Developments in Excess Judgment Liability
Texas Policyholder Perspective

Addendum

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A. The *Stowers* Doctrine and Third Party Settlements

Texas common law imposes a duty on liability insurers to settle third party claims against their policyholders when reasonably prudent to do so. *See GA Stowers Furniture Company v. American Indemnity Company*, 15 S.W.2d 544 (Tex. 1929). An insurer has an essentially identical statutory duty to settle under section 541.060(a)(2)(A) of the Texas Insurance Code, as recognized in *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 262 (Tex. 2002).

An insurer's *Stowers* duty is triggered by a settlement demand if the following three conditions 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 ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994).

Similarly, under the Texas Insurance Code, an insurer will be liable for failing to settle when: "(1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it." *See Rocor*, 77 S.W.3d at 262. Under the doctrine of equitable subrogation, an excess insurer is permitted to bring a *Stowers* claim against a primary layer insurer on behalf of the insured, effectively standing in the shoes of the insured. *See American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 483 (Tex. 1992); *General Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5th Cir. 1999).

Stowers applies only when "the settlement's terms [are] clear and undisputed." *Rocor*, 77 S.W.3d at 263. The offer "must also be unconditional" and cannot "carry[] risks of further liability." *Danner v. Iowa Mut. Ins. Co*., 340 F.2d 427, 429–30 (5th Cir. 1964).

The *Stowers* doctrine is largely mirrored in the Restatement of the Law of Liability Insurance. Consistent with Texas's *Stowers* doctrine, the Restatement provides that a liability insurer has a duty to make reasonable settlement decisions, and defines a "reasonable settlement decision" as "one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment" without regard to the limits of liability at issue, as set forth below:

> (1) When an insurer has the authority to settle a legal action brought against the insured, or the insurer's prior consent is required for any settlement by the insured to be payable by the insurer, and there is a potential for a judgment in excess of the applicable policy limit, the insurer has a duty to the insured to make reasonable settlement decisions.
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> (2) A reasonable settlement decision is one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment.
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> (3) An insurer's duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.

See Restatement of the Law of Liability Insurance § 24.

The common law *Stowers* doctrine – and its Insurance Code and Restatement corollaries – encourages prompt and reasonable settlements by eliminating a potential for conflict between insurer and policyholder in cases involving damage claims potentially exceeding the applicable policy limits. The conflict arises because the insurer has control over the settlement, but only limited liability. In the absence of the *Stowers* doctrine, an insurer, motivated by self-interest, may be tempted to resist reasonable settlement offers assuming that any adverse judgment will, at worst, exhaust the policy limits and, thus, proceeding to trial will put only the policyholder's or excess insurer's money at risk. *Stowers* penalizes this type of self-interest by raising the stakes for the insurer should it act unreasonably when presented with an opportunity to settle at or below policy limits. *Stowers* liability is designed to compensate the policyholder or excess insurer for damages suffered as a result of the primary insurer's unreasonable refusal to settle. *See generally* Restatement of the Law of Liability Insurance § 24 cmt (b) (explaining the duty to make reasonable settlement decisions is based on the need to solve a "conflict-of-interest problem" where, an insurer that elects to go to trial rather than accept a full-limits or near-limits settlement demand, "is effectively 'gambling with the insured's money,' or gambling with the excess insurer's money, because the insured or the insured's excess insurer will have to pay any verdict in excess of the policy limit.").

B. Stowerizing Excess Carriers

An issue arises when a claimant demands an amount above the limits of the insured's primary insurance coverage but within the limits of the insured's *excess* insurance policy. *See Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692, 701 (Tex. 2000) ("An excess insurer owes its insured a duty to accept reasonable settlements, but that duty is also not typically invoked until the primary insurer has tendered its policy limits."); *Schneider Nat. Transp. v. Ford Motor Co.*, 280 F.3d 532, 539 (5th Cir. 2002) (refusing to allow an excess carrier to sue a primary insurer for equitable subrogation under a *Stowers* theory where there was never a demand within the primary limits).

In *Keck*, the primary insurer asserted as a defense to the excess insurers' equitable subrogation claim that the excess insurer handled the dispute negligently by not responding to the claimant's lower settlement demand earlier in the case. *See* 20 S.W.3d at 701. The court rejected the defense, noting that the primary insurer did not tender its limits until the trial began, which was well after the lower settlement demand had been withdrawn, and the excess insurer did not interfere with the insured's defense or assume control of the defense prior to the earlier demand. According to the court, under those circumstances the excess insurer's contributory negligence, e.g., failure to respond to the settlement demand, was irrelevant. *Id.* at 702. *See also Emscor Mfg., Inc. v. Alliance Ins. Group,* 879 S.W.2d 894, 901 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("[W]e note that the Stowers doctrine . . . has never been applied to an excess carrier . . . .").

