

STOWERS AND MULTIPLE CARRIERS

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MULTIPLE CARRIER SITUATIONS

1. Multiple Primary Policies
2. Primary and Excess Policies

STOWERS BACKGROUND

Genesis of the *Stowers* extra contractual claim is the 1929 decision in *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex.Comm'n.App. 1929).

STOWERS BACKGROUND

In *Stowers*, the insurer refused to accept the third party's offer to settle within policy limits and a judgment in excess of policy limits resulted after trial. The Court imposed a duty to handle settlement demands reasonably as a result of the carrier's control over the defense and settlement.

STOWERS BACKGROUND

American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842
(Tex. 1994)

THREE ELEMENTS

- (1) the claim against the insured is within the scope of coverage;
- (2) the amount of 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 the degree of the insured's potential exposure to an excess judgment.

Multiple Primary Policies

QUESTION

The demand is above a single primary limit but within the combined limits. How is a *Stowers* obligation triggered?

Multiple Primary Policies

Aftco Enterprises, Inc. v. Acceptance Indem. Ins. Co., 321 S.W.3d 65
(Tex. App. – Houston [1 Dist.] 2010, rev. denied)

FACTS

- Insured covered by 2 primary and 2 excess policies
- Suit brought against both primary carriers and one excess carrier claiming delay in settlement
- First settlement demand within primary and one excess limits
- Second settlement demand within all policy limits
- All demands rejected

HOLDING

- No violation of *Stowers*
- Co-primary: No demand within limits of any one policy therefore no *Stowers*

Multiple Primary Policies

State Farm Lloyds Ins. Co. v. Maldonado., 963 S.W.2d 38 (Tex. 1998)

FACTS

- Policy limits of \$300,000
- Settlement demand of \$1,300,000
- On day demand expired, insured agreed to pay \$1,000,000 out of his personal assets
- Demand rejected and Excess Verdict

HOLDING

- No violation of *Stowers*
- 1,300,000 demand was not within policy limits
- State Farm did not know about insured's agreement to pay \$1,000,00 in sufficient time to react
- LEAVES OPEN POSSIBILITY THAT IT COULD HAVE TRIGGERED STOWERS(Notes not addressed in *Garcia*)

Multiple Primary Policies

PROBABLE ANSWER:

One of the primary carriers agrees to pay sum that would bring the outstanding amount of the demand within the second carrier's policy limits

Multiple Primary Policies

POTENTIAL PROBLEM:

Both policies have \$1 M limits and demand is \$1.5 M.
One carrier responds first with a tender of \$500 K.

Creates a race to respond first and pits the carriers against each other if the first one pays less than their fair share under the “other insurance” provision. Forces second carrier to potentially accept higher value.

Second carrier should have subrogation right against
second carrier

PRIMARY AND EXCESS POLICIES

1. Excess v. Primary
2. Does Excess Carrier have Stowers Obligation

EXCESS V. PRIMARY

Primary Carrier rejects settlement demand within policy limits. A judgment is entered in excess of the primary limits and within the excess limits. Excess Carrier pays portion of Judgment within its limits.

Can Excess Carrier sue Primary Carrier for payment Excess Carrier makes?

EXCESS V. PRIMARY

YES!

Excess carrier is subrogated to insured's claim against Primary Carrier

PRIMARY AND EXCESS

Can an Excess Carrier be Stower-ized?

PRIMARY AND EXCESS

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HOLDING

- No violation of *Stowers*
- Excess: **No *Stowers* obligation until policy triggered** – policy never triggered

PRIMARY AND EXCESS

As set forth in *Stowers*, the obligation to settle is based on carrier's right to control the Defense and Settlement

Excess Carriers argue that they have no *Stowers* duty because they lack of control of settlement until the primary policy is exhausted.

PRIMARY AND EXCESS

How does the Primary Carrier exhaust?

“Policy limits used in payment of a judgment or settlement.”

PRIMARY AND EXCESS

In response to a settlement demand above the primary limits and within the excess limits, a Primary Carrier can tender its policy limits to the Excess Carrier. If the Excess Carrier accepts the tender, the Excess Carrier then has a Stowers obligation because the primary is exhausted and the Excess Carrier now controls settlement.

PRIMARY AND EXCESS

If the Excess Carrier does not accept the tender, the primary policy had not been exhausted.

Moreover, payment to the tort plaintiff most likely does not exhaust without a Release which would never be given.

PRIMARY AND EXCESS

What can the Primary do?

PRIMARY AND EXCESS

Aggreko LLC v. Chartis Specialty Ins. Co., 942 F.3d 682 (5th Cir. 2019)

FACTS

- Aggreko was Additional Insured under Gray's Policy which was primary and non-contributing
- Indian Harbor was Aggreko's primary carrier
- Gray attempted to pay its policy limits at 2 mediations but other carriers refused to participate (fighting among themselves as to who was next in line)
- Gray paid Plaintiffs policy limits in exchange for a Covenant not to Execute against Aggreko's personal assets and Plaintiffs would proceed against only remaining insurance. Plaintiffs also agreed that Aggreko had a settlement credit for payment
- Gray withdrew from the defense which was taken over by Indian Harbor
- Indian Harbor sued Gray for the defense costs claiming that the Gray Policy was not exhausted because the payment was not in satisfaction of a judgment or settlement

PRIMARY AND EXCESS

ARGUMENTS

Indian

There was no settlement because there was not a release of tort liability or end any part of the lawsuit against Aggreko

If Gray is right, a carrier could pay and run leaving the insured unprotected

Gray

Because of excess coverage, Gray could never get a full release.

Covenant was best Gray could do and was a full release of Aggreko's personal assets

PRIMARY AND EXCESS

Holding:

Payment of policy limits in exchange for Covenant Not to Execute is a settlement for purpose of exhaustion under Texas law.

Covenant concluded any claim against Aggreko's personal assets, eliminated any personal exposure and reduced the amount of damages that could be recovered

Result was the best Gray could hope to obtain given excess coverage and is in line with public policy of encouraging settlements

PRIMARY AND EXCESS

Although not a *Stowers* case, there is no reason why its reasoning would not apply in the *Stowers* context.

THANK YOU FOR YOUR TIME!

If you have any questions, please contact me

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