But the court of appeals' modification of the trial court' s discovery orders provides inadequate protection to Relators and little guidance regarding the permissible scope of net worth discovery. For example, as discussed, the court of appeals' decision still allows Real Parties to depose Drs. Jacobs and Gunn generally about the "facts and methods" used to calculate their net worth -- and invites the use of this discovery as a means to prematurely engage in judgment-enforcement-type discovery . (Id) In re Jacobs , 2009 Tex. App . LEXIS 81 12 at *28-*29 (Tex . App.-Houston [14t11 Dist .l 2009, orig . proceeding) .

need for a prima facie showing of entitlement to punitive damages.[20] In keeping with the trend of other jurisdictions, and in recognizing the legislative and judicial restraints impacting the imposition of punitive damages since *Lunsford*, however, it is urged that more than mere allegations of gross negligence should be required to support pretrial discovery of net worth information.[21]

It is argued that an order for net worth discovery without more than bare-bones allegations is not only insufficient to support discovery, but also is intrusive of a defendant's sensitive, private, and confidential net worth information.[22] The Court is being asked to consider the modern trend, apply the Legislature's clear intent in ensuring due process and protection of privacy rights in imposing exemplary damages, as expressed through Chapter 41's strict statutory scheme, and require a prima facie showing of a viable issue of punitive liability, or at a minimum, require a claimant to demonstrate some specific factual basis for the punitive damages claim, rather than a simple allegation of "gross negligence" or "knowing" negligent conduct before permitting discovery of a defendant's net worth.

B. Texas Legislature's Dramatic Restriction of Litigants' Ability to Recover Punitive Damages Reduces Benefit. or Utility of Net Worth Discovery, and Supports Requirement for Prima Facie Showing Prior to Net Worth Discovery

It is argued that over the years since *Lunsford*, the Legislature has dramatically restricted the ability of litigants to recover punitive damages. That fact makes it less likely plaintiffs can recover punitive damages, which reduces the probable benefit or utility of net worth discovery that is conducted based only on mere allegations of gross negligence.[23].

Under the Texas Rules of Civil Procedure, a trial judge should limit discovery for which the burden or expense outweighs the likely benefit.[24] In weighing these factors, courts are to consider, among other things, the importance of the proposed discovery in resolving the material issues of the lawsuit.[25] Accordingly, these legislative changes tightening the availability and recovery of punitive damages through increased burdens required to establish entitlement to them-support the institution of a prima ,facie showing of entitlement to punitive damages before intrusive net worth discovery should be allowed. As Justice Sullivan pointed out, the year before *Lunsford* was decided, the Legislature began the process of restricting the availability of punitive damages by enacting Chapter 41 of the Texas Civil Practice and Remedies

[20] *Id*. at 471-73 (acknowledging, "[s]ome states require a prima facie showing of entitlement to punitive damages before information about a defendant's net worth may be sought," but rejecting that requirement in holding "there is no evidentiary threshold a litigant must cross before seeking discovery").

[21] See *In re Jacobs*, 2009 Tex . App . LEXIS 8112 at *8 n.2, *10 n .3 (majority opinion noting several other jurisdictions requiring a prima facie showing of entitlement to recover punitive damages prior to conducting discovery on a defendant's financial status, and still other jurisdictions that require the plaintiff to establish a factual or evidentiary basis to be entitled to discovery on a defendant's net worth). RELATORS' BRIEF ON THE MERITS.

[22] See In re *Jerry's Chevrolet-Buick*, 977 S .W.2d 565, 565-66 (Tex . 1998) (Gonzalez, J., dissenting); *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 331-32 (Tex. 1993) (Gonzalez, J., concurring)

[23] *See In re Jacobs*, 2009 Tex. App. LEXIS 8112 at *37 (Sullivan, J ., concurring) (Apx. Tab A).

[24] *Id.* at *31 (Sullivan, J., concurring); Tex. R. Civ. P . 192.4(b).

[25] *Id.*

Code.[26] In 1995, the Legislature enacted more sweeping tort reform to the law of punitive damages, substantially rewriting Chapter 41 to provide significant protection against a punitive damages award:

- Juries could no longer award punitive damages designed to serve "as an example to others," but were instead limited to assessing damages with the limited purpose of punishing the wrongdoer. Chapter 41's coverage was extended to all but a few types of tort actions.

- The "clear and convincing" standard of proof was required to prove all elements of punitive damages.

- With a few exceptions, a defendant could no longer be held responsible for punitive damages based on the conduct of another.

- The cap on punitive damages was lowered.

- On the defendant's motion, the trial court was required to bifurcate the trial for a separate determination of the amount of punitive damages, and evidence of a defendant's net worth was not admissible during the liability phase of the bifurcated trial.[27]

These changes limited both (a) the amount of any exemplary damages award, and (b) the likelihood that any punitive damages award would be made.[28] In 2003, the Legislature enacted a comprehensive tort-reform package that included the new requirement that a jury's verdict be unanimous as to both liability for punitive damages, and unanimous as to the amount of any such award.[29]

In contrast, *Lunsford* was decided when there was a one-phase trial, in which all relevant evidence, including the defendant's net worth, was admissible. But even under *Lunsford,* net worth is only discoverable "in a suit in which exemplary damages may be recovered.[30] . Under current Texas law, following the litany of significant changes discussed above, a defendant has a right to a separate trial phase as to the amount of exemplary damages, which must be unanimous, following the requisite predicate, to-wit, a unanimous liability finding (by "clear and convincing evidence") in the first phase of the trial of *Lunsford*, and taking into account the new

[26]*In re Mark A . Jacobs, M.D.*, 2009 Tex, App. LEXIS 8112 at *33 (Sullivan, J ., concurring) (Apx . Tab A) ; see Act of June 3, 1987, 70th Leg ., 1st C .S., ch. 2, § 2 .12, 1987 Tex . Gen . Laws 37, 44 (amended 1995 & 2003) (current version at Tex.Civ.Prac.&Rem.Code §§ 41 .001–41 .013); RELATORS ' BRIEF ON THE MERITS

[27] '3See Act of April 11, 1995, 74th Leg ., R .S ., ch . 19, § 1, 1995 Tex. Gen . Laws 108, 108-13 (amended 2003) (current version at Tex.Civ.Prac.&Rem. Code §§ 41 .001–41.013); In re Jacobs, 2009 Tex. App. LEXIS 8112 at *3 7 (Sullivan, J ., concurring) ,

[28] *Id.*

[29] See Act of June 2, 2003, 78th Leg., R.S ., ch . 204, §§ 13 .01 - 13 .08, 2003 Tex. Gen . Laws 847, 886-89; Tex.Civ.Prac.&Rem. Code §§ 41.003(d) ; Patricia P. Miller, Comment, 2003 Texas House Bill 4 : Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions, 37 ST. MARY'S L.J. 515, 520 (2006) ("The unanimity requirements make it more difficult for a plaintiff to receive a punitive damage award from a Texas jury ."). RELATORS' BRIEF ON THE MERITS

[30]*See Lunsford*, 746 S.W.2d at 473.

procedures controlling exemplary damages, the only issue to which net worth is relevant is the amount of exemplary damages, and that is not an issue until Real Parties prove their entitlement to punitive damages in the first place.

C. Court's Change or Clarification of Lunsford Would Not Violate Separation of Powers Doctrine

It has been argued that the Texas Supreme Court should not require them to plead more specific allegations of gross negligence, or to make a prima facie case of entitlement to punitive damages, before allowing net worth discovery because doing so would "ignore a more fundamental issue of constitutional importance–separation of powers." It has been urged that "the plain language of Chapter 41 of the Civil Practice and Remedies Code embodies the policy choice by the Legislature on this issue," and the imposition of such a threshold requirement would "second-guess the policy choices made by the Legislature" because the Legislature has not included such a provision in Chapter 41 of the Texas Civil Practice and Remedies Code.

The Supreme Court's change or clarification of *Lunsford*, if it chooses to do so, would not violate the separation of powers doctrine because, as discussed below. (a) the Legislature has not spoken to the issue of whether to require a prima facie showing of entitlement to punitive damages prior to net worth discovery; (b) the Legislature's silence on that issue should not be construed as legislative intent that such a requirement should not be imposed; and (c) it is within the province of the judiciary, and this Court, to ensure procedures relating to the award of punitive damages comports with the due process guarantees of the Texas and United States constitutions.