1. Taking Control

As foreshadowed in *Keck*, Texas courts have imposed a *Stowers* duty on the excess carrier if the excess carrier assumed control over the settlement process. *See Rocor,* 77 S.W.3d at 253 (excess insurer owed a *Stowers* duty to the insured where it assumed control of settlement negotiations, canceled a scheduled mediation, and directed that no offer be made to plaintiffs); *Employers Nat'l Ins. Co. v. General Accident Ins. Co.,* 857 F. Supp. 549, 554-55 (S.D. Tex. 1994) (when excess liability is likely, an excess insurer may interject itself into settlement negotiations before tender by the primary insurer). Taking control of the settlement process includes negligently disclosing information to plaintiff's counsel in a third-party claim against the insured. *See Birmingham Fire Ins. Co. v. American Nat'l Fire Ins. Co.*, 947 S.W.2d 592, 596 (Tex. App.—Texarkana 1997, writ denied). Thus, actively participating in the negotiations may trigger *Stowers* for excess carriers.

2. Other Considerations—All Other Insurers Agree to Settle or the Insured is Willing to Pay the Difference.

The duty to settle may also attach to an excess insurer where all of the other excess insurers in the insured's tower of insurance have agreed to pay their policy limits. *See Cameron Int'l Corp. v. Liberty Ins. Underwriters, Inc. (In re Oil Spill By the Oil Rig "Deepwater Horizon" in the Gulf of Mexico)*, No. 2:10-md-02179-CJB-SS (E.D. La. Aug. 16, 2012) (Doc. No. 7129) (predicting Texas Supreme Court would find that settlement demand within limits of $250 million tower of insurance would trigger *Stowers* duty on the part of mid-level excess insurer with $50 million in coverage where all other insurers in the tower have agreed to fund the settlement).

A related issue is one in which a demand is made that exceeds the primary carrier's policy limits, but the insured is willing to pay the difference between the limits and the total of the demand. 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.

Garcia, 876 S.W.2d at 849, fn. 13.

At least one state appellate court has adopted the view that 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. In *State Farm Lloyds Insurance Company v. Maldonado*, the claimant offered to settle the suit for State Farm's policy limits of $300,000 plus $1 million from the insured's own pocket. 935 S.W.2d 805, 809 (Tex. App.—San Antonio 1996), *affirmed in part and reversed in part*, 963 S.W.2d 38 (Tex. 1998). The San Antonio Court of Appeals concluded that the "bifurcated nature" of the demand brought it within policy limits and triggered the *Stowers* duty. *Id*. at 815. The Supreme Court reversed the court of appeals on the specific facts of that case, and it ruled that the $1.3 million settlement demand "was not an unconditional offer to settle within policy limits and therefore did not trigger the *Stowers* doctrine." *Id*. at 41. The Court explained:

> In this case, State Farm claims Maldonado never made an unconditional offer to settle within State Farm policy limits. It is undisputed that Maldonado never made a settlement demand of less than $1.3 million. She nevertheless contends that Robert's offer to pay the $1 million above policy limits converted the $1.3 million demand into a $300,000 policy-limits demand. We disagree.

Id. However, in a footnote, the Court acknowledged that *Garcia* left open the question of whether a *Stowers* duty is triggered if an insured provides notice of his or her willingness to fund a settlement above the policy limits.

C. Multiple Claimants or Insureds

With the possible exception of one unpublished Texas court of appeals decision, it is generally accepted that a *Stowers* demand does not need to include all claimants or offer a release as to all insureds to be effective. *See Texas Farmers Insurance Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994); *Pride Transp. v. Continental Cas. Co.,* 511 F. App'x 347 (5th Cir. 2013) (unpublished); *Travelers Indemnity Co. v. Citgo Petroleum Corp.,* 166 F.3d 761, 768 (5th Cir. 1999) (collecting cases across the nation); *American States Ins. Co. of Texas v. Arnold,* 930 S.W.2d 196, 202 (Tex. App.—Dallas 1996, writ denied).

In *Soriano*, for example, the insurer was faced with multiple claims to $20,000 of insurance proceeds. One of the claimants agreed to a complete release for $5,000. Farmers accepted the offer leaving insufficient funds to settle the additional claims against the insured. The insured argued that its insurer did not have the right to extinguish some claims against its insured at the expense

of other pending claims. The Texas Supreme Court rejected that argument in part because the insurer owes separate *Stowers* duties in connection with each settlement demand. In other words, Farmers was required under *Stowers* to exercise reasonable care in responding to the $5,000 demand by only one of the claimants. 881 S.W.2d at 315 ("Farmers was required under *Stowers* to exercise reasonable care in responding to that demand.") (emphasis added).

In *Citgo*, the Fifth Circuit extended *Soriano* to cases with multiple insured defendants. The court held that "an insurer is not subject to liability for proceeding, on behalf of a sued insured, with a reasonable settlement . . . once a settlement demand is made, even if the settlement eliminates . . . coverage for a co-insured as to whom no *Stowers* demand has been made." *Citgo*, 166 F.3d at 768. The court reached its holding with the express understanding that a settlement demand to less than all of the insureds is sufficient to trigger an insurer's potential excess exposure under *Stowers*. *Id*. at 767 ("A valid *Stowers* demand in the context of multiple insureds requires that the settlement offer be reasonable and the insured party reasonably fear liability over the policy limit. In other words, for the issue to come up at all there usually has to be an objective possibility that the liability of at least one of the insureds would ultimately exceed the policy limits.") (emphasis in original). Likewise, the Fifth Circuit in *Pride* — citing both *Soriano* and *Citgo* — assumed that a settlement demand will trigger the insurer's *Stowers* duty even if it only offers to release some insureds. *Pride*, 511 F.App'x at 352.

