The Duty To Settle In Texas

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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 approved), and to an excess carrier's right to sue a primary

> carrier, under the theory of equitable subrogation, to protect the excess carrier from damages for a primary carrier's wrongful handling of a claim, *see American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 483 (Tex.1992). Neither of those circumstances are present in the instant case.
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> Under *Stowers,* the insurer's duty to the insured, extends to the full range of the agency relationship as expressed in the policy**.** *See Ranger County Mut. Ins. Co. v. Guin,* 723 S.W.2d 656, 659 (Tex.1987). [emphasis added]. That duty may include investigation, preparation for defense of the lawsuit, trial of the case, and reasonable attempts to settle. *See American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d 842, 849 (Tex.1994) (opinion on motion for rehearing). Here, ***Alliance had no duty to investigate, negotiate or defend Emscor*** under the terms of the excess policy or at law, and ***never undertook those responsibilities on its own.*** *See Emscor,* 804 S.W.2d at 197–99. Therefore, Alliance had no duty under *Stowers* and Emscor has failed to state a *Stowers* cause of action.

879 S.W.2d at 909 (emphasis added).

C. Appeals

As will be discussed more fully below, case authority suggests that the duty to settle does not apply once there has been a judgment in excess of limits. If no appeal is prosecuted, the special relationship between the carrier and the insured upon which the duty to settle is based no longer exists. The carrier is in that situation no longer controlling settlement or defense. Moreover, any judgment entered before a valid *Stowers* offer has been rejected is not caused by a subsequent refusal to settle within limits.

II. THE LEGAL BASICS—ACTIVATION OF THE STOWERS DUTY

A. The Garcia Test

The Fifth Circuit recently noted in *OneBeacon Insurance Company v. T. Wade Welch & Associates*, 841 F.3d 669 (5th Cir. 2016), that there are four distinct requirements for "activating" the Stowers duty to settle:

> The *Stowers* duty is ***activated*** by a settlement demand when "three prerequisites 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." *Am. Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842, 849 (Tex. 1994). The demand must also offer to release fully the insured in exchange for a sum equal to or less than the policy limits. *Id*. at 848–49.[1]

It is quite difficult to organize all of the rules and restrictions surrounding *Stowers* claims within the confines of these elements. We will at least as an initial matter attempt to collect and discuss as many of these precepts as possible under these elements.

B. Element One—Coverage

1. Common Law—Debatable Coverage—A Defense?

a. Texas Decisions

A carrier has no *Stowers* duty to settle as to uncovered claims. *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994). Therefore, if there is no coverage, *Stowers* cannot apply. *Garcia, supra; American Western Home Ins. Co. v. Tristar Convenience Stores, Inc.*, 2011 WL 2412678, *4 (S.D. Tex., Jun 02, 2011)(Werlein, J.). Importantly, purely common law *Stowers* decisions, as opposed to insurance code claims for failing to settle when liability is reasonably clear, hold that **mere *uncertainty*** regarding the existence or not of coverage is not enough to prevent the application of the *Stowers* doctrine. *American Western, supra.*[2] In *American Western,* the court held: "Whether there

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[1] In *American Physicians Ins. Exch. v. Garcia supra,* the court summarized the *Stowers* elements as follows:

> (1) [T]he claim against the insured is within the scope of coverage, (2) the demand is within policy limits, and (3) the terms of the demand are 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

[2] The court cited and discussed the following decisions: *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.,* 246 S.W.3d 42, 46 (Tex.2008) (noting "the dilemma faced by both insurer

are 'questions' about coverage at the time of the settlement offer is not the equivalent of establishing as a matter of law that there is no coverage for the claim." *Id.* ***Importantly, this does not mean necessarily that questions regarding coverage cannot be considered by the jury in assessing whether a reasonable carrier would have settled.*** *Id.*[3]

b. Other Jurisdictions

Other jurisdictions have generally held that an erroneous belief regarding coverage is ***not a defense*** to a claim for failure to settle. As Professor Windt explains:

