The Duty To Settle In Texas – An Update On *Stowers* and How To Deal With Multiple Claims and Insureds With Inadequate Limits

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I. INTRODUCTION

This paper is intended to explain, and critique in some instances, the Talmudic interpretation of the duty to settle under Texas law. *Stowers* agonistes have been evolving and bedeviling parties and courts in Texas for over 85 years. Despite repeated efforts to straight-jacket the cause of action and severely limit its application, it remains a viable claim and is ever-present in connection with the handling of liability insurance claims in Texas.

II. SOURCES OF THE COMMON LAW DUTY

A. Control of Defense and Settlement

In *G.A. Stowers Furniture Co. v. American Indemnity Co.,* 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved), the court predicated the duty to settle on the "control" given to and exercised by the carrier under the policy terms:

> The provisions of the policy giving the indemnity company ***absolute and complete control of the litigation***, as a matter of law, carried with it a corresponding duty and obligation, on the part of the indemnity company, to exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances, and a failure to exercise such care and prudence would be negligence on the part of the indemnity company.

Id.; *see also Rocor Int'l v. Nat'l Union Fire Ins. Co. of Pittburgh, PA,* 77 S.W.3d 253, 263 (Tex. 2002) (noting the *Stowers* decision is based in part "upon the insurer's control over settlement"). Stated another way, an insurer whose policy does not permit its insured to settle claims without its consent owes to its insured a common law "tort duty." *Ford v. Cimarron Ins. Co., Inc.,* 230 F.3d 828, 831 (5th Cir. 2000)(citing *G.A. Stowers Furniture Co. v. Am. Indem. Co.,* 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved)). It would seem that the *Stowers* doctrine is an excellent example of the rule that if a party undertakes a given duty or task, it must act reasonably in its performance.

B. Excess Carriers

Apparently, according to some authorities, the excess carrier must also have taken over the defense of the case. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.,* 20 S.W.3d 692,

701-02 (Tex. 2000). Thus, the failure of the excess carrier in *Keck* to respond to the initial settlement demand of $3.6 million could not be used as contributory negligence where the offer came prior to tender of the primary limits and prior to takeover of the defense. *Id.*

The *Keck* court held that even if the excess carrier was negligent in failing to "explore coverage issues more diligently, reserved its rights . . . investigated the merits of the third-party claim more thoroughly, hired independent counsel to monitor the third-party claim, supervised its claim adjuster more closely, and demanded to settle the claim months before trial," it was not actionable because it was based on conduct prior to the tender of the primary limits and because in this pre-tender situation the *excess carrier has no duty to defend or indemnify*. *Id.* The court added that pre-tender, the excess carrier had no duty to monitor the defense or to anticipate that the defense was being mishandled by the primary carrier and the defense counsel selected by the insured, noting the general tort rule that a party has no duty to anticipate the negligence of another. *Id.*

In some other jurisdictions, the courts have recognized that an excess carrier has a duty to settle once the primary limits or any self-insured retention have been tendered, regardless of whether the excess carrier is defending or not. ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS, sec. 5:26 (Database updated March 2011). In Texas, however, at least some courts have recognized that the tort duty to settle under *Stowers* does not apply unless the excess carrier is defending. *Emscor Mfg., Inc. v. Alliance Ins. Group,* 879 S.W.2d 894, 909 (Tex. App.—Houston [14th Dist.] 1994, writ denied)(holding that excess insurer can never have a duty to settle). The court in *Emscor* observed: "[W]e note that ***the Stowers doctrine . . . has never been applied to an excess carrier*** . . . ." *Id.* at 901(emphasis added). The *Emscor* court added: "There is simply no authority in this State establishing a cause of action by an insured against its **excess** insurer for negligence, bad faith, or for unfair and deceptive practices in the handling of a claim brought by a third-party." *Id.* at 909; *accord West Oaks Hosp., Inc. v. Jones,* No. 01-98-00879-CV, 2001 WL 83528, at *10. The court reasoned:

> The *Stowers* doctrine has been applied in Texas in only two circumstances—to the insured's right to sue a primary carrier for wrongful refusal to settle a claim within policy limits, *see G.A. Stowers Furniture Co. v. American Indem., Co.,* 15 S.W.2d 544, 547–48 (Tex.Comm'n App.1929, holding

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