The *Citgo* court expressly rejected an attempt to expand the *Stowers* analysis to require consideration of all potential claims and all of the insured parties. *See Citgo*, 166 F.3d at 765 ("Citgo next attempts to argue that the reference to reasonable settlement in *Soriano* allows a court to examine whether settlement was proper in light of all potential claims against all the insured parties. However, as noted, the *Soriano* court made it clear that reasonableness would only be measured by looking at the initial demand for settlement in isolation.") (citing *Soriano*, 881 S.W.2d at 316 ("The test is whether 'a reasonably prudent insurer would not have settled the Lopez claim when considering solely the merits of the Lopez claim when considering solely the merits of the Lopez claim and the potential liability of its insured on the claim.'")).

In cases where an insured is liable for injuries to multiple plaintiffs, the policy limit represents the total compensation collectively available to all claimants. This dynamic creates a motivation for separate claimants not only to settle, but to settle quickly. As the Texas Supreme Court explained in *Soriano*, "[w]hen 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 several claimants even though such settlement exhausts or diminishes proceeds available to satisfy other claims." 881 S.W.2d 312, 315 (Tex. 1994). Plaintiff attorneys should therefore structure their releases of liability so that *each* of the claimants they represent *entirely* relinquishes their claims to the insured for additional future recovery. Doing so will eliminate at least one basis for the carrier to reject a certain demand by claiming that it is unreasonable. And, in the context where competition exists between multiple claimants for the available policy limits, avoiding such a delay could prove the difference between securing full compensation for a particular client and encountering a depleted asset pool.

One Texas court of appeals attempted to buck the trend by arguably requiring that all claimants release all insureds sued by those claimants in order for a *Stowers* demand to be

effective. In *Patterson v. Home State Mutual Insurance Company*, No. 01-12-00365-CV, 2014 WL 1676931, at *10 (Tex. App.—Houston [1st Dist.] April 24, 2014, pet. denied), the underlying injury occurred when Diane Patterson was fatally struck by an eighteen-wheeler owned by Brewer Leasing and operated by Charles Hitchens, an employee of Texas Stretch. The decedent's husband, Marcus Patterson, filed a wrongful death action against Brewer, Hitchens and Texas Stretch. *See id*. Brewer had an insurance contract with Home State that also covered anyone driving a "covered auto" with Brewer's permission. *Id.*

Patterson sent Home State three separate letters inviting settlement. Patterson's first letter proposed that Home State pay out the policy limits to his and Diane's children, Daniel and Danae, and in relevant part read:

> *"Marcus Patterson* [] *will provide Brewer Leasing, Inc. with a full complete, total, and unconditional release of any and all claims against Brewer Leasing and its insurance company in exchange for the payment of the policy limits…This also applies to any claim against Brewer Leasing by, through, or under Charles Hitchens. But we are not releasing Mr. Hitchens, Texas Stretch or their insurance carriers."*

Id. at *21. As is clear from the excerpt above, this letter only purports to release the claims of the children, and not the claims of the father. Additionally, the children agreed to release Brewer, but not Hitchens, the driver. *Id.* In his follow up correspondence with Home State, Patterson confirmed these limitations: "I want to reaffirm that the settlement offer is made on behalf of Daniel Patterson and Diane Patterson. It does not include an offer of settlement from their father, Marcus Patterson, in his individual capacity." *Id*. at *22. In similar fashion, the second settlement proposal, which only included a release by Marcus Patterson and not the children, confirmed that not all of the *potential* insureds were being released:

> *"This letter is sent as a settlement offer on behalf of Marcus Patterson, individually, Marcus Patterson as administrator of Diane's estate, Marcus Patterson as next friend of both Daniel and Diane Patterson, and Larry Goffney. They will settle all of their claims against Brewer Leasing, Inc. and its insurance carrier for the policy limits."*

Id. Finally, in his third settlement offer, Patterson included all of the claimants but not all of the *potential* insureds, namely Hitchens:

> *"This letter is sent as a settlement offer on behalf of Marcus Patterson, individually, Marcus Patterson as administrator of Diane's estate, Marcus Patterson as next friend of both Daniel and Diane Patterson, and Larry Goffney. They will settle all of their claims against Brewer Leasing, Inc. and its insurance carrier for the policy limits."*

Id. All three proposals were eventually rejected by Home State. With regard to the first two settlement offers, the court explained:

> A settlement offer must be both unconditional and . . . propose to release the insured fully to trigger the insurer's *Stowers* duty to settle. The purpose of the *Stowers* doctrine is to shift the risk of an excess judgment onto the insurer when the insurer has the opportunity to prevent an excess judgment by settling within the applicable policy limits. . . . Here, Patterson's first and second settlement offers did not propose to fully release Brewer, as it would still have been liable to an excess judgment to either Marcus Patterson, his children, or his wife's estate, whichever was not named in the settlement demand. Indeed, by settling in the full amount of the policy limits with only one of the claimants, Home State could have potentially exposed Brewer to an excess judgment by one of the other claimants. Accordingly, we hold that the first and second settlement offers did not trigger Home State's *Stowers* duty to settle.