> Frequently, an insurance company will refuse to settle a case because of its erroneous belief that there is no coverage or only limited coverage under the policy. That belief, however, cannot be used to justify the company's refusal to settle in an appropriate case. As explained in *State Farm Automobile Insurance Co v Civil Service Employees Insurance Co.*:
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> > The mere fact that an insurer has erroneously concluded that there is no coverage … cannot excuse subsequent breaches by the insurer of other provisions of the contract, including the implied obligations pertaining to settlement. To hold otherwise would result in penalizing the more prudent insurer who initially correctly recognizes [that there is

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and insured when a claimant presents a settlement demand within policy limits and coverage is uncertain," because, in part, "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 and discussing *Tex. Assoc. of Counties Cnty. Gov't Risk Mqmt. Pool v. Matagorda Cnty.,* 52 S.W.3d 128, 135 (Tex. 2000) and *Stowers,* 15 S.W.2d at 547)); *Am. Physicians,* 876 S.W.2d at 848 ("We start with the proposition that an insurer has no duty to settle a claim *that is not covered under its policy."* (emphasis added)).

[3] The *Tri-Star* court observed: "The contention that there was questionable coverage would be better addressed to the third ***Stowers*** liability element, which American Western also argues, namely, whether a reasonable insurer would have accepted the settlement at the time it was offered." *American Western, supra,* at *4.

> coverage] …, but subsequently wrongfully refuses a settlement offer.[FN2][4]
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> To put it in other words, when one party to a contract breaches a contract, that party is responsible for the foreseeable consequential damages from that breach, whether the breach was inadvertent, negligent or intentional. Accordingly, when an insurer wrongfully denies coverage, even if its belief in the absence of coverage was merely negligent, the insurer should be liable for the foreseeable consequential damages from its denial of coverage, including the fact that there is no settlement in a situation in which a reasonable insurer affording coverage would have settled the case.

WINDT, INSURANCE CLAIMS AND DISPUTES, section 5:5 (citations omitted). This rationale is perhaps tied to the fact that jurisdictions such as California base the duty to settle on an implied contractual duty to settle within limits. *Stowers* is based on a tort duty, and it is not an implied contractual right. This is certainly the manner in which the related duty of good faith in first party cases has been interpreted as well. Thus, the California approach may be of limited applicability in Texas.

c. The Franks Odyssey—Sifting Through the Supreme Court Decisions For References to Other Jurisdictions and Logical Imperatives

As noted, the Texas Supreme Court does not appear to believe that the fact a carrier has a good faith coverage defense is in fact a defense to a *Stowers* action. In *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994), the Court stated that both the claimants and the carriers are at risk in determining the proper scope and limits of coverage:

> Thus, [the claimant] was informed of the insurers' position concerning the policy limits, and was advised of the demand he would have to make to trigger the *Stowers* duty. [The claimant] elected to proceed on the disputed assumption that he could aggregate the policies. Conversely, APIE elected to ***bear the risk***

[4] *State Farm Auto. Ins. Co. v. Civil Service Emp. Ins. Co.*, 19 Ariz. App. 594, 509 P.2d 725, 733 (Div. 1 1973).

> ***that its point of view might have been incorrect, which could result in liability for any excess judgment.***

Id. at 850. In other words, the claimant bears the risk as to whether he or she is right in making an offer for what it believes to be the limits. If the claimant is wrong, the *Stowers* doctrine does not apply because the offer was too high. If the carrier is wrong, and the demand is actually correct and within limits, its "bears the risk" of being wrong on coverage and thus will be fully liable for the excess judgment if it guesses wrong. *Id.*[5]

Similarly, in *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc*., 2005 WL 1252321, at *4 (Tex., May 27, 2005)("*Frank's I* (motion for rehearing granted Jan. 6, 2006), *vacated,* 246 S.W.3d 42, 51 Tex. Sup. Ct. J. 397 (Tex. 2008), the Court followed the rationale of the California Supreme Court in *Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal.4th 489, 22 P.3d 313, 106 Cal. Rptr.2d 535 (2001).