1. Legislature Has Not Spoken to Issue of Whether to Require a Prima Facie Showing of Entitlement to Punitive Damages Prior to Net Worth Discovery

The Legislature has not spoken to the issue of whether to require a prima facie or other evidentiary showing of entitlement to punitive damages prior to net worth discovery, so it has not made a policy choice subject to second-guessing by this Court.[31]

The separation-of-powers doctrine prohibits one branch of government from exercising a power inherently belonging to another branch.[32]. The Legislature has not spoken on the issue of whether a prima facie showing of entitlement to punitive damages should be required before net worth discovery.[33] . To the contrary, the Court is being asked to revisit its holding in *Lunsford v. Morris* in light of (a) what the Legislature has done, with Chapter 41 since *Lunsford*, and (b) the trend in other jurisdictions of requiring an evidentiary threshold before net worth discovery may go forward.[34]

2. Legislature's Silence Should Not be Construed as Legislative Intent That No Prima Facie Requirement Should be Imposed

It is argued that the Court ought to infer, because the Legislature has not spoken on the issue, that legislative silence should be construed as a legislative policy choice not to require any evidentiary showing of

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[31] *See* TEX. CIv. PRAC. & REM. CODE §§ 41 .001, et seq.; *McIntyre v. Ramirez*, 109 S .W .3d 741, 748 (Tex . 2003) (court's "role is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results")

[32] *State Bd. of Ins. v. Betts*, 308 S.W.2d 846, 851-52 (Tex . 1958); see Tex . Const., art. . I1, § 1

[33] Real Parties' Response to Petition for Writ of Mandamus, p . 14

[34] Petition for. Writ of Mandamus, pp . 9-14).

punitive liability before net worth discovery can commence.[35] But silence or inaction of the Legislature cannot be interpreted as prohibiting judicial reappraisal of the judicial pronouncements of *Lunsford*. Put another way, as this Court has stated, "a legislature legislates by legislating, not by doing nothing, not by keeping silent."[36] Indeed, this Court has recognized before that it is "not bound by prior legislative inaction in an are a like tort law which has traditionally been developed primarily through the judicial process."[37]

3. **It is Within the Province of Judiciary and This Court to Ensure Procedures Relating to Awards of Punitive Damages Comport With Due Process Guarantees**

Moreover, it is the province of the judicial branch of the government and this Court to ensure that due process guarantees of the United States and Texas constitutions are protected.[38] . In particular, following the Legislature's initial enactment in 1987 of Chapter 41, in *Transportation Insurance Company v . Moriel*,[39] the Court examined Texas' punitive damages procedures to ensure those procedures comport with due process guarantees of the United States and Texas constitutions. There, in "the exercise of [its] common law duties, [the Court] articulate[d] procedural standards . . . [to] apply to all punitive damage cases tried in the future," determining that due process required the bifurcation of the punitive damages portion of trials.[40] And just a few years later, following *Moriel*, the Legislature amended Chapter 41 to add the bifurcation procedure to the statute.[41]

4. **The Court Should Recognize the Trend in Other Jurisdictions and Recent Legislative Enactments in Chapter 41**

Based on the trend in other jurisdictions to require bifurcation of the punitive damages phase of trials, the Court dramatically altered the legal landscape regarding punitive damages in *Transportation Insurance Company v . Moriel*.[42] As the Court did in *Moriel*, Relators ask the Court here to acknowledge the trend in other jurisdictions and recent legislative enactments in Chapter 41.

In *Moriel*, the Court referenced the trend regarding the requirement of bifurcation of the punitive damages phase of trials, "[a]t least thirteen states now require bifurcation of trials in which punitive damages are sought."[43] Contrary to Real Parties' assertion that Relators "allege[d] that Texas is outside the mainstream for net[44] worth discovery," Relators have urged the Court here to consider the trend in other jurisdictions requiring an evidentiary threshold of entitlement to punitive damages

[35] Real Parties' Response to Petition for Writ of Mandamus, pp. 13-14

[36] *Sanchez v. Schindler*, 651 S .W .2d 249, 252 (Tex. 1983)

[37] *Bedgood v. Madalin*, 600 S .W.2d 773, 780 {Tex. 1980)

[38] *See, e.g., In re J.F.C.*, 96 S.W.3d 256, 273 (Tex. 2002) (reviewing whether civil procedure rule 279 violates federal due process and state due course of law provisions)

[39] 879 S .W .2d 10 (Tex. 1994)

[40] *Id.* at 30

[41] *See* Act of April 11, 1995, 74th Leg ., R.S ., ch . 19, § 1, 1995 Tex . Gen. Laws 108, 108-13 (amended 2003) (current version at Tex.Civ.Prac.&Rem. Code Ann. §§ 41 .001-.013 (Vernon 2008 & Supp . 2009))

[42] 879 S .W.2d 10 (Tex. 1994)

[43] 879 S .W .2d at 30.

[44] Also, for example, the Legislature codified the common law definition of "gross negligence" in the 1987 Tort Reform Act, making no change affecting the common law elements of gross negligence . *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 20 (Tex . 1994) ; see also Act of June 3, 1987, 70th Leg ., 1st C .S ., ch . 2, § 2 .12, (codified as Tex.Civ.Prac.&Rem. Code § 41 .001 (5))

before net worth discovery is allowed . This trend is evident in eighteen other jurisdictions and is consistent with the Texas Legislature's tightening or restricting of the availability of punitive damages since *Lunsford*.

5. **Justice Suggests the Court Should Consider Models From Other States for Prima Facie or Threshold Showing of Punitive Liabilities Prior to Net Worth Discovery**

Once a plaintiff has properly pleaded a demonstrated factual basis for punitive liability, as discussed supra, the plaintiff should still be required to meet some evidentiary threshold before being allowed net worth discovery from a defendant . In this regard, as previously suggested by Justice Gonzalez, other States offer models for a prima facie or threshold showing of punitive liability prior to net worth discovery.[45]

In his *Lunsford* dissent, Justice Gonzalez presciently suggested, among other things, the implementation of a bifurcated trial procedure to separately determine issues of liability and damages "to prevent net worth evidence from prejudicially impacting liability and compensatory damage findings when punitive damages are claimed."[46].

Following Lunsford and Alexander, as discussed above, the Court established the bifurcated trial procedure for trials involving punitive damages claims because of the "very real potential" that evidence of a defendant's wealth will prejudice the jury's determination of other issues.[47]

Subsequently, in his concurrence in *Wal-Mart Stores, Inc. v. Alexander*,[48] Justice Gonzalez wrote separately to argue for the bifurcated trial procedure. . He also wrote to .express his concern about the dangers of allowing net worth discovery based on nothing more than mere allegations of gross negligence.

Finally, another problem with unlimited discovery of financial information is the potential for abuse. If all that is required for discovery of sensitive, private, and confidential financial information in tort actions is the mere assertion of gross negligence in a pleading, needless abuse and harassment could result . I suggest that a plaintiff be required to demonstrate a factual basis for its punitive-damage claim before this type of sensitive information is allowed

[45] The Court recognized in 1988 in Lunsford : Some states allowing discovery of net worth require a prima facie showing of entitlement to punitive damages before information about a defendant's net worth may be sought. *See, e .g., Curtis v. Partain*, 27 2 Ark. 400, 614 S.W.2d 671 (1981); Other courts would make a plaintiff wait until trial, after the jury has heard evidence warranting punitive damages, before evidence of net worth is introduced . *Ruiz v. Southern Pacific Transportation Co.*, 97 N.M. 194, 638 P .2d 406, 414 (N .M. Ct. App. 1981). One state subjects a plaintiff to a show-cause hearing in which a prima facie right to punitive damages must be proved. *Leidholt v. District Court*, 619 P.2d 768, 771 (Colo . 1980). In Wyoming, a plaintiff must overcome two hurdles. First, the plaintiff must make a prima facie showing of entitlement to punitive damages before the trial court permits discovery of net worth. Then, a trial involving punitive damages is bifurcated; a jury must again find a plaintiff is entitled to punitive damages; and then the jury may consider evidence of net worth to determine damages. *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981) ; see also Annot., 32 A.L .R .4th 432 (1984); 746 S.W.2d at 473.

[46] 746 S .W .2d at 474 (Gonzalez, J ., dissenting)

[47] *Transp . Ins . Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex . 1994) ; see also Tex.Civ.Prac.&Rem. Code § 41 .009

[48] 868 S .W .2d 322, 329-330 (Tex . 1993) (Gonzalez, J., concurring).

to be discovered. At least twelve jurisdictions now follow this approach, and it is also urged by the American College of Trial Lawyers.

Otherwise, this information will be discoverable in every garden-variety fender bender case.[49]

Ten years after *Lunsford*, in *In re Jerry's Chevrolet-Buick*, Justice Gonzalez dissented from the Court's denial of mandamus relief, this time joined by Justice Hecht , to urge that plaintiffs should make a prima facie showing that punitive damages are appropriate before they may discover net worth information.[50] Judge Gonzalez in his dissenting opinion stating, "[t]hese issues, are significant and demand the Court's attention." Justice Gonzalez then reiterated that "[t]his procedure would protect defendants from intrusive and pointless discovery of sensitive, private, and confidential net worth information based on plaintiff's mere assertion of gross negligence in a petition."[51]

In his dissent in *Lunsford*, Justice Gonzalez suggested that employment of the "Wyoming Plan" would be a "good model for Texas," which requires the plaintiff to "make a prima facie showing to the trial court that a viable issue exists for punitive damages" before being allowed to seek pretrial discovery of a defendant's net worth.[52] "States that have adopted bifurcated proceedings for punitive damages cases have followed one of two main approaches to discover a defendant's net worth: (1) discovery upon a special verdict which establishes a right to punitive damages (the New York approach) ; and (2) pretrial discovery upon prima facie .proof of a viable claim for punitive damages (the Wyoming approach)."[53]

An alternative to the Wyoming and New York approaches that has been suggested is as follows :

Under this suggested approach, the court must first determine if the defendant's net worth is relevant to the case under the general principles prescribed by Texas Rule of Civil Procedure 166b [now Tex.R.Civ.P. 192], that is, if the plaintiffs pleadings support a claim for punitive damages. Thus, the plaintiff would be required to state a factual basis for punitive damages as opposed to proving the higher standard of a reasonable likelihood that the issue will ultimately be submitted to the jury. If the defendant's net worth is determined to be relevant, then net worth discovery and any debate as to what financial information is discoverable is conducted pretrial. Net worth discovery and determination should be conducted a short time before trial to protect defendants from frivolous suits by limiting plaintiffs access to the defendant's net worth until late in the litigation process.[54]

Even under this alternative standard, however, the requirement. of stating a factual basis for punitive damages should require more than conclusory allegations that the conduct complained of constitutes "gross negligence," or a mere recitation of

[49] Id. at 331-32 (citations omitted)
[50] 977 S .W .2d 565, 565-66 (Tex. 1998) (Gonzalez, J., dissenting)
[51] Id. at 565-66.
[52] Lunsford, 746 S .W.2d at 475 (Gonzalez, J., dissenting)
[53] *Comment, Discovery of Net Worth in Bifurcated Punitive Damages Cases . A Suggested Approach After Transportation Insurance Co . v. Moriel*, 37 S . TEX. L. REV. 193, 212 (1996)
[54] *Id.* at 219 (emphasis added).

the governing legal standard for imposing punitive damages, such as a statement in the language of the definition of "gross negligence," or malice, as found within chapter 41, or a conclusory allegation restating the common law elements constituting fraud.