Id. at *8 (citations omitted). The court also found fault with the third settlement demand, which agrees to release all of the Patterson claimants. While that final demand released all claims against Brewer, it did not include Hitchens. According to the court,

> The insurance policy for Brewer expressly provided that those insured under the policy included "[a]nyone else while using with your permission a covered auto you own, hire, or borrow." Thus, Patterson's third settlement offer did not constitute an unconditional offer to fully release the insureds in exchange for a settlement.

Id. at *10. The court further pointed out that personal counsel for the Brewer and Stretch had advised that he did not want "any settlement demands to be accepted that didn't involve a release of all the Pattersons' claims against both Brewer Leasing and Mr. Hitchens." *Id*. The fact that the insured's counsel had apparently not wanted Home State to accept the offers was significant to the court.

Patterson arguably stands for the proposition that all claimants must release all *potential* insureds in order for a settlement offer to qualify as an effective *Stowers* demand. No court followed that same path prior to *Patterson* and no court has chosen to follow it since. Moreover, the decision in *Patterson* directly conflicts with the Texas Supreme Court's decision in *Soriano*. 881 S.W.2d at 312.

Though the Texas Supreme Court has still not spoken directly on the issue of whether an offer to settle must release all insureds, the Fifth Circuit has. *See OneBeacon Ins. Co. v. T. Wade Welch & Assoc.*, 841 F.3d 669 (5th Cir. 2016) (applying Texas law). In *OneBeacon*, a former client offered a full release of its legal malpractice claims against the insured law firm in exchange for policy limits, but the demand did not offer a release to the individual attorney who handled the client's case. *Id*. at 678. OneBeacon, the malpractice insurance carrier, rejected the demand because it did not offer to release all insureds—namely, the handling attorney, Wooten. *Id*. The

United States Court for the Southern District of Texas held that the former client's offer was a valid *Stowers* demand as a matter of law, despite its failure to include the individual attorney. *Id*. On appeal to the Fifth Circuit, OneBeacon urged the Court to apply *Patterson*, arguing the former client's demand did not constitute a valid *Stowers* demand because it did not offer to release all insureds. *Id*. The Fifth Circuit distinguished the Houston Court of Appeals' decision in *Patterson*, and instead relied on its prior decision in *Citgo* and the Texas Supreme Court's decision in *Soriano*:

> OneBeacon argues that to be a "true" *Stowers* demand, the offer to settle must offer to release all insureds (here the Welch Firm and Wooten). The Texas Supreme Court has not spoken directly on this issue. However, we have. In *Travelers Indemnity Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764 (5th Cir. 1999), we held that, when faced with a settlement demand over a policy with multiple insureds, an insurer fulfilling its *Stowers* duty "is free to settle suits against one of its insureds without being hindered by potential liability to co-insured parties who have not yet been sued." In coming to this conclusion, we were persuaded by the Texas Supreme Court's decision in *Soriano*.
>
> Instead of following *Citgo*, OneBeacon urges us to follow a recent Texas appellate decision in which the court found no valid *Stowers* demand where only the insured employer and not the employee (an additional insured) would have been released. However, in that case, the insured employer had explicitly indicated to its attorney that it "did not want 'any settlement demands to be accepted that didn't involve a release of all the claims against both [the employer and the employee.]'"

Id. at 678-79 (internal citations omitted). Accordingly, the Fifth Circuit concluded the district court did not err in holding that the former client's demand letter was a valid *Stowers* demand that OneBeacon improperly rejected. *Id*. at 679.

Nonetheless, with the *Patterson* decision in the midst of other Texas *Stowers* decisions, claimants should be mindful that a demand from less than all of the claimants, and a release of less than all potential insureds, may not qualify as a valid *Stowers* demand under Texas law. And, the Fifth Circuit's decision in OneBeacon makes clear that—though not required by the policy—obtaining the insured's consent for a partial release may, as a practical matter, protect the carrier from an adverse finding of liability.

D. Can an Insurer Consider Disputed Coverage Issues in Analyzing Whether a Reasonably Prudent Insurer Would Accept the Policy Limits Demand?

As previously noted, the third prong of an insurer's *Stowers* duty is triggered when "the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Garcia*, 876 S.W.2d at 849. The weight of Texas authority confirms that an insurer is not justified in taking coverage arguments into account in refusing to accept the *Stowers* demand. An insurer's "good faith" belief in its coverage defenses is not a defense under the third prong of the *Stowers* test.

