STOWERS UPDATE

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General Duties

- Texas law recognizes that insurers owe an implied duty of ordinary care to their insured to accept reasonable settlement demands that are within policy limits. See, e.g., Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex.1994); G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App.1929, holding approved) (holding that insurer "is held to that degree of care and diligence which a man of ordinary care and diligence would exercise in the management of his own business."). This doctrine is commonly referred to as the Stowers doctrine, and it is limited in scope.

Reasonable Opportunity to Prevent the Excess Judgment

- For thirty years, the Texas Supreme Court has included as an element of a Stowers claim proof that "the insurer was presented with a reasonable opportunity to prevent the excess judgment by settling within the applicable limits." American Physicians Ins. Exchange v. Garcia, 876 S.W.2d 842, 876 (Tex. 1994). Since that decision, numerous trial courts, courts of appeals, and supreme court opinions have reaffirmed the reasonable opportunity requirement. See Id., Wilcox v. American Home Assur. Co., 900 F.Supp. 850 (SD Tex. 1995); Insurance Corp. of America v. Webster, 906 S.W.2d 77 (Tex.App.—Houston [1st Dist. 1995); State Farm Lloyds Insurance Co. v. Maldonado, 963 S.W.2d 38 (1998)

Elements of Reasonable Opportunity

- Elements of Reasonable Opportunity-
- Substantive Reasonableness
- Procedural Reasonableness

Substantive Reasonableness

- **Offer within limits-**
  - *American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d 842 (Tex. 1994
  - **"A liability policy requires an insurance company to indemnify an insured only up to the insured's contractual limits with that company. Thus, insurers have no duty to accept over the limit demands."**

Substantive Reasonableness

- **Reasonably Prudent Insurer Would Accept**
  - **Likelihood of the Degree of the Insured's exposure to an excess judgment**
  - **Degree of insured's exposure to an excess judgment**

Substantive Reasonableness

- Reasonably Prudent Insurer Would Accept
- Likelihood of the Degree of the Insured's exposure to an excess judgment
- The term "likelihood" is defined by Merriam Webster's Ninth Collegiate Dictionary as "probability." Under this factor, the greater the likelihood of an excess judgment, the more reasonable it is for the insurer to accept the settlement demand.

Substantive Reasonableness

- Reasonably Prudent Insurer Would Accept
- Degree of insured's exposure to an excess judgment
- Merriam Webster's Ninth Collegiate Dictionary defines "degree" to mean "the extent, measure or scope of an action, condition, or relation." Under this factor, the fact finder must focus on the issue of if there is an excess verdict, how much larger than the policy limits will it be?

Procedural Reasonableness

- Procedural reasonableness encompasses the timing to accept the demand as well as information available to the insurer at the time of the demand to evaluate the demand.
- The two elements are (a) information to evaluate the demand, and (b) time to accept.

Procedural Reasonableness

- Information to evaluate demand:
  - *DeLaune v. Liberty Mutual Ins. Co.*, 314 So.2d 601 (Fla.Ct.App. 1975)
  - *Glenn v. Fleming*, 247 Kan. 296 (1990), 799 P.2d 79 (Kan. 1990)
  - *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595 (Tex.App.—Tyler 1984)
  - *Bramlett v. Medical Protective Co., 2013 WL 796725 (N.D. Tex. 2013)*

Procedural Reasonableness

- Information to evaluate demand-Factors to be considered include:
  - date of incident;
  - state of discovery;
  - is the policy eroding;
  - availability of reports from defense counsel;
  - opportunity to evaluate liability and damages reserves;
  - availability of opinions from experts;
  - availability of necessary documentary evidence including medical records;
  - cost of defense; and
  - trial setting.

Procedural Reasonableness

- Time to accept demand:
  - *American Insurance Company, et al. v. Assicurazioni Generali,* Civil Action No. H-93-1801 (S.D. Tex. 1999), rev'd 228 F.3d 409 (Fifth Cir. 2000)
  - *State Farm Ins. Co. v. Maldonado*, 963 S.W.2d 38 (Tex. 1998)

Procedural Reasonableness

- Time to Accept Demand - From a review of the case law, the following elements are a non-exclusive list of factors to be taken into consideration as to whether the time to accept the offer is reasonable:
  - number of days to accept the offer;
  - number of business days versus weekends and holidays to accept the offer;
  - consent by insured to settle if necessary
  - availability of management to provide authority;
  - settlement authority of the adjuster;
  - reserves set on the case; and
  - attempts by the insurer to settle.