It is noteworthy, too, that jurisdictions employing a bifurcated trial system for punitive damages like Texas have required plaintiffs to make some type of prima facie showing of punitive damage liability before requiring a defendant to produce net worth documentation. This Court should do likewise. Courts in these states have recognized that more than bifurcation is necessary that limitations must also be placed on net worth discovery.[55]

Other approaches include: (1) establishing the existence of a tryable issue of exemplary damages;[56] (2) demonstrating a reasonable basis for the claim;[57] (3) requiring a finding of liability and a basis for punitive damages;[58] (4) demonstrating likely

[55] See, e .g., *Herman v. Sunshine Chem.*, 627 A .2d 1081 (N.J . 1993) (proof of a prima facie case as a condition precedent to discovery of a defendant's financial condition); *Hanners v. Balfour Guthrie, Inc.*, 589 So,2d 684 (Ala . 1991) (net worth is not discoverable until defendant has been found liable for exemplary damages); *Holman v. Burgess*, 404 S.E .2d 144 (Ga. App. 1991) (prima facie showing by plaintiff required before discovery of defendant's net worth); *State ex . Rel Fitzgerald v. District Court*, 70 3 P.2d 148 (Mont . 1985) (must be prima facie proof of a defendant's liability for punitive damages before wealth or financial condition may be discovered); *Campen v. Stone*, 635 P.2d 1121 (Wyo. 1981) (plaintiff may seek pretrial discovery of a defendant's wealth with pleading of . a right to punitive damages; defendant may move for a protective order requiring the plaintiff to make a prima facie showing to the trial court that a viable issue exists for punitive damages, but upon such a showing, pretrial discovery is allowed); *Rupert v. Sellers*, 368 N.Y.S2d 904 (N.Y. App. Div. 2d 1975) (not until a plaintiff obtains a special verdict that he is entitled to punitive damages is it necessary or important for him to know a defendant's wealth).

[56] See, e.g., *Patrick v. Ronald Williams*, Professional Ass'n, 402 S.E .2d 452 (N .C . 1991) (Legal malpractice plaintiffs would be allowed to discover the net worth of the defendant law firm, where a forecast of evidence, which revealed a succession of negligent acts in handling an underlying personal injury claim, would support the submission of a punitive damages claim to the jury); COLO. REV. STAT . ("C .R.S,") §13-21-102(1)(a) (2005) ("After the plaintiff establishes the existence of a triable issue of exemplary damages, the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate).

[57] See, e.g., Estate of Despain v. Avante Group, Inc ., 900 So. 2d 637 (Fla . App . 2005) (although punitive damages pleading statute is procedural in nature, it also provides a substantive right to parties not to be subjected to a punitive damages claim and attendant discovery of financial worth until the requisite "reasonable basis" showing under the statute has been made to the trial court) ; Hetter v. Eighth Judicial Dist. Court of State In and For County of Clark, 874 P .2d 762 (Nev . 1994) (party to suit can discover opposing party's financial condition relative to a punitive damages claim upon a showing of a factual basis for the claim); Clement v . Mountain States Logistics, 2006 U .S . Dist. LEXIS 95650 at *7 (D . N .M. Aug. 28, 2006) (mem. op.) (applying federal procedural law, to discover financial information, plaintiffs must show their claim for punitive damages is "not spurious") ; FLA. STAT. ANN. § 768.72(1) (West 2003) (requiring plaintiff to demonstrate a reasonable basis for the claim) ; IOWA CODE ANN. § 668A.1(3) (West 2002) ("The mere allegation or assertion of a claim for punitive damages shall not form the basis for discovery of the wealth or ability to respond in damages on behalf of the party from whom punitive damages are claimed.").

[58] See, e.g., *Montgomery Ward Stores v. Wilson*, 647 A.2d 1218 (Md. 1994) (defendant's liability for punitive damages must be determined by the trier of fact before his wealth or financial condition may be discovered) ; *Wilson v Gillis Advertising Co.*, 145 F.R.D. 578 (N .D . Ala . 1993) (evidence of defendant's financial condition was discoverable only after determination by jury of liability for punitive damages) ; MD Cry & JUD PRO § 10-91 3 (prohibiting discovery of a defendant's financial

survival of directed verdict;[59] (5) requiring hearing and finding based on clear and convincing evidence of reasonable basis to believe there has been willful, wanton, or malicious, conduct;[60] (6) making a prima facie showing that a viable issue exists for awarding punitive damages and (7) requiring adversary hearing to consider defendant's request for protection based on legitimate claim to privacy balanced against plaintiff's right to prepare for trial and avoid delay in evidentiary process. Under either the New York or Wyoming approaches, or under a modified or blended version to include demonstration of the viability of the claim supporting an award of punitive damages, this Court should require much more than bare allegations of gross negligence, fraud, or malice, before allowing net worth discovery to proceed.

VI. BIFURCATED OR SEPARATE TRIAL

A procedural tactic that should be employed by every defendant is to move for a bifurcated or separate trial on the issue of liability and damages. What is the worst part of a *Stowers* case? The verdict and the judgment! It is very easy to say the case should have settled when one knows of the outcome. Clearly if there is only $1m in coverage and there is a $5m judgment, one does not have to be a rocket scientist to know that the better course of action would have been to have settled the case and not taken the verdict and judgment. There is just one problem–the insurer did not have the verdict or the judgment at the time it made its decision to not accept the case. Again the focus is on the evidence that the insurer had at its disposal at the time the decision to accept or reject the settlement offer was made. What happened in the verdict or the judgment was not information the insurer had at that time and is not relevant to the issue of whether the insurer acted as a reasonably prudent insurer would have acted. Moreover, the introduction of the verdict or the judgment at this stage typically is so prejudicial to the case as to prevent the insurer from getting a fair trial. However, the judgment is necessary in order for the plaintiff or the insured to prove damages. How is this dilemma solved? By the use of separate trials. Much Texas authority supports this proposition.

A. The Standard for Bifurcated or Separate Trials

Rule 174(b) of the Texas Rules of Civil Procedure allows "the court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues."[61] The same standards that apply to separate trials apply to bifurcated trials.[62] An order for bifurcated or separate trial leaves the lawsuit intact, but enables the court to hear and

status in an action seeking punitive damages for personal injuries absent both a finding of liability and a basis for punitive damages).

[59] 2003 OR. LAWS 552(3)(a) (amending OR. REV. STAT. § 18 .535(3)) (requiring plaintiff to demonstrate likely survival of a direct verdict)

[60] S .D. Codified Laws § 21-1-4 .1 (2009) ("In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.")

[61] Tex.R.Civ.P. 174(b)

[62] *Baker v Goldsmith*, 582 SW2d 404 (Tex. 1979); *Columbia Med. Centr. of Las Colinas v. Hogue*, 271 SW3rd 238 (Tex. 2009); *Tarrant Reg. Water Dist. V. Gragg*, 151 SW3d 546 (Tex 2004)

determine separate and distinct issues without trying all controverted issues in the same proceeding.

Under Rule 174, the trial court usually has broad discretion to sever and order separate or bifurcated trials.[63] However, the Texas Supreme Court has instructed that a "trial court has no discretion to deny separate trials when an injustice will result:" when all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial.[64]

There are numerous instances of Texas courts ordering separate trials of distinct issues.[65]

In *State Farm Mut. Auto. Ins. Co. v. Wilborn*,[66] the Fourteenth Court of Appeals at Houston conditionally granted mandamus relief to direct a trial court to allow separate trials and severance pursuant to Rule 174(b) of an insurance bad faith claim until an uninsured motorist claim was resolved.[67] The Court of Appeals reasoned that, under the "prevailing law the trial court had but one decision to make and that was to grant the motions for separate trials or severance of the two causes of action" because "[b]oth parties would lose a substantial right in the trial of the two matters together."[68]

[63] *See F.A. Richard and Assocs. v. Millard*, 856 S.W.2d 765, 767 (Tex. App.–Houston [1st Dist.] 1993, no writ).

[64] *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) (emphasis added) (advising that "the express purpose of Rule 174(b) was to further convenience, to avoid prejudice, and to promote the ends of justice.") (quoting *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (explaining that the trial court has discretion to order separate trials)); *see also In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 207-10 (Tex. 2004) (holding consolidation was abuse of discretion in "toxic soup" case where different plaintiffs had different causes of their injuries); *In re Shell Oil Co.*, 202 S.W.3d 286, 292 (Tex. App.–Beaumont 2006, orig. proceeding) (granting mandamus relief to address improper consolidation and explaining: "The dominant consideration must be whether a consolidated trial will be fair and impartial to all parties."). Indeed, if the joint trial of these multiple claims will prejudice either one of the claims, this court should order separate trials. *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (holding separate trials required where evidence probative of one claim was highly prejudicial to the other claim).