The Jacobsen shined the light of the key inquiry on whether, in light of the injuries and the probable liability of the insured, the ultimate outcome was likely to exceed the amount of the settlement offer. The court discussed the decision in *Johansen v. Cal. State Auto. Assoc. Inter-Insurance Bureau,* 15 Cal.3d 9, 123 Cal. Rptr. 288, 538 P.2d 744 (1975), noting that this decision held:

- A carrier failing to accept a reasonable offer of settlement would be held liable for amounts in excess of the policy limits.
- ***In determining whether the offer was reasonable, "an insurer may not consider the issue of coverage."***
- The only permissible consideration is whether in light of the injuries and the probable liability of the insured, the ultimate outcome is likely to exceed the amount of the settlement offer.

[5] The Court added: "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." *Id.* at 851 n. 18 (emphasis added).

Id. at 541 (emphasis added). The portions of the *Jacobson* opinion relied on in *Franks I* include the following analysis:

> Under *Johansen*, if an insurer fails to accept a reasonable settlement offer within the policy limits, and the judgment exceeds the policy limits, the insurer risks liability for the entire judgment and any other damages incurred by the insured. ***Moreover, the insurer may not consider the issue of coverage in determining whether the settlement is reasonable.*** (Johansen, supra, 15 Cal.3d at pp. 12, 15, 16, 123 Cal. Rptr. 288, 538 P.2d 744.)
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> In light of *Johansen*, were we to conclude insureds could, as in this case, refuse to assume their own defense, insisting an insurer settle a lawsuit or risk a bad faith action, but at the same time refuse to agree the insurer could seek reimbursement should the claim not be covered, the resulting Catch-22 would force insurers to indemnify non-covered claims. If an insurer could not unilaterally reserve its right to later assert non-coverage of any settled claim, it would have no practical avenue of recourse other than to settle and forgo reimbursement. An insured's mere objection to a reservation of right would create coverage contrary to the parties' agreement in the insurance policy and violate basic notions of fairness.

Jacobson, 22 P.3d at 321 (emphasis added).[6]

The Texas Supreme Court in *Franks I* made very clear that it found the reasoning in *Jacobson* applicable and consistent with Texas law. The *Franks* Court held:

> Whether the insurer or the insured ultimately bears the cost of a reasonable settlement with a third party should depend on whether

[6] The Court in *Johanson* reasoned: "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself ***as though it alone were liable*** for the entire amount of the judgment. (*Crisci v. Security Ins. Co., supra*, 66 Cal.2d at p. 429, 58 Cal. Rptr. 13, 426 P.2d 173.) Thus, the only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, and ultimate judgment is likely to exceed the amount of the settlement offer. Such factors as the limits imposed by the policy, a desire to reduce the amount of future settlements, or a belief that the policy does not provide coverage, should not affect a decision as to whether the settlement offer in question is a reasonable one." 538 P.2d at 748-49 (emphasis added).

> there is coverage. As pointed out by the California Supreme Court and our own court of appeals in the present case, denying a right of reimbursement once an insured has demanded that an insurer accept a reasonable settlement offer from an injured third party can significantly tilt the playing field. ***The insurer would have only two options.*** **[1]** ***It could refuse to settle and face a bad faith claim if it is later determined there was coverage.*** **[2]** Or it could settle the third-party claim with no right of recourse against the insured if it is determined there was no coverage, which effectively creates coverage where there was none.

Id. Obviously, if the existence of a good faith coverage defense were an absolute defense in a *Stowers* action, then the Court's statements, which serve as the backbone of its rationale in *Garcia* and *Franks*, would be flat wrong.

Equally important, the Supreme Court in *Franks* emphasized that the *Stowers* reasonableness standard involves a test of objective reasonableness focusing on "an objective assessment ***of the insured's potential liability***." *Id.* at *3 (emphasis added). Thus, the Court reasoned that the seemingly varying standards for the *Stowers* duty were not really different:

> We have said that the duty imposed by *Stowers* is to "exercise 'that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business.'" We have also said that the *Stowers* duty is viewed from the perspective of an insurer: "the terms of the demand are such that an ordinarily prudent insurer would accept it." Both statements are correct. Whether a settlement offer within policy limits is a reasonable one is determined by an objective standard based on an assessment of the likelihood that the insured will be found liable and the range of potential damages for which the insured may be held liable, including "the likelihood and degree of the insured's potential exposure to an excess judgment." The reasonableness of a settlement offer is not judged by whether the insured has no assets or substantial assets, or whether the limits of insurance coverage greatly exceed the potential damages for which the insured may be

> liable. ***<u>It is an objective assessment of the insured's potential liability.</u>***

Id. (footnotes omitted).

