THE GOOD, THE BAD AND THE UGLY:

What Is and What Is Not An Effective Stowers Demand

J. JAMES COOPER
REED SMITH LLP
811 MAIN STREET | SUITE 1700
HOUSTON, TX 77002
PH: 713.469.3879 | FAX: 713.469.3899
JCOOPER@REEDSMITH.COM

JAMIE R. CARSEY
THOMPSON COE COUSINS & IRONS, L.L.P.
ONE RIVERWAY, SUITE 1400
HOUSTON, TEXAS 77056
PH: 713.403.8209 | FAX: 713.403.8299
JCARSEY@THOMPSONCOE.COM

ROBERT GESSINGER
LAW STUDENT (CLASS OF 2016)
NORTHEASTERN UNIVERSITY SCHOOL OF LAW
BOSTON, MASSACHUSETTS

THE UNIVERSITY OF TEXAS SCHOOL OF LAW
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I. Introduction

Few issues in insurance law have produced more nuanced rules and court opinions than the manner in which plaintiffs must communicate their written settlement demands to a defendant with liability insurance. In Texas, insurers have a common law duty to exercise ordinary care in the settlement of covered claims to protect their insureds against judgments in excess of policy limits. Such is the legacy of *G.A. Stowers Furniture Co. v. American Indemnity Co.,* 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved). Almost a century after the *Stowers* decision, proposing a valid *Stowers* demand remains suffused with more than enough potential pitfalls, trap doors and stumbling blocks to squander the unwary practitioner's bargaining leverage and send his client back into the legal services market, post haste. On the other hand, a proper *Stowers* letter can be an effective tool in prompting insurers to conclude an expedient and favorable settlement for the claimant.

Almost as much text has been devoted to analyzing the legal history and doctrinal aspects surrounding *Stower*'s letters as to actually drafting them. Thus, the following is not an attempt to replicate or exceed the first-rate efforts already available along these lines. Rather, beyond examining the case law as needed, this discussion covers two practical focus areas. First, a summary review of foundational court opinions will identify the elements to a valid *Stower*'s demand, while excerpts culled from actual settlement letters are incorporated to highlight drafting techniques that have withstood eventual scrutiny and those that have not. Second, discussion will shift to analyzing some of the more notable cases recently decided in Texas, along with a sample set of *Stowers* jury instructions, to illustrate how these developments come into play in a courtroom.

II. The Necessary Elements of a Valid Demand

In *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994), the Texas Supreme Court articulated the criteria for a valid *Stowers* demand, which consist of the following: (1) at the time

the offer is made, the amount sought against the insured must be within the scope of coverage; (2) the amount demanded must be within the insured's policy limits; and (3) the terms of the demand must be such that an ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Id*. at 849. As a threshold matter, the question of coverage is typically not under the control of the plaintiff attorney drafting the demand. However, whether the amount demanded is within policy limits and whether such amount is reasonable are two distinct prongs the drafter can control. Each of these two elements of a *Stowers* demand is susceptible to numerous variables that make determining their legal sufficiency less straight-forward.

A. Settlement Figure Must Be Within Policy Limits

1) Policy Erosion

Although an insurance policy will state the amount of monetary coverage provided, claimants should bear in mind that this allotted figure may be tied to offsetting defense costs incurred by the carrier. In cases where the insured is covered under a "burning" or "eroding" policy, these costs will be deducted against the coverage available for settlement. If so, this contingency must be anticipated by the claimant's attorney when preparing a *Stowers* demand, either with a reduced settlement figure or by specifically seeking "policy limits."

In *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172 (Tex. App. – Fort Worth 2004, pet. denied), the court discussed the standard for a valid request in the context of an eroding insurance policy. Counsel for the claimant sent a written settlement proposal to the insured, which stated: "We are willing, *at this time*, to settle this case for the policy limits of the primary insurance policy: $1,000,000. I trust that you will apprise the excess carrier of the fact that this case can be settled, *at this time*, within the limits of the primary insurance policy." *Id*. at 192. (emphasis in opinion) The primary insurer (Admiral), which was later sued by the excess insurer (Westchester) for failing to settle the case within policy limits, contended that the amount sought by the claimant exceeded the available policy limit[1] and, therefore, the letter was an ineffective *Stowers* demand. Countering that position, Westchester offered the following

[1] Defense costs had eroded the policy limits to below $1,000,000.

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