[65] See, e.g., *Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 616 (Tex. App.–El Paso 1992, no writ) ("If the convenience factors are substantially outweighed by the risk of an unfair outcome because of prejudice or confusion, then the trial court abuses its discretion in granting consolidation."); *In re Van Waters*, 145 S.W.3d at 208-210 (holding that consolidation of toxic tort cases was an abuse of discretion that would result in "significant juror confusion and undue prejudice"); *In re Shell Oil Co.*, 202 S.W.3d at 292 (granting mandamus relief to address improper consolidation); *State Farm Mut. Auto. Ins. Co. v. Wilborn*, 835 S.W.2d 260 (Tex. App.–Houston [14th Dist.] 1992, no writ).

[66] *Id.*

[67] Wilborn, 835 S.W.2d at 260-262 (Tex.App.—Houston [14th Dist.] 1992).

[68] *Id.* at 262; *see also St. Paul Ins. Co. v. McPeak*, 641 S.W.2d 284, 289 (Tex. App.–Houston [14th Dist.] 1982, writ ref'd n.r.e.) (citing same controlling reasons in ordering separate trials of workers' compensation claim and unfair insurance practices claim); *Dal-Briar Corp.*, 833 S.W.2d at 616; *Blackmon v. Nelson*, 534 S.W.2d 439, 442 (Tex. Civ. App.–Texarkana 1976, no writ) (holding that the trial court improperly failed to order separate trials under Rule 174(b) of a will contest and claims by the executor that she had acted in good faith in defending the will to support her claim for reimbursement).

B. Standard for Bifurcated or Separate Trials: Bifurcated or Separate Trials Required if the Trial on One Claim Prejudices Another

> The rights of the parties to a fair trial cannot be compromised in the name of judicial economy.[69]

If the joint trial of multiple claims will prejudice either one of the claims, the court should order separate trials.[70] Under Rule 174, the trial court usually has broad discretion to sever and order bifurcated or separate trials.[71]

However, a "trial court has no discretion to deny separate trials when an injustice will result:"

> When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial.[72]

Here, all of the facts and circumstances of these cases unquestionably require a separate trial to prevent manifest injustice, as shown below.

C. Bifurcated or Separate Trials Required Where Party Would Suffer Prejudice or Lose a Substantial Right by Combined Trials

Texas law is clear that the same legal principles apply in considering the propriety of consolidation under Rule 174 as apply to the ordering of separate trials.[73] Even if a common issue of law unites cases, and the testimony and documentary evidence will overlap, where the cases stem from distinct factual scenarios, a trial court abuses its discretion in consolidating those cases for trial.[74]

In *Dal-Briar Corp. v. Baskette* the Court of Appeals considered the consolidation order of three discrimination cases pending against Dal-Briar, alleging a common policy or practice of discrimination by Dal-Briar against workers' compensation claimants.[75] The Court of Appeals explained that even if a common practice of discrimination is proven, each plaintiff must still prove, individually, that he or she was a victim of that practice. Each act sued upon must be established by its own facts and circumstances, and the existence of similar acts, or even proof of a policy consistent with the act sued upon, will not suffice to establish liability as to any individual.[76]

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[69] *In re Ethyl Corp.*, 975 S.W.2d 606, 620 (Tex. 1998).

[70] *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (holding separate trials required where evidence probative of one claim was highly prejudicial to the other claim).

[71] *See F.A. Richard and Assocs. v. Millard*, 856 S.W.2d 765, 767 (Tex. App.–Houston [1st Dist.] 1993, no writ).

[72] *In re Ethyl Corp.*, 975 S.W.2d at 610 (emphasis added) (advising that "the express purpose of Rule 174(b) was to further convenience, to avoid prejudice, and to promote the ends of justice.") (quoting *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (explaining that the trial court has discretion to order separate trials)); *see also In re Van Waters & Rogers, Inc.*, 145 S.W.3d at 207-10 (holding consolidation was abuse of discretion in "toxic soup" case where different Real Parties had different causes of their injuries).

[73] *See Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 616 (Tex. App.-El Paso 1992, no writ).

[74] *Id.*

[75] *Id.*

[76] *Id.*

Each plaintiff must stand or fall with the strength of his or her own case.[77]

The Court of Appeals explained that where consolidation allows an opportunity to "bootstrap" which creates an unacceptable probability of unfair results to the defendant, limiting instructions and even separate verdict forms will not adequately safeguard against the possibility that a single jury will be unduly confused or prejudiced by hearing all three cases at once.[78] The Court of Appeals concluded that even though the evidence might be identical, the defendant, like any citizen, is entitled to be tried for the specific wrongful acts alleged by each individual.[79]

Finally, the *Baskette* Court of Appeals concluded that in such a circumstance, a defendant will suffer an imminent loss of substantial rights, and further, have no adequate remedy on appeal from the judgment of the consolidated claims because "[o]nce the consolidated trial is held, there will be no way to untangle how or whether the prejudice and confusion infected the jury's deliberations. The jury will simply return a verdict upon each claim, and whether jurors reached any individual verdict because of evidence admitted as relevant to another case; or whether jurors believed that because three Real Parties alleged the same wrongs, there must be some misdeeds by Dal-Briar based upon sheer numbers; or whether the jury simply hesitated to return a verdict for one plaintiff without finding for all three, will never be ascertainable."[80]

The same rationale applies to trying the liability portion of a *Stowers* claim with the damages portion. If the amount of the verdict or judgment is introduced in the liability section of the case, the prejudice will be incurable. Once the outcome of the decision not to settle the case is known, it will be impossible for the insurer to obtain a fair and impartial trial. The only manner in which this harm can be ameliorated is to bifurcate the liability from the damages or to order a separate trial. This is the precise situation that TRCP 174(b) was designed to address. A motion to bifurcate or for separate trial under TRCP 174(b) should be an integral part of the strategy of every defendant in a *Stowers* case.

VII. EXPERT WITNESSES

The ultimate issue to be decided in most cases is whether an ordinary prudent insurer would accept the offer, considering the likelihood and degree of the insured's exposure to an excess judgment. The nature of this inquiry requires a jury to evaluate the potential for a jury verdict in light of what was known at the time the offer was made. Moreover, this inquiry must be from the standpoint of the insurer. This has not always been the standard. Under the original *Stowers* decision, the inquiry was not from the standpoint of the insurer but from the standpoint of the insured. The original standard was as follows:

> [B]y the very terms of the contract, assumed the responsibility to act as the exclusive and absolute agent of the assured in all matters pertaining to the questions in litigation, and, as such agent, it ought to be held to that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business; and if an

[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 617 & n.5; see also TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b).

> ordinary prudent person, in the exercise of ordinary care, as viewed from the standpoint of the assured, would have settled the case, and failed or refused to do so, then the agent, which in this case is the indemnity company, should respond in damages.[81]

Under the original standard, the inquiry was what an ordinary prudent person would do. An argument could be made that under this standard, expert testimony might not be required since arguably most jurors are ordinary prudent persons. However, under the standard articulated in *Garcia*, expert testimony is required. The standard is now what an ordinary prudent insurer would do. How insurance companies operate, how they decide cases, and how they handle claims is beyond the knowledge of the common lay person. This is the type of testimony considered under Rule 702 of the Texas Rules of Evidence. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Most, if not all, reported *Stowers* cases involved the use of expert witnesses.[82] The burden is on the insured/plaintiff to show that a reasonably prudent insurer would have accepted the settlement demand. Without expert testimony, it is doubtful that a plaintiff can satisfy that burden unless admissions are obtained from the insurer.

VIII. TRIAL

The trial of the *Stowers* case generally is anti-climatic if all of the appropriate steps and discovery have been conducted. However, there are a number of legal and factual issues that must be determined before the fact finder reaches the issue of whether the "terms of the demand are such that an ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." They will be discussed below.

A. Insurer Control of Settlement

One of the first requirements that must be established for a *Stowers* duty to exist is that the insurer must be in control of settlement.[83] In most cases, this is not an issue. The policy gives the insurer the right to control the settlement of the cases. Under some policies this may not be the case. For example, under many professional liability policies, the insurer has the right to consent to settle. Under these policies, the insurer contractually has relinquished the right to settle the case to the insured.[84] In some cases there may be a fact issue whether or not there was consent by the insured to settlement. If there is a fact issue, the fact finder must determine this fact as a predicate to other facts in the case. If there is no fact

[81] *G. A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved)

[82] *See,e.g., Westchester Fire Ins. Co. v Admiral Ins Co*, 152 S.W.3d 172 (Tex. App.—Fort Worth 2004, pet. denied); *Trinity Univ. Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998); and *Whatley v. City of Dallas*, 758 S.W.2d 301 (Tex.App.--Dallas 1988, writ denied).

[83] *Stowers*, 15 S.W.2d at 545.

[84] Brion v. Vigilant Ins. Co., 651 S.W.2d 183 (Mo. App. 1983)

issue, the issue and the legal effects may be determined by the court as a matter of law.

B. Written Demand

One of the first issues that must be determined is the validity of the demand. In order for a demand to be valid, there are several requirements under Texas law. It must be a formal demand, i.e., written demand in order to trigger an obligation.[85]

1. ***American Physicians Ins. Exch. v. Garcia***

The dissent in *American Physicians Ins. Exch. v. Garcia*[86] interprets the majority opinion as as requiring a "formal settlement demand" in order for the *Stowers* Doctrine to be activated. The dissent states that:

> The court describes an insurer 's duty to settle as (1) the duty to accept reasonable settlement demands within policy limits, (2) the duty to exercise that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business in responding to settlement demands within policy limits, and (3) a duty of ordinary care that includes reasonable attempts to settle within the insured's coverage after they receive a formal settlement demand within the policy limits.[87]

[Emphasis ours.]

The majority comments on the dissent and states that:

> [W]e have no quarrel with the notion that a formal demand is not "an absolute prerequisite" . . . for holding an insurer liable for damages caused by its misconduct other than a *Stowers* breach.[88]

[Emphasis ours.]