Whether debatable coverage is a defense in a *Stowers* case is even more confused with the issuance of *Frank's II,* which deleted all substantive reliance on *Jacobson.* Given that the Court reasoned that the availability of declaratory actions was a sufficient protection to carriers with debatable coverage facing a *Stowers* demand, one would think that no further protection is warranted or intended by the Court. Nevertheless, the decision in *D.R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co., Ltd.,* 300 S.W.3d 740 (Tex. 2009), shows that declaratory relief is simply not a widely available as a protection. Accordingly, the potential availability of debatable coverage as a defense would appear to still be alive since the Court may find it necessary in light of the *D.R. Horton* limitations.

In *LSG Technologies, Inc. v. U.S. Fire Ins. Co.,* 2010 WL 5646054 (E.D. Tex., Sep 02, 2010)(pending before Fifth Circuit currently), the court held that a reasonable basis for contesting coverage was not a defense to a common law *Stowers* cause of action. The court reasoned that the *Stowers* action is one based in negligence, not good faith. The court did not cite *Garcia, Franks II,* or any other decisions previously touching upon this subject.

d. OneBeacon—District Court Refuses To Allow Testimony Regarding A Reasonable Basis As A Defense to A Stowers Claim

The trial court in *OneBeacon Ins. Co. v. T. Wade Welch & Associates,* Not Reported in F.Supp.3d (2014), granted the claimant/policyholder's motion in limine regarding expert testimony that the carrier had a reasonable basis for denying the claim, as a defense to a common law *Stowers* and Insurance Code claim for failure to settle when liability was reasonably clear. The court held that testimony from an attorney expert as to whether OneBeacon could consider its policy defenses in evaluating the reasonableness of DISH's *Stowers* Demand involved a pure legal question, that no witness can testify regarding legal issues, and that it is the duty of the court to instruct the jury on the law. More importantly, the court refused to allow testimony that there was a reasonable basis as to the *Stowers* claim, but it allowed it as to the Insurance Code claim, with instructions to the jury.

e. *US Metals v. Liberty*—Reasonable Basis Defense to Common Law Stowers and 541.060 Claims

Recently, the court in *American U.S. Metals, Inc., Plaintiff, v. Liberty Ins.*, --- F.Supp.3d ---- (2017), combined first party bad faith concepts, a reasonable basis or bona fide controversy defense, in a liability or third-party insurance setting. The court seized on the fact that section 541.060 requires an attempt in "good faith" to settle when liability is reasonably clear, incorporated the common law *Stowers* elements from *Garcia, supra,* and found a reasonable basis defense, even if the carrier was ultimately wrong in denying coverage. The court reasoned:

> Plaintiff brings claims against Defendant under Texas Insurance Code § 541.060. This section requires insurers to "attempt in good faith to effectuate a prompt, fair, and equitable settlement of: (a) a claim with respect to which the insurer's liability has become reasonably clear." Tex. Ins. Code § 541.060.
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> Under Texas law, the good-faith duty is triggered where "(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." *Pride Transp. v. Cont'l Cas. Co.*, 511 F. App'x 347, 354 (5th Cir. 2013). A cause of action for breach of the duty of good faith and fair dealing exists when the insurer has no reasonable basis for denying or delaying payment of a claim or when the insurer fails to determine or delays in determining whether there is any reasonable basis for denial. *Id.* Insurance carriers maintain the right to deny questionable claims without being subject to liability for an erroneous denial of the claim. *St. Paul Lloyd's Ins. v. Fong Chun Huang*, 808 S.W.2d 524, 526 (Tex. Ct. App. 1991). A bona fide controversy is a sufficient reason for failure of an insurer to incorrectly deny a claim. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998). As long as the insurer has a reasonable basis to deny or delay payment of a claim, even if that basis is eventually determined by the fact finder to be erroneous, the insurer is not liable for breach of good faith. *Lyons v. Millers Casualty Insurance Co.*, 866 S.W.2d 597, 600 (Tex. 1993).