First, the "liability of the carrier" is irrelevant to whether an ordinarily prudent insurer would accept the settlement of its insured's liability. As the *Garcia* court clearly stated, the only

relevant factor to consider in determining the reasonableness of the settlement is "the likelihood and degree of the insured's potential exposure to an excess judgment." *Garcia*, 876 S.W.2d at 849. The insurers' assessment of its own liability cannot affect its evaluation of the reasonableness of the settlement offered to the insured.

Second, a good faith coverage defense is not a defense to *Stowers* liability. *See Garcia*, 876 S.W.2d at 850; *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.,* 246 S.W.3d 42, 46 (Tex. 2008) (". . . an insurer that rejects a reasonable offer within policy limits risks significant potential liability for bad-faith insurance practices if it does not ultimately prevail in its coverage contest.") (citing *Stowers*).

Third, a contrary position is incorrect because it would turn *Stowers* liability into a species of a bad faith claim, which the Texas Supreme Court has expressly rejected. *See, e.g., Soriano*, 881 S.W.2d at 318-319 (Hecht, J. concurring); *Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc.,* 938 S.W.2d 27, 28 (Tex. 1996). The Texas Supreme Court expressly refused to equate *Stowers* liability with bad faith: "A *Stowers* claim is not a bad faith claim." *Maryland Ins. Co.,* 938 S.W.2d at 28; *see also LSG Technologies, Inc. v. U.S. Fire Ins. Co.,* 2:07-CV-399, 2010 WL 5646054, at *16 (E.D. Tex. Sept. 2, 2010) ("A *Stowers* claim . . . . does not require bad faith on the part of the insurer."). *But see American Western Home Insurance Company v. Tristar Convenience Stores, Inc.,* 2011 WL 2412678 (S.D. Tex. June 2, 2011) (Werlein, J.) (coverage issue factors into whether the carrier reasonably rejected the demand).

E. Can an Oral Demand be a Valid *Stowers* Demand?

Although no Texas Court has ever ruled that a *Stowers* demand must be in writing, an unambiguous written demand is clearly the best course of action. As the Texas Supreme Court observed in *Rocor*, 77 S.W.3d at 263:

> In *Garcia,* we stated that the *Stowers* remedy of shifting the risk of an excess judgment onto the insurer is not appropriate unless there is proof that the insurer was presented with a reasonable opportunity to settle within policy limits. *Garcia,* 876 S.W.2d at 849. We implied that a formal settlement demand is not absolutely necessary to hold the insurer liable, *see id.,* although that would certainly be the better course. But at a minimum we believe that the settlement's terms must be clear and undisputed. That is because "settlement negotiations are adversarial and ... often involve [ ] hard bargaining by both sides." *Id.*

Nonetheless, at least two Texas courts have found that oral demands may be sufficient to trigger an insurer's *Stowers* obligation. In *Trinity Universal Ins. Co. v. Bleeker*, 944 S.W.2d 672 (Tex. App.—Corpus Christi 1997), *rev'd on other grounds*, 966 S.W.2d 489 (Tex. 1998), the Corpus Christi Court of Appeals rejected the insurer's argument that settlement offers need to be in writing to trigger the *Stowers* duty. According to the court, under contract law, oral offers are valid to the same extent as written offers. 944 S.W.2d at 675. In reversing the court of appeals' decision, the Texas 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. 966 S.W.2d at 491.

The validity of an oral *Stowers* demand was presented in part in *Westchester Fire Ins. Co. v. Admiral Ins. Co.,* 152 S.W.3d 172 (Tex. App.--Fort Worth 2004, pet. denied). In that case, the claimants provided contested testimony supporting an oral settlement demand within limits during mediation. The case did not settle at mediation, and a judgment was later rendered against the insured in excess of limits. On appeal from the subsequent *Stowers* lawsuit, the Fort Worth court of appeals addressed the issue of whether the oral settlement demand was sufficient to trigger the insurer's *Stowers* obligation. According to the court, the conversations between counsel at mediation were some evidence of an offer to settle within limits. *Id.* at 192-96. Consequently, this evidence amounted to more than a scintilla that there was a valid *Stowers* demand. *Id.*

F. Duty to Investigate or Negotiate

1. Texas Law Prior to *Garcia*.

In *Globe Indem. Co. v. Gen-Aero, Inc.,* 459 S.W.2d 205 (Tex. Civ. App.—San Antonio 1970), writ ref'd n.r.e., 469 S.W.2d 164 (Tex. 1971) (5th Circuit Judge Thomas Reavley dissented), the San Antonio Court of Appeals referred to some "guidelines" in determining whether an insurer is negligent in failing to accept an offer to settle. The court summarized the guidelines as follows:

(A) An opportunity to settle during the course of investigation or trial.

(B) Failure to carry on negotiations to settle or make a counter offer after receipt of an offer to settle. *See Chancey v. New Amsterdam Casualty Company*, 336 S.W.2d 763 (Tex. Civ. App.—Amarillo 1960, writ ref'd, n.r.e.); *Bell v. Commercial Insurance Co. of Newark*, N.J., 3 Cir., 280 F.2d 514 (1960).

(C) Failure to investigate all the facts necessary to protect properly the insured against liability.