The majority opinion later goes on to state that:

> Moreover, to the extent that *Stowers* and *Ranger* formalize the negotiation process, we think claimants are perfectly capable of transmitting suitable settlement demands without assistance from the other side.[89]

In *Trinity Universal Ins. Co. v. Bleeker,*[90] the Corpus Christi Court of Appeals was faced with the issue of whether an oral settlement agreement would suffice. The court held that:

> The parties dispute whether the oral authors of settlement testified to by Villegas are sufficient to activate a *Stowers* duty. Appellants presented no evidence to controvert Villegas's testimony as to the oral offers, rather they argued at trial and here on appeal that settlement offers should be in writing to trigger the *Stowers* duty. Appellants refer to rule 11 of the Texas Rules of Civil Procedure as support for their position. This reliance is misplaced. Rule 11 requires that settlement *agreements* be in

[85] *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994)
[86] *876 S.W.2d 842 (Tex. 1994).*
[87] *Id.* at 865
[88] *Id.* at 849.
[89] *Id.* at 851, n. 17.
[90] 944 S.W.2d 672 (Tex. App.--Corpus Christi 1997, rev'd 966 S.W.2d 489 (Tex. 1998)).

> writing, not that settlement *offers* be in writing. Generally speaking, settlements are governed by the principles of contract law. *Shaw v. Kennedy*, 879 S.W.2d 240, 247 (Tex. App.--Amarillo 1994, no writ); *Stewart v. Mathes*, 528 S.W.2d 116, 118 (Tex. Civ. App.--Beaumont 1975, no writ). Under contract law, oral offers are valid to the same extent as written offers.[91]

In the supreme court, the court's of appeals decision was reversed on the issue of whether a valid *Stowers* demand had been made. The supreme court did not reach the issue of whether or not an oral offer would suffice under the *Stowers* doctrine because none of the offers in that case proposed to release the insured from the hospital lien. As a result of whether an oral offer was sufficient was moot.[92]

The interpretation of Rule 11 by the Corpus Christi Court of Appeals in *Bleeker* was simply wrong. Rule 11 provides that:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed, and filed with the papers as part of the record, or unless it be made in open court and entered of record.

In *London Mkt. Cos. v. Schattman*,[93] the Texas Supreme Court held that Rule 11 requires agreements between attorneys or parties concerning a pending suit to be in writing, signed, and filed in the record of the cause to be enforceable. Once the existence of such an agreement becomes disputed, it is unenforceable unless it comports with these requirements. Therefore, an oral settlement offer which is accepted in writing by the defendant is unenforceable by the court. The defendant is simply not in a position whereby his acceptance will put a conclusion to the lawsuit.

The placement by the Texas Supreme Court of the burden of making an offer on the plaintiff also supports the fact that the settlement demand must be in writing. In *American Physicians Ins. Exchange v. Garcia*,[94] the Texas Supreme Court placed the burden of making a *Stowers* demand upon the plaintiff. The court there held that:

> From the standpoint of judicial economy, we question the wisdom of a rule that would require the insurer to bid against itself in the absence of a commitment by the claimant that the case can be settled within policy limits. Considering the negotiating incentives for each party, we conclude that the public interest favoring early dispute resolution supports our decision not to shift the burden of making settlement offers under *Stowers* onto insurers.[95]

Under the rationale in *Garcia*, there must be a commitment by the claimant that the case can be settled within the policy limits in order to be a valid *Stowers* demand. In other words, the defendant must be able to accept the demand and the case be concluded. If the offer is oral, that situation simply does not exist. If oral offers were

[91] 944 S.W.2d at 675.
[92] 966 S.W.2d at 491.
[93] 811 S.W.2d 550, 552 (Tex. 1991, orig. proceeding).
[94] 876 S.W.2d 842 (Tex. 1994).
[95] 876 S.W.2d at 851.

allowed, plaintiffs would be able to make an oral demand for the policy limits hoping that the insurer would not accept the demand. If the insurer does not accept the demand, then the plaintiff later on can argue that indeed there was a valid *Stowers* demand. If the insurer accepts the demand, then the plaintiff is in a position to argue there is no valid settlement because the terms of Rule 11 have not been complied with. In essence, it allows a plaintiff to attempt to place the insurer in a *Stowers* position without actually committing himself to a settlement. This is not what the supreme court had in mind in *Garcia* and is why a settlement demand must be in writing in order to trigger a *Stowers* obligation.

C. Demand when Coverage Existed

One of the more often overlooked requirements of *Stowers* is that the demand be made when coverage existed.

In many cases, there will be multiple petitions filed, some of which would invoke coverage and some of which do not. Whether a petition has alleged facts sufficient to invoke coverage is very important with respect to the timing of the *Stowers* demand. In *American Physicians Ins. Exchange v. Garcia,*[96] the supreme court reiterated the usual rule regarding determining the duty to defend. The court stated that the duty to defend is determined solely by the allegations in the pleadings filed against the insured. If the petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured.[97] However, more importantly, the court went on to state that there is no duty to settle a claim that is not covered under the terms of the policy.[98] In other words, if there is no duty to defend, then the possibility of indemnity under the terms of the policy is foreclosed and hence, there is no duty to settle. As a result, any settlement demand received while there is no duty to defend would not trigger a *Stowers* duty. Only settlement demands triggered during the time in which there is a duty to defend would trigger a duty on the part of the insurer to respond.[99] For example, if the plaintiff sends a written *Stowers* demand for the policy limits at a time in which there is no duty to defend, a *Stowers* duty has not been triggered. One issue raised by this scenario is whether or not there would be a duty if the insurer were defending pursuant to a reservation-of-rights letters and the issue of coverage was not certain. However, in the *Garcia* case, it appears that a defense was being conducted pursuant to a reservation-of-rights letter and that APIC paid for defense costs during the entire case. Based upon Footnote 19 of the decision, the fact that APIC was defending pursuant to a reservation-of-rights letter did not change the fact that no *Stowers* duty was triggered when the pleadings did not assert a claim covered under the APIC policy.

Typically the issue of whether coverage existed at the time the demand was made will be a question of law. The only exception to this issue would be where the issue for determining the duty to defend

[96] 876 S.W.2d 842, 848 (Tex. 1994).
[97] *Id.* at 847-848.

[98] *Id.* at 848.
[99] The supreme court in American Physicians Ins. Exchange v. Garcia, 876 S.W.2d 842 (Tex. 1994), in Footnote 19 stated that:

> Because the Cardenases' claim technically was not covered under the APIC policy until the day of trial, only the $1.6 million settlement demand could have potentially triggered a Stowers duty.

allowed the use of extrinsic evidence and a fact issue existed on that issue. Otherwise, the issue is one of law for the court.

D. Specificity of Demand

One issue that is raised on numerous occasions is how specific must the settlement demand be from the plaintiff. In certain instances, the plaintiff may not be aware of the limits of liability insurance available to defendant. In other cases, the limits may have been eroded by payments of prior claims. In such cases, the plaintiff may make a blanket demand for the remaining limits of insurance available to defendant. In such cases, the plaintiff will be taking a chance that the insurance is at a level that would satisfy his evaluation of the case. The current state of the law appears to be that a plaintiff demand for the policy limits will be sufficient to trigger a *Stowers* demand. In *American Physicians Ins. Exchange v. Garcia,*[100] the supreme court addressed this precise situation. There the court held that:

> Generally, a *Stowers* settlement demand must propose to release the insured fully in exchange for a stated sum of money, but may substitute "the policy limits" for a sum certain.[101]

Therefore, a demand for the "policy limits" would appear to be specific enough to trigger a *Stowers* duty.

Normally, whether the demand is within or without the policy limits will be undisputed. The only exception to this rule would be where there has been erosion by the payment or claims or defense costs as the case may be and some dispute exists as to the amount of the actual erosion at the time of the demand.

E. Release of Liens

One issue which is present in many cases is whether or not the settlement demand must offer to release any liens that may exist with respect to the plaintiff's case. These liens may take the form of a hospital lien,[102] a medicare lien,[103] medicaid lien, or a subrogation lien from a health insurer. In *Trinity Univ. Ins. Co. v. Bleeker*[104] the limits of liability for the insurance policy were $40,000 per accident. The hospital bills alone for the fourteen claimants in the case exceeded $40,000. The hospital had filed a lien in the county prior to the initiation of any proceedings. The attorney representing five of the plaintiffs offered to settle for the entire policy limits, but did not mention the hospital liens. The supreme court held that the demand was insufficient to trigger a *Stowers* duty. The court held that "none of the offers included the hospital liens."[105] The court went on to hold that "any implied release that Villegas offered to Trinity was not a full one under Section 55.007(a)."[106] Therefore, no *Stowers* demand was triggered.

The issue still exists, however, as to whether the demand letter must mention that

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[100] 876 S.W.2d 842, 848 (Tex. 1994).
[101] 876 S.W.2d at 848.

[102] Tex. Prop. Code, § 5.007(a).

