

UPDATE ON *STOWERS*



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What is Stowers?

- Texas law recognizes that insurers owe an implied duty of care to their insured to accept reasonable settlement demands that are within policy limits.
- *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n. App. 1929).

What is Stowers?

- The purpose of the doctrine is to protect the insured when the insurer retains the exclusive right to control settlement in a case.

Elements of a Stowers Claim

1. The claim against the insured must be within the scope of the insurance coverage;
2. The settlement demand must be within the policy limits; and
3. The terms of the demand must be such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment

Stowers Exposure

When these elements are met and the insurer's negligent failure to settle results in an excess judgment against the insured, the insurer is liable under the Stowers Doctrine for the entire amount of the judgment, including that part exceeding the insured's policy limits.

Elements - Coverage

- Any settlement demand received while there is no duty to defend would not trigger a *Stowers* duty.
- Potentially sink or swim on coverage – be careful.

Must be Within Policy Limits

- Insurer must have ability to settle within limits.
- Excess carrier has no Stowers obligation when primary policy limits exist.
- Check other insurance clauses applicability.
- Be mindful of partial exhaustion.

Insurer Must Control Settlement

- Relatedly, for a *Stowers* duty to exist, the insurer must be in control of settlement. In most cases, this is not an issue. The policy gives the insurer the right to control the settlement of the cases.

Ordinarily prudent insurer

- Focus is on reasonableness.

Reasonableness: Procedural Reasonableness

- Timing of Demand-Factors to be considered include:
 - date of incident;
 - state of discovery;
 - is the policy eroding;
 - availability of reports from defense counsel;
 - consent to settle if required;
 - 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 Offer-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;
 - availability of management to provide authority;
 - settlement authority of the adjuster;
 - reserves set on the case; and
 - attempts by the insurer to settle.

Substantive Reasonableness

- The ultimate issue in a *Stowers* case is typically whether an ordinarily prudent insurer would have accepted the settlement offer, considering the likelihood and degree of the insured's exposure to an excess judgment (substantive reasonableness). The standard set out by the Texas Supreme Court has two elements :
 - 1) likelihood of insured's exposure to an excess judgment and
 - 2) degree of the insured's exposure to an excess judgment

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.

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 is quite insubstantial compared to the risk in the second.

More Issues: Must be in Writing

- 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.

No Duty to Solicit Offer

***Birmingham Fire Ins. Co. of PA. v. American
National Fire Ins. Co., 947 S.W.2d 592
(Tex.App.-Texarkana 1997, writ denied)***

The insured's and excess insurer's demands that insurer tender limits were insufficient to trigger a *Stowers* duty.

Liens

- Must offer to release liens if they exist.
- No liens and insurer has been told no liens exist, no need to mention release of liens.

Specificity

- 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.
- But this may be insufficient if the policy limits have been partially exhausted.
- This may also be insufficient when multiple policies.

Multiple Claimants

- Texas permits the settling with some but not all claimants.
- What's in the best interests of the insured?
- What does insured want?
- Get out of jail free card if insured says don't settle?

Multiple Claimants

Texas Farmers Ins. Co. v. Soriano, 881, S.W.2d 312 (Tex. 1994)

Facts

- 2 car vehicle accident with death to other driver (Medina) and insured's passenger
- \$20,000 policy.
- Farmers offered to settle Medina's claim early on but refused by Medina.
- At eve of trial, Farmers settled other death claim for \$5,000 and offered Medina remaining \$15,000; Medina refused offer and demanded \$20,000.
- Excess verdict.

Holding

- No *Stowers* exposure.
- Can settle one of multiple claims, if:
 - No unreasonable refusal of other demand, or
 - Settlement of claim is reasonable when viewed in isolation.

Multiple Insureds

- Texas permits the settling of the lawsuit against some but not all insureds.
- What's in the best interests of the insured?
- What do the insureds want?
- Communication is key.

Multiple Insureds

***Pride Transportation v. Continental Cas. Co., 804
F.Supp.2d 520 (N.D. Tex. March 31, 2011)***

Facts

- Pride Transportation named insured.
- Harbin, the driver, is an additional insured.
- Suit brought against Pride and Harbin.
- Settlement demand for policy limits to Harbin only .
- Carrier's alleged request to include Pride rejected.
- Settlement demand accepted.
- Pride files claim for indemnity against Harbin.
- Release specifically excludes any claim by Pride against Harbin.

Multiple Insureds

Pride Transportation v. Continental Cas. Co.

Holding

- No violation of *Stowers*.
- Relied on *Soriano*, found settlement reasonable when viewed in isolation.
- Only has to release claims by and through Plaintiff.

Multiple Policies

- 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.

Multiple Policies

- 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.

Multiple Policies

- 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.
- The key in this situation is that the primary insurer does not have the ability on its own to accept the demand and bring about a termination of litigation. Thus *Stowers* duty not triggered.

Multiple Policies

- 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.

Recap of Stowers Elements

1. The claim against the insured must be within the scope of the insurance coverage;
2. The settlement demand must be within the policy limits; and
3. The terms of the demand must be such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment

Thoughts/Tips

- Coverage counsel/insurer should respond unless accepting offer.
- Defense counsel should not be advising about *Stowers*. Her client is the insured, not the insurer.
- Be careful of Defense counsel's written evaluation

Thoughts/Tips

- Difficult to draft valid *Stowers* demand.
- Try to always respond to demand.
- Keep it short – response will be Exhibit at *Stowers* trial.

Thoughts/Tips

- Keep insured in the loop
- Best interests of insured
- Stowers rights belong to insured not the claimant—
what do they want to do?

Questions?

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