(D) Question of liability—if liability is clear, greater duty to settle may exist.

(E) Element of good faith—whether insurer acts negligently, fraudulently, or in bad faith. *See Crisci v. Security Insurance Co. of New Haven, Conn.*, 66 Cal.2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967).

(F) If there are conflicts in evidence which increase the uncertainty of the insured's defense to the injured party's claim, the possibility of the insurer being held negligent increases.

The Globe Indemnity guidelines were applied 20 years later in *Stroman v. Fidelity and Cas. of New York,* 792 S.W.2d 257 (Tex. App.—Austin 1990, writ denied). Just prior to the *Stroman* decision, the Texas Supreme Court decided *Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656 (Tex. 1987), its most expansive interpretation of the *Stowers* doctrine to date. In *Ranger*, the Supreme Court stated that the basis of an action against an insurer for negligence in

handling a claim is not limited to an insurer's failure to settle a claim within policy limits. Rather, an insurer's duty to the insured extends to the full range of the agency relationship, including investigation, preparation for defense of a lawsuit, trial of the case, and reasonable attempts to settle.

2. Texas Law After *Garcia.*

But all of these decisions pre-dated *Garcia*. In *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994), the Supreme Court concluded that *Ranger's* broad language about the scope of the insurer's responsibilities was dicta. The *Garcia* court also noted that, with regard to *Ranger's* discussion of an insurer's duties *Stowers*, "evidence concerning claims investigation, trial defense, and conduct during settlement negotiations is necessarily subsidiary to the ultimate issue of whether the claimant's demand was reasonable under the circumstances, such that an ordinarily prudent insurer would accept it." *Id*. Does this mean that an insurer's failure to investigate is not a factor in deciding whether the demand was reasonable and should have been accepted, or does "necessarily subsidiary" mean that there is no independent *Stowers* duty to investigate a claim, engage in settlement negotiations, etc. (but it can be considered)?

It is clear that an insurer does not have an obligation to solicit a settlement demand or even negotiate with the underlying plaintiff. It is also clear that the *Stowers* duty does not contain a "good faith" element. So, at least two of the guidelines listed above are questionable under current law. Whether an investigation element still survives is questionable in light of the "necessarily subsidiary" language in *Garcia*.

Nonetheless, the insurer's reasonableness is judged by what it—or its agents—had access to at the time of the demand. *Bramlett v. Medical Protective Co. of Ft. Wayne, Ind.,* 2013 WL 796725 (N.D. Tex. March 5, 2013) (NO. 3:10-CV-2048-D) (Fitzwater, J.). While the insurer may not need to conduct an investigation during the settlement window, *Bramlett* dispels the notion that the insurer needs to know everything about the claim before it can satisfy its *Stowers* duties.

In *Bramlett*, the insurer sought summary judgment on the *Stowers* claim because the underlying plaintiff (now the plaintiff in the *Stowers* case) had not provided the statutorily-required expert report before its settlement demand expired. The district court rejected this argument. In doing so, the court observed (in footnote 10) that:

> There is no per se requirement that an insurer know all, or even most, of the facts of the case in order to have a *Stowers* duty. Indeed, early settlement is encouraged. *See Garcia*, 876 S.W.2d at 851 n. 18 ("If the claimant makes such a settlement demand early in the negotiations, the insurer must either accept the demand or assume the risk that it will not be able to do so later. In cases presenting *a real potential* for an excess judgment, insurers have a strong incentive to accept." (emphasis added)).

Id. at *4, fn. 10. The court held that "MedPro was aware of other facts that would enable a reasonable jury to find that a reasonably prudent insurer would have accepted the first *Stowers* demand despite the absence of an expert report."

The court added:

> For example, plaintiffs have produced evidence that, at the time of the first *Stowers* demand, MedPro (or Crawford as its claims adjuster) (1) had received a copy of Mrs. Bramlett's hospital records; (2) knew that Dr. Phillips performed a hysterectomy on Mrs. Bramlett; (3) knew that Mrs. Bramlett died from complications due to post-operative bleeding; (4) knew that Dr. Phillips was suspicious that Mrs. Bramlett was suffering from internal bleeding and therefore ordered a blood test; (5) knew that Dr. Phillips' office was informed that the blood test indicated that Mrs. Bramlett was bleeding internally; (6) knew that Dr. Phillips left the hospital to work out without checking the results of the blood test he had ordered; (7) knew that by the time Dr. Phillips learned of Mrs. Bramlett's status and returned to the hospital, it was too late to save her; (8) Crawford had met with Dr. Phillips and Davidson to discuss the case; (9) knew the case was very serious; and (10) Crawford had authority to settle the claim for $200,000, the policy limits. A reasonable jury could find from the evidence in the summary judgment record that, in response to plaintiffs' first *Stowers* demand, a reasonably prudent insurer would have settled within policy limits.

Id. at *4.