[103] 25*See* 42 U.S.C. § 1395(y)(b)(2)(ii) through (iii). Several approaches to Medicare issues in health care liability settlements include (1) reliance upon a hold harmless/indemnity provision, (2) requiring plaintiff's counsel to obtain a Medicare release, or (3) have defense counsel obtain a release from Medicare in exchange for placing settlement funds into the registry of the court in an interpleader action.
[104] 966 S.W.2d 489 (Tex. 1998).
[105] *Id.* at 491.
[106] *Id.* at 491.

all liens will be released, even if there are no liens. In many cases, a *Stowers* demand will be received by the insurer relatively early in the process. At that point in time, the carrier may not have sufficient information to know if there are outstanding hospital, medical, medicaid or health insurance liens out there. If the demand letter fails to state it will take care of those types of lien, is there a *Stowers* duty triggered, even if no such liens exists. The most likely response to that argument is that no *Stowers* duty has been triggered if the insurer knows of the existence of liens or does not have reasons to know that no liens exists. The risk should not be on the insured or the insurer to determine whether or not liens exist and whether or not they will be taken care of as part of the settlement. Therefore, if the insurer is aware of liens or if the insurer does not have reason to believe that no liens exist, then there has not been a valid *Stowers* demand. However, if there has information furnished by plaintiff to the insurer that indeed there are no liens, then the insurer should not be able to argue that the *Stowers* duty was not triggered based upon the failure of the plaintiff to include a release for liens.

In the context of liens, a fact issue could arise on the issue of whether the insurer had a reasonable belief that a lien existed that would need to be released in order for the insured to be fully and finally released. If the fact finder were to find that there was a reasonable basis, then the offer to settle without addressing the potential lien would not be effective.

F. Reasonable Time to Accept

Another issue bearing upon the validity of a *Stowers* demand is whether the insurer had a reasonable opportunity to settle. In other words, was the reasonable time given to the insurer to evaluate the settlement demand and respond.

In *American Physicians Ins. Exchange v. Garcia*,[107] the supreme court said that:

> [T]he *Stowers* remedy of shifting the risk of an excess judgment onto the insurer is inappropriate absent proof that the insurer was presented with a reasonable opportunity to prevent the excess judgment by settling within the applicable policy limits.

In *State Farm Lloyds Ins. Co. v. Maldonado*,[108] the supreme court was confronted with the issue of whether or not an insurer must have a reasonable amount of time to respond to the *Stowers* demand. In that case, the court noted that:

> There is no evidence that State Farm knew, at a point when it had a reasonable amount of time to respond, that Robert had made an unconditional offer to pay the excess.[109]

As a result, the court held that unless the insurer has a reasonable time period in which to respond, there is no valid *Stowers* demand.

Finally, the court of appeals in *Trinity Univ. Ins. Co. v. Bleeker*[110] implicitly recognized the requirement that there be a reasonable opportunity to respond to the settlement offer when they held that the "oral offers were made before the written offer and without imposing any deadline of

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[107] 876 S.W.2d 842, 849 (Tex. 1994)
[108] 963 S.W.2d 38 (Tex. 1998).
[109] *Id.* at 41.
[110] 944 S.W.2d 672 (Tex. App.--Corpus Christi 1997).

their own gave Trinity a reasonable time to evaluate them."[111]

The issue remains "what is a reasonable time." This period will vary depending upon at what stage of the case the demand is made. If a demand is made at the inception of the case, before any investigation has been conducted, in all probability a deadline of seventy-two hours will be insufficient. However, if discovery has been completed, and the case is set for trial on Monday, a deadline on Friday with a twenty-four hour trigger may be a reasonable time.

In most of the cases involving a reasonable time to accept, a fact issue will exist which will require the fact finder to make that determination.

G. Willingness of Insured to Contribute

As a general rule, a demand in excess of the policy limits will not trigger a duty under the *Stowers* doctrine.[112] However, this does not mean that a settlement offer in excess of the policy limits could never trigger a *Stowers* duty. In Footnote 13 of the *Garcia* opinion, the majority noted that:

> We do not reach the question of when, if ever, a *Stowers* duty may be triggered if an insured provides notice of his or her willingness to accept a reasonable demand above the policy limits, and to fund the settlement, such that the insurer's share of the settlement would remain within the policy limits[113]

According to Keeton, if the insured is willing to contribute the difference between the insurance policy limit and the total settlement demand, then the *Stowers* duty on the part of the insurer would be triggered.[114]

This interpretation has been followed by at least one Texas court. The San Antonio court of appeals held that a jury's finding that the insurer was negligent in failing to settle constituted an implied finding that a demand for $1 million in addition to the policy limits was a "demand within policy limits."[115] In *Maldonado*, the underlying suit involved Maldonado's claims against Robert for defamation arising out of Robert's statements accusing Maldonado of being a thief and prostitute.[116] The trial court rendered judgment for Maldonado for $2 million plus prejudgment interest.[117] Robert and Maldonado sued State Farm for breach of its *Stowers* duty regarding settlement of the defamation suit.[118]

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[111] *Id.* at 676.
[112] *Garcia*, 876 S.W.2d at 855.
[113] *Garcia*, 876 S.W.2d at 849.

[114] Keeton *Insurance Law*, § 7.8(d).

> Windt imposes a more onerous burden on the part of the insurer. According to Windt, an insurance company must do two things in order to satisfy its obligation to the insured:
>
> First, it must, if reasonable to do so under the circumstances, attempt to engage the plaintiff's counsel into discussions in an effort to reduce the settlement demand.
>
> Second, if the insurer is unable to obtain a settlement offer that is within the policy limits, it must communicate the higher settlement offer to the insured, since the insured might be willing to make up the difference.

A. Windt, *Insurance Claims and Disputes*, § 5.07.
[115] *State Farm Lloyds Ins. Co. v. Maldonado*, 935 S.W.2d 805, 815-16 (Tex. App.--San Antonio 1996, n.w.h.).
[116] *Id.* at 808.
[117] *Id.*
[118] *Id.*

During the underlying suit, Maldonado's attorney orally offered to settle the suit for State Farm's policy limits of $300,000 plus $1 million from Robert's own pocket, and that the offer would expire in thirty days.[119] On the 29th day, State Farm made a written offer to settle for $50,000 and informed Robert that Maldonado had made a demand in excess of the policy limits, and advised Robert to seek advice of a personal attorney.[120] Eleven days later, Maldonado again extended the demand for $1.3 million for another 3 days.[121] Although State Farm did not accept the settlement offer, Robert entered into an agreement to pay Maldonado $1 million, and did not assign his causes of action against State Farm.[122] After the settlement deadline passed, Maldonado denied State Farm's request for an extension of time to accept the settlement offer.[123] Later, State Farm offered its policy limits, but Maldonado declined the offer.[124]

The court concluded that the "bifurcated nature" of the demand brought it within policy limits, triggering the *Stowers* duty.[125] The court explained that the demand was tendered both orally and in writing, although the bifurcation of the demand was not reduced to writing.[126] The court characterized the demand as "an offer of a policy limits settlement . . . made to State Farm if Robert would pay $1 million out of his own pocket."[127] The court stated:

> We note that the present case presents an unusual factual situation. However, the supreme court, while not reaching the merits of the applicability of *Stowers* in such a circumstance, acknowledged that such a situation was feasible. . . . We find little distinction between a demand such as this one made in the present case and a more traditional *Stowers* demand. In both cases, the demand to the insurer is limited to the coverage provided in the policy. As such, a demand such as the one in the present case places no additional burden on the insurer. If the insured is amenable to funding the portion of the demand in excess of policy limits, as he was in the present case, the demand to the insurer falls within those limits.[128]

The supreme court disagreed with the application of the law of the facts in that case. The court noted that in *American Physicians*, the supreme court had left open the question of whether a *Stowers* duty is triggered "if an insured provides notice of his or her willingness to accept a reasonable demand above the policy limits, and to fund the settlement, such that the insurer's share of the settlement would remain within the policy limits."[129] However, in this case, the court went on to state that:

> Because State Farm did not know that Robert made an unconditional offer to pay the $1 million excess, we are not confronted with the

[119] *Id*. at 809.
[120] *Id*.
[121] *Id*.
[122] *Id.*
[123] *Id*.
[124] *Id*. at 810.
[125] *Id*. at 815.
[126] Indeed, no writing is necessary to trigger the *Stowers* duty. *Id*.
[127] *Id*.
[128] *Id*. at 816 (quoting *Garcia*, 876 S.W.2d at 849 n.13).
[129] *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849, n. 13.

situation, and we therefore decline to decide it here.[130]

H. Settlement with Some, But Not all of the Claimants

Texas courts have already addressed the situation of under what circumstances an insurer may settle with some but not all the claimants. An insurer who is faced with multiple claimants and a policy with insufficient limits may enter into a settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims.[131] The Texas Supreme Court has addressed how an insurer should respond to a situation where that are multiple claimants claiming under a policy with insufficient limits.[132]

The lawsuit in *Soriano* arose out of an automobile accident. Soriano, the insured, collided head-on into a vehicle driven by Medina, one of the claimants. As a result of the accident Medina and his children, as well as Soriano's passenger Lopez, were severely injured. Medina's wife was killed.[133]

Soriano had minimum insurance coverage through his parent's policy with Texas Farmer's Insurance group, which provided for limits of $10,000 per person and $20,000 per occurrence. Farmers initially offered $20,000, the policy limits, to the Medinas. This offer was refused. Thereafter the Medinas and Lopez filed suit against Soriano. Prior to trial Farmers settled with Lopez and offered the remaining $15,000 of the insurance to the Medinas. The offer was refused and a demand was made for the original policy limits of $20,000. The case went to trial and a judgment was entered against Soriano in the amount of $172,187.00.[134] Soriano then assigned his cause of action against Farmers to the Medinas in exchange for a covenant not to execute. In the Medina's suit against Farmers, the jury found that Farmers was negligent in the handling of the settlement negotiations and rendered judgment of actual damages in the amount of $520,577.24 and exemplary damages of $5 million.[135]