G. A "Policy Limits" Demand is Sufficient

To satisfy the requirements of *Stowers*, it is sufficient that the demand propose to release the insured for "the policy limits" rather than stating a sum certain. *See Garcia*, 876 S.W.2d at 848-849 ("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."); *Yorkshire Ins. Co., Ltd. v. Seger*, 279 S.W.3d 755, 769 (Tex. App.—Amarillo 2007, pet. denied) ("[A] settlement demand that proposes to release the insured for 'the policy limits,' in lieu of a demand for a sum certain, is sufficient to satisfy the 'demand within limits' element of a *Stowers* action.").

H. Recent Developments Regarding the *Stowers* Doctrine.

1. *In re Farmers Texas Cty. Mut. Ins. Co*. (Tex. 2021).[1]

Operative Facts. Two months before the scheduled trial, a mediator proposed the case settle for $350,000 and the injured plaintiff notified Farmers he would accept. Farmers countered with an offer to settle for $250,000 and told Longoria, its insured, she could contribute $100,000 to secure a release. The plaintiff rejected Farmers' $250,000 offer and withdrew his own, advising he would seek $2 million in damages. Longoria's personal counsel reopened negotiations. The plaintiff agreed to settle for $350,000 and Farmers again refused to contribute more than $250,000. Longoria offered to pay the additional $100,000 without waiving her right to seek recovery from Farmers. The case settled on that basis.

Longoria sued Farmers for negligent failure to settle, alleging in part Farmers mishandled her defense by not designating damages experts before trial. Farmers moved to dismiss, arguing that Longoria's claim had no basis in law: that Texas law does not recognize negligent failure to settle—a *Stowers* claim—without a judgment against the insured exceeding policy limits.

Holding. The Texas Supreme Court held that:

- When a claim settles within policy limits, *Stowers* liability is not needed to resolve potential claims by an insured against its insured. The insurance contract fully addresses the parties' common-law obligations under those circumstances.

- The Court has consistently recognized that an insured must be liable beyond policy limits—whether by judgment or settlement—in order to bring a *Stowers* claim. It declined to extend *Stowers* to cases in which no liability exists beyond policy limits. Longoria's claim for Farmers' negligent failure to settle within policy limits has no basis in law because her allegations, taken as true, do not entitle her to the relief she seeks under *Stowers*.

- Farmers concluded it was appropriate to structure a settlement under which both it and Longoria contributed money to obtain a release. But Longoria can assert a claim against Farmers for breach of its separate promise—under the policy—to pay the damages for which this settlement made her legally responsible.

- Farmers structured a within-limits settlement but did not pay it fully. The Court did not determine what the policy as a whole required, whether Farmers breached it by consenting to settle within policy limits but making the insured's release contingent on her contribution, or whether Longoria can prove damages. Instead, the Court clarified a narrow issue: *Stowers* and the other principles of Texas insurance law do not foreclose a claim for contract breach against an insurer regarding its indemnity obligation.

[1] *In re Farmers Texas Cty. Mut. Ins. Co*., 621 S.W.3d 261 (Tex. 2021).

2. *Am. Guarantee & Liab. Ins. Co. v. ACE Am. Ins. Co.* (5th Cir. 2021).[2]

In *American Guarantee*, Mark Braswell died after his road bike collided with a stopped truck. His survivors, the Braswells, sued the truck's owner, the Brickman Group. ACE provided Brickman's primary layer of coverage (up to $2 million in liability coverage) and American Guarantee (AGLIC) served in an excess capacity ($10 million in excess of ACE's $2 million). At trial the Braswells asserted Brickman caused Braswell's death under two negligence theories: (1) Brickman's driver stopped short directly in front of Braswell, and (2) Brickman's truck was parked in an inherently dangerous spot. But premised on his analysis of Braswell's comparative negligence, Brickman's ACE-appointed counsel believed Brickman had a strong case in defense. ACE controlled Brickman's settlement negotiations.

The facts were disputed. There was evidence that Brickman's truck had been stopped for four or five minutes, or one to two minutes, or that it had actually stopped short in front of Braswell. No orange cones had been placed around the truck despite Brickman's policy of using safety cones. Significantly, Braswell's helmet was cracked down the middle, indicating he was not watching where he was going. Brickman's driver admitted it was dangerous, though legal, to park where he did.

Brickman's counsel estimated settlement value to be $1.25 to $2 million. ACE also conducted juror research that yielded two conclusions: it was important to prove at trial that the truck did not stop short and that the truck was legally parked. After reviewing this material, AGLIC's case manager valued a "risk neutral" settlement at "no more than 500K, not primary's 2M." On the eve of trial, the Braswells' counsel made the first of three settlement offers, asking for $2 million. ACE counter-offered $500,000. The Braswells rejected this counter, and the parties went to trial.

Events quickly turned against Brickman. The trial judge excluded evidence that Brickman's truck was legally parked; allowed Michelle Braswell to testify about the "stop-short" statement of a Brickman employee; and allowed Mrs. Braswell to testify about her daughter Mary's psychological trauma, self-harm, suicide attempts, and hospitalization, all caused by her father's death. Mrs. Brickman was an exceptional witness. After the plaintiffs' closing statement, AGLIC's case manager communicated that a verdict in excess of $2 million was possible "[g]iven the adverse evidentiary . . . rulings."

The case was submitted to the jury. Before the jury reached a verdict, the Braswells' counsel made two more settlement demands. First, he orally offered Brickman a high/low of "$1.9MM to $2.0MM with costs." ACE believed this offer was outside of its settlement valuation, as the inclusion of "costs" would push the final settlement value beyond its $2 million policy limit. Brickman rejected the offer. Then the Braswells' counsel emailed a third offer to Brickman's counsel:

> Plaintiffs renew their prior offer to settlement for the policy limits of $2 million. Such offer will expire when the jury announces that it has a verdict.

[2] *Am. Guarantee & Liab. Ins. Co. v. ACE Am. Ins. Co.*, 990 F.3d 842 (5th Cir. 2021).

Brickman declined that offer and countered. The Braswells withdrew all offers. The next day the jury returned a verdict of nearly $40 million. After deducting 32% for Braswell's comparative negligence, the trial court rendered judgment against Brickman for nearly $28 million. The Braswells and Brickman eventually settled for nearly $10 million (avoiding appellate litigation). ACE paid its policy limit of $2 million, and AGLIC furnished the excess amount of nearly $8 million.

AGLIC then sued ACE, urging that ACE had violated its *Stowers* duty to Brickman by rejecting the Braswells' settlement offers. Texas law permits such actions between insurance carriers under the doctrine of equitable subrogation. *American Centennial*, 843 S.W.2d at 482-83; *Gen. Star Indem. Co.*, 173 F.3d at 950. Ruling on dueling summary judgment motions, the district court held that "all three demands" invoked the *Stowers* duty. Then, following a bench trial, the court held that the first rejection was reasonable under *Stowers* but the last two were not. The district court entered judgment for the entirety of AGLIC's excess payment and ACE appealed.

ACE raised two issues: (1) the district court erred by holding that all three offers triggered *Stowers*, and (2) the court erred in determining that ACE violated *Stowers* by rejecting the second and third settlement offers.

The Settlement Demands. The district court held that all three demands were "unconditional, within policy limits, and presented an offer for a full release," thus triggering *Stowers*. The Fifth Circuit disagreed regarding the second offer, but affirmed that the third offer did trigger a *Stowers* duty. The Braswells' second offer sought "$1.9MM to $2.0MM with costs." The record indicated that the requested "costs" were ambiguous. ACE believed "costs" included litigation expenses and court costs. In contrast, AGLIC believed "costs" were limited to court costs. The result was that the second offer lacked the clear statement of a sum certain, and therefore did not invoke *Stowers*. ACE's principal argument as to why the third offer did not generate a *Stowers* duty was that Mrs. Braswell asserted claims alongside her minor children, whom she represented as next friend. According to ACE, this generated adverse interests and mandated at least court and perhaps guardian ad litem approval of any settlement. Whether these requirements of third-party approval made the plaintiffs' demand inherently conditional was an issue no Texas court had ruled on in the *Stowers* context.

Making an *Erie* guess, the Fifth Circuit noted that there was no evidence that the settlement offer was more favorable to Mrs. Braswell than her children or that Mrs. Braswell was operating with interests adverse to those of her children. ACE offered nothing in the record suggesting that, had the third settlement offer been accepted, Mrs. Braswell would have placed maximizing compensation for her own injuries above her children's claims.

Despite the caution that state courts observe when considering the rights of minors, the Fifth Circuit did not read Texas law to require guardian ad litem appointment—and thus third-party approval—in this or every case where a parent serves as next friend for her children. And because such appointments are not required, the Court could not conceive that every settlement generated in a case involving claims of a parent on behalf of herself and children violates *Stowers* because of a bare potential conflict of interest. Because the record was void of any specter of

adverse interests between Mrs. Braswell and her children had the third lump sum settlement offer been accepted, her children would have been bound by it. Accordingly, the offer generated a *Stowers* duty because it "proposed to release the insured fully" and it was not conditional.

Once its Stowers Duty was Triggered, ACE was Negligent in Rejecting the Third Settlement Demand. Finally, the Fifth Circuit rejected ACE's contention that the district court erred in concluding that ACE violated its settlement duty as to the third offer. Under *Stowers*, an insurer is required to exercise ordinary care in responding to qualifying settlement demands. When presented with a settlement demand within policy limits, an insurer cannot respond negligently. Whether an insurer responds negligently hinges on whether "the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Garcia*, 876 S.W.2d at 849.

ACE's challenge hinged solely on whether the trial court's adverse rulings were likely to be reversed on appeal, but ACE never argued that point to the district court (i.e., that as a legal matter *Stowers* requires consideration of appellate prospects). The Fifth Circuit concluded that ACE could not raise this novel legal theory for the first time on appeal, and did not address it. That said, the Court declared that even if it were to review ACE's evidentiary sufficiency challenge *de novo*, the evidence was clearly sufficient to support the bench trial verdict that, after considering the testimony at trial and the court's adverse evidentiary rulings, a reasonable insurer would have reevaluated the settlement value of the case and accepted the Braswells' third offer.