The case was appealed, with the primary issue being the standard that was to be applied in reviewing Farmer's conduct in attempting to settle several claims with insufficient policy limits.[136] The court of appeals adopted the "comparative-seriousness" rule. Under this rule, an insurer can be held liable for settling with one claimant to the detriment of the other even though the first settlement was reasonable and entered into in good faith when viewed apart from exposure in the second case.[137] An insurer must measure the proportional limits of each claim and then settle the cases accordingly.[138] If the insurer is wrong in this assessment, then it becomes liable beyond its policy limits.[139]

The Supreme Court reversed, holding that when faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the

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[130] *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38, 41 n.6 (Tex. 1998)
[131] *Soriano*, 881 S.W.2d at 315.
[132] *Id.*
[133] *Id.* at 313.
[134] *Id.* at 314.
[135] *Id.*
[136] *Soriano*, 844 S.W.2d 808 (Tex. App.--San Antonio 1993), *rev'd* 881 S.W.2d 312 (Tex. 1994).
[137] *Id.* at 840.
[138] *Id.*
[139] *Id.*

several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims.[140] The court reasoned that this approach would promote settlement of lawsuits and encourage claimants to make their claims promptly.[141]

The Supreme Court then stated that Farmers could not be liable for negligently failing to settle the Medina's claims unless there was evidence that either (1) Farmers negligently rejected a demand from the Medinas within policy limits; or (2) the Lopez settlement was itself unreasonable.[142] The court found that there was no evidence of either. First, the Medinas did not demand the $20,000 until after the Lopez settlement. Farmers was under no obligation at that time to offer to settle in excess of the remaining $15,000 policy limits.[143] Second, the court stated that to show that a settlement is "unreasonable," the claimant must show that a reasonably prudent insurer would not have made the settlement when considering solely the merits of the first claim and the potential liability of the insured on that claim.[144] The court concluded that there was no evidence that Farmer's decision to settle the claim for $5,000 was unreasonable.[145]

Keeton proposes several solutions to the multiple claimant scenario. These include proration among the claimants of the insurance coverage as well as allocation by agreement of the claimants.[146]

Windt offers a more pragmatic approach, though one not recognized in Texas. According to Windt, the insurer should first invite all of the potential claimants to join and participate in efforts to reach an agreement as to the available funds. If an agreement cannot be reached, then the insurer may simply pay the policy limits to the insured.[147] Windt's proposal is somewhat troubling in that it allows the insurer to delegate its responsibility regarding settlement to the insured. Again, in many cases, the insurer may have negotiators who are far more skilled than the insured in negotiating claims.

However, the above discussion only addresses the situation of where the insurer elects to accept settlement demands from some but not all of the claimants. A very real issue is does an insurer have liability if it refuses to accept settlement demands from some, but not all of the claimants.

If there has been a challenge to a settlement made with some, but not all of the claimants, a fact issue may exist as to whether the settlement was reasonable. In Soriano, the court determined as a matter of law that the settlement was reasonable. In other cases, if there are diverging expert opinions, a fact issue may be created requiring resolution by the fact finder.

I. Funding from Multiple Policies

Another area that is problematic to both the plaintiff and the insurer is the situation where there is a primary policy with excess policies stacked on top. First, it should be

[140] *Soriano*, 881 S.W.2d at 315.
[141] *Id.*
[142] *Id.* at 315.
[143] *Id.* at 316.
[144] *Id*
[145] The supreme court's holding in Soriano has been followed by several courts of appeals. *See Lang v. State Farm Mutual Automobile Ins. Co.*, 982 S.W.2d 545 (Tex. App.–Texarkana 1999, pet. denied); *Mid Century Ins. Co. of Texas v. Childs*, 2000 WL225546 (Tex. App.–Texarkana 2000).

[146] Keeton, *Insurance Law*, § 7.4(d) and § 7.4(e).
[147] A. Windt, *Insurance Claims and Disputes*, § 5.08.

noted that the supreme court in the *Garcia* opinion specifically refrained from addressing this situation. There the Court held that:

> Nor do we address the *Stowers* duty when a settlement requires funding from multiple insurers and no single insurer can fund the settlement within the limits that apply under its particular policy.[148]

The supreme court in *Garcia* further stated in Footnote 25 that:

> Although we have discussed the process of allocating indemnity or settlement costs among multiple insurers, this opinion does not address what responsibilities a *Stowers* duty imposes when two or more insurance companies, excess insurers, or reinsurers must jointly fund a settlement.[149]

a. **Demand Within Policy Limits**

In a stacked situation, if the demand is within the primary limits, there is no question that a *Stowers* duty can be triggered. The key in this situation is that the insurer has the ability on its own to accept the demand and bring about a termination of litigation. The fact that there may be other excess policies above the insurer will not obviate this duty.[150]

b. **Demand in Excess of Primary Limits**

If the demand is in excess of the primary limits, a different question is presented. In this case, the primary insurer has no ability to bring about a termination of the litigation by paying its limits. In *Westchester Fire Ins. Co. v. American Contractors Ins. Co. Risk Retention Group,*[151] American Contractors was the primary insurance carrier for the insured with a policy limit of $250,000. Westchester was a third-level excess carrier responsible for amounts over $2 million and up to $4 million. At a mediation conference, the plaintiff made a demand of $1.8 million. This offer was rejected by American Contractors. After trial, judgment was rendered for in excess of $7.5 million. The carrier settled with the plaintiff for $4.3 million, of which Westchester paid $1.3 million. The court of appeals held that the demand of $1.8 million was not within the American Contractors' policy limits and therefore no *Stowers* duty was triggered.[152]

This principle was also reaffirmed in *West Oaks Hospital Inc. v. Jones, Inc.* In that case, the lowest settlement demand of the plaintiff was $725,000. The primary insurance coverage available to the insured was $500,000. As a result, the court of appeals held that since the demand was above the primary policy limits, even though reasonable, it did not trigger a *Stowers* duty on the part of the primary carrier.

2. **<u>Concurrent Policies</u>**

In some cases, there may be multiple policies available to pay the claim but instead of the policies being stacked, they

[148] *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849, n. 13.
[149] *Id.* at 855, n. 25.
[150] However, this situation may be changed if there are concurrent policies available to fund the settlement.

[151] 1 S.W.3d 872 (Tex. App.-Houston [1st Dist.] 1999).
[152] ____ S.W.3rd ____ (Tex. App.–Houston [1st Dist.] 2001, pet. granted).

may apply on a concurrent primary basis. The Texas Supreme Court has not yet directly addressed issues that may arise when multiple insurers are presented with a settlement demand by a plaintiff. As a matter of fact, in Footnotes 13 and 25 of *American Physicians Ins. Exchange v. Garcia*, the Supreme Court specifically refrained from addressing the situation presented where funding from multiple insurers would be required to settle a case.

In a situation involving multiple insurers, there are at least two scenarios in which *Stowers* issues may arise. The first would be one in which a plaintiff makes a settlement demand which exceeds the policy limits of each carrier, but the demand is less than the total limits under all available policies. The second situation would be a demand made by a plaintiff which is within the policy limits of each carrier providing coverage.

To address these questions, one must first reconcile the other insurance clauses of the relevant policies. If the policies have other insurance clauses typical of most general liability policies, they will provide for a contribution by limits or equal shares. While an insurer's duty to defend is not limited by the existence of other insurance, the insurer's duty to indemnify is. The obligation of an insured to contribute toward a judgment or settlement is restricted by the "Other Insurance" clause. The insurer has no legal obligation to contribute toward a settlement more than its percentage of the settlement as determined by the "Other Insurance" clause. For example, if there were two primary policies which apply to a lawsuit and each have policy limits of $1 million and a settlement offer was received for $1.5 million, each would have a contractual obligation only to contribute $750,000 to the settlement if the policies provided for contribution by limits of equal shares. The obligation under the policy would be for each carrier only to contribute $750,000. Likewise, if two carriers have policy limits of $1 million and a settlement demand was received for $750,000, each carrier would be contractually obligated only for $375,000.

a. **Demand Within Each Policy's Primary Limits**

The more difficult question presented in this situation is where there is a demand within the limits of any of the concurrent policies. Clearly in this situation, the insurer would have the ability to settle the case. However, under the contractual terms of the policy, it is only obligated to pay its pro rata share of the judgment or settlement. Since there has been no guidance provided by the Supreme Court in this situation, the more prudent course of conduct for the insurer would appear to be to go ahead and pay the limits to settle a case and seek subrogation against the other insurer who was recalcitrant. Unfortunately, a new Supreme Court case may make this option much less desirable. *See*, *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co*., 236 S.W.3d 765 (Tex. 2007).

Although not technically a *Stowers* decision, the *Mid-Continent* decision should impact the issues stated above and the Supreme Court does discuss the *Stowers* scope within the opinion. In *Mid-Continent*, the Supreme Court was presented issues on certified questions from the federal Fifth Circuit Court of Appeals. The case arose out of an automobile accident in which members of the Boutin family were injured after their vehicle was struck by a car being driven by Tony Cooper when his vehicle crossed lanes of traffic narrowed by

highway construction. Kinsel Industries was the general contractor on the project and Crabtree Barricades was its subcontractor. The Boutins sued those companies and others for their injuries. Kinsel was the named insured of Liberty Mutual and an additional insured under the CGL policy issued to Crabtree by Mid-Continent. Both Liberty Mutual and Mid-Continent had general liability limits of $1 million and jointly agreed to defend Kinsel. Liberty Mutual also provided Kinsel with an excess policy with limits of $10 million. Both of the primary policies also contained identical "other insurance" clauses that had the effect of requiring each to contribute by equal shares. During settlement negotiations, Liberty Mutual evaluated the settlement value as to Kinsel was $1.5 million, but Mid-Continent believed that the settlement value was only $300,000. Liberty Mutual agreed to settle the case against Kinsel for the sum of $1.5 million and demanded that Mid-Continent contribute half. Mid-Continent refused, and would only contribute the sum of $150,000, or half of the settlement value it placed on behalf of Kinsel. Liberty Mutual funded the remaining $1.35 million and reserved the right to seek recovery from Mid-Continent.

After the federal district court held that Mid-Continent's evaluation of the settlement value was unreasonable, it ordered that Mid-continent pay its share of the settlement, which was $750,000 minus the $150,000 already paid. The Fifth Circuit certified the following questions to the Texas Supreme Court:

> 1. Two insurers, providing the same insured applicable primary insurance liability coverage under policies with $1 million limits and standard provisions (one insurer also providing the insured coverage under a $10 million excess policy), cooperatively assume defense of the suit against their common insured, admitting coverage. The insurer also issuing the excess policy procures an offer to settle for the reasonable amount of $1.5 million and demands that the other insurer contribute its proportionate part of the settlement, but the other insurer, unreasonably valuing the case at no more than $300,000, contributes only $150,000, although it could contribute as much as $700,000 without exceeding its remaining available policy limits. As a result, the case settles (without an actual trial) for $1.5 million funded $1.35 million by the insurer which also issued the excess policy and $150,000 by the other insurer.
>
> In that situation is any actionable duty owed (directly or by subrogation to the insured's rights) to the insurer paying the $1.35 million by the underpaying insurer to reimburse the former respecting its payment of more than its proportionate part of the settlement?
>
> 2. If there is potentially such a duty, does it depend on the underpaying insurer having been negligent in its ultimate evaluation of the case as worth no more than $300,000, or does the duty depend on the

underpaying insurer's evaluation having been sufficiently wrongful to justify an action for breach of the duty of good faith and fair dealing for denial of a first party claim, or is the existence of the duty measured by some other standard?

3. If there is potentially such a duty, is it limited to a duty owed the overpaying insurer respecting the $350,000 it paid on the settlement under its excess policy?

The Supreme Court disagreed with ruling of the district court and answered no to certified question 1. That prevented the court from reaching the other two questions. The Supreme Court noted that the primary policies provided equal coverage and contained pro rata clauses, such that each insurer contractually agreed to pay a proportionate share of the covered loss up to the policy limit. They did not contract with each other to create any obligations between themselves. There was thus no contractual right of contribution and the presence of the "other insurance" clauses precluded an equitable contribution claim. The Supreme Court disapproved the case of *General Agents Insurance Co. of America v. Home Insurance Co. of Illinois*,[153] to the extent it implied the existence of a common law duty between co-primary insurers to reasonably exercise their rights under an insurance policy. Further, because the insured was fully indemnified, the insured had no contractual rights that could be asserted by Liberty Mutual by way of subrogation. Mid-Continent also did not breach any *Stowers* duty because there was never any settlement demand within its policy limits. Finally, the Court held that Liberty Mutual's payment was not a debt for which another was primarily liable, so there was no right of equitable subrogation.

Again, this is not technically a *Stowers* case as the Supreme Court properly ruled that no demand was ever made within the policy limits of either primary policy. However, the Court discarded any idea that one primary carrier owes any direct duty to another when both policies contain "other insurance" provisions. When that is the case, the carriers' duty to contribute is contractually limited to their proportionate share of the loss. Only if the insured has a right of action against the recalcitrant insurer can the paying insurer step into the shoes of the insured and seek reimbursement for any amount paid beyond its contractually agreed upon proportion. But once a settlement demand is paid and the insured is fully indemnified, the insured will never have a claim against the recalcitrant insurer and no claim for equitable subrogation will ever arise.

This creates an uncomfortable *Stowers* scenario for a carrier faced with a reasonable settlement demand that is less than the limits of both its policy limits and the limits of the recalcitrant insurer and the recalcitrant insurer is unwilling to pay its proportionate share. Can the paying insurer escape *Stowers* liability simply by tendering its proportionate share of such a *Stowers* settlement demand while refusing to pay any portion of the other carrier's obligation? And, if the paying insurer does do just that, would only the recalcitrant insurer face exposure under the *Stowers* doctrine or would the paying insurer also face such exposure to an excess judgment? The *Mid-*

[153] 21 S.W.3d 419 (Tex.App..—San Antonio 2000, no writ)

Continent case is problematic because it does not appear to recognize any mechanism in which the paying insurer can protect its insured and also be reimbursed for its payment of sums greater than its proportionate share. If the Supreme Court's answer is that the paying insurer escapes liability under *Stowers* by tendering payment of its proportionate share, even though that will not accomplish a settlement, then the Court appears to be placing a strong burden on the insured to have to go to trial and face an excess judgment just so that it can later sue the recalcitrant insurer for the excess amount.

Although *Mid-Continent* does not present pure *Stowers* issues and the Supreme Court does state that it must be read in the context of the facts of that case, the rulings in the case appear to create a situation in which an insurer, willing to pay its share of a reasonable *Stowers* demand, will be forced to make a difficult decision on how to respond to a *Stowers* demand with little guidance from the Supreme Court regarding its rights and obligations.

It is interesting to note that the holding in *Mid-Continent* has already been rejected by a federal district court in Louisiana. *American Home Assurance Co. v. Liberty Mutual Insurance Co.,* 2008 U.S. Dist. LEXIS 10281 (E.D.La., Feb.12, 2008). The court in that case held, in a situation similar to the one in *Mid-Continent,* that when one of two or more carriers potentially liable for a loss pays the loss by itself, whether to satisfy a judgment or simply to settle the case, it may seek reimbursement from the other carriers for their proportionate share of the loss. (citing, *Couch on Insurance,* 15 Couch on Ins. §217: 4 (3d Ed. 2007). "The payment sought is referred to as 'contribution.'" *Id.* at 11.

It is possible that creative settlement demand techniques by the plaintiff's counsel may be helpful, especially in situations where there are multiple claimants asserting the right of recovery. A demand could, for example be made to each insurer separately offering to fully settle out one or more claimants (but not the same claimants) for an equal sum within each insurers' limits. For example, if there are four claimants, and one claimant has significantly greater potential damages, a demand for policy limits could be made on behalf of the other three claimants aimed at carrier A and a separate policy limit demand can be made on behalf of the more injured claimant against Carrier B. This may not totally avoid the "other insurance clause issue, but it does force each carrier to evaluate its potential *Stowers* obligations.

In cases involving funding from multiple policies, numerous fact issues may be presented that may require the fact finder to make factual determinations. The issue in all *Stowers* cases is whether the insurer has the ability, by paying its policy limits, to terminate or end the litigation against its insured. If another carrier has committed its limits and the remaining carrier could effectuate a settlement by committing its limits, then the situation called for in most *Stowers* cases may exist. The ability to create fact issues in these scenarios are limitless.

J. Coverage Issues

In many cases, predicate coverage issues may need to be determined before there can be a determination if a *Stowers* situation even exists. In *St. Paul Fire & Marine Ins. Co. v. Convalescent Services, Inc.,*[154] the Fifth Circuit Court of Appeals

[154] 193 F.3d 340 (5th Cir. 1999).

reaffirmed the proposition that there is only a duty to settle covered claims. An insurer received no premium to insure non-covered claims and has no duty to do so. If the judgment includes both covered and non-covered damages, there will have to be an allocation by the jury of what is covered and what is not covered to see if the covered portion of the judgment exceeds the policy limits. If the covered portion of the judgment does not exceed the policy limits, there is no *Stowers* claim triggered.[155] In many circumstances, the allocation will be a fact issue to be determined by the fact finder.

K. Ultimate Issue

The ultimate issue in a *Stowers* case is whether an ordinary prudent insurer would have accepted the settlement offer, considering the likelihood and degree of the insured's exposure to an excess judgment. The standard set out by the Texas Supreme Court has two elements for the standard of review:

> 1) likelihood of insured's exposure to an excess judgment and
>
> 2) degree of the insured's exposure to an excess judgment.

These two concepts will be address separately below. However, in addressing the two concepts, one must keep in mind that we are only talking about covered damages being in excess of the policy limits. So, the fact finder must look first at only the information available to the insurer at the time the decision on the settlement was made and, second, only consideration may be given to damages covered by the terms and conditions of the policy. The fact that there may have been huge punitive exposure is irrelevant if punitive damages are not covered by the terms of the policy.

L. Likelihood of Insured's Exposure to Excess Judgment

This prong of the standard focuses on not on the chance that the insured would lose the case, but on the chance that the case would be lost in an amount in excess of the policy limits. Typically, this will result in expert testimony about the percentage chance of a verdict in excess of the policy limits. Most insurers in an attempt to quantify their exposure will ask defense counsel to give percentage chances of prevailing in the case. In many cases, the percentage estimate given by defense counsel at or near the time of the settlement will be a key exhibit in the case.

M. Degree of Insured's Exposure to Excess Judgment

The focus in this prong is not the percentage chance of an excess judgment, but if there is an excess verdict, how large will it be. If all the estimates before trial were that if there were an excess verdict, it would only be $10,000 above the policy limits it would be far different than estimates that if there were an excess verdict, it would most likely exceed the policy limits by $10m. The risk in the first example if quite insubstantial compared to the risk in the second.

IX. CONCLUSION

The issues addressed in this paper are by no means exclusive. As the law continues to develop in the *Stowers* area, no doubt new issues will be created that will have to be address. In addition, as stated earlier, there have been few *Stowers* cases tried and most

[155] *Id.* at 349.

litigants are working with blank slates. Without question, it will be the creative attorneys who will thrive and prosper in these cases in the future and who are able to construct creative and original ideas from the framework as it currently exists.