. . . .

> At the time that Defendant denied coverage, it had a reasonable basis for its decision and there is no genuine issue of material fact that it breach its duty of good faith and fair dealing pursuant to Texas Insurance Code § 541.060. *See Lyons v. Millers Casualty Insurance Co.*, 866 S.W.2d 597, 600 (Tex. 1993).
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> In light of the Supreme Court of Texas's opinion in this case, Plaintiff is now ***covered for part*** of Exxon's third-party claim. *See* (Instrument No. 106-2 at 14). However, Plaintiff has not made a showing creating a genuine issue of material fact that Defendant ***did not have a reasonable basis*** for denying the claim.

Id. (emphasis added).

f. *Yorkshire v. Seger*—The Burdens of Proof on Coverage Are The Same In A Stowers Case As In A Breach of Contract Case

The Supreme Court in *Seger v. Yorkshire Insurance Co., Ltd.*, 503 S.W.3d 388, (2016), held:

> In a ***Stowers*** action, however, the ***burden is on the insured to prove coverage.*** *See State Farm Lloyds Ins. Co. v. Maldonado,* 963 S.W.2d 38, 41 (Tex.1998) (holding that the insured had the burden to show that the second element of his ***Stowers*** claim was met); *Garcia,* 876 S.W.2d at 848–49 (addressing coverage before moving on to the other elements of the ***Stowers*** claim); *Emp'rs Cas. Co. v. Block,* 744 S.W.2d 940, 944 (Tex.1988) (citation omitted) ("An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy.").

Id. at 396. The court explained the contractual burden of proof rules as follows:

> "Initially, the insured has the burden of establishing coverage under the terms of the policy."

> *Ins. Co.*, 460 S.W.3d 597, 603 (Tex.2015) (citing *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex.2010)). "To avoid liability, the insurer then has the burden to plead and prove that the loss falls within an exclusion to the policy's coverage." *Id.* "The insurer has neither a 'right' nor a burden to assert noncoverage of a risk or loss until the insured shows that the risk or loss is covered by the terms of the policy." *Ulico Cas. Co.*, 262 S.W.3d at 778. To prove coverage, the plaintiff must establish that the injury or damage is the type covered by the policy . . . The plaintiff must also establish that the injury or damage was incurred at a time covered by the policy. *Block*, 744 S.W.2d at 944. Finally, the plaintiff must establish that the injury or damage was incurred by a person whose injuries are covered by the policy. *See Thompson v. Travelers Indem. Co. of R.I.*, 789 S.W.2d 277, 278–79 (Tex.1990) (determining whether a jockey was an employee of a race track and therefore covered under the race track's workers' compensation insurance). Only by establishing each of these elements—that a covered injury or loss was incurred at a time covered by the policy and incurred by a person whose injuries are covered by the policy—can a plaintiff prove coverage, and only then does the burden shift to the insurer to prove that a coverage exclusion applies. *See Ulico Cas. Co.*, 262 S.W.3d at 782 ("[T]he insured bears the burden to show that a policy is in force and that the risk comes within the policy's coverage."). As such, each of these elements of coverage is a precondition to coverage, not an exception. *See Block*, 744 S.W.2d at 944 ("[T]he time of the insured's damages is a precondition to any coverage rather than an exception to general coverage.").

Id. at 400-401 (some citations omitted).

As to the burden of proof as to coverage in a *Stowers* case, the court held:

> A ***Stowers*** action is no different. A ***Stowers*** plaintiff cannot recover under a ***Stowers*** cause of action without first satisfying the precondition of establishing each element of coverage. *See Maldonado*, 963 S.W.2d at 41 (holding that the insured had the

> burden to show that the second element of his ***Stowers*** claim was met).

Id. at 401.

In *Yorkshire,* the policy CGL policy "expressly covered liability for injury to independent contractors." It excluded coverage for "Leased-in Employees/Workers." *Id.* at 397. The court found that there was at least an implied finding that the injured party was an independent contractor and was thus covered absent applicability of an exclusion. The court noted: "Because we hold that the Segers met their initial burden to prove coverage, the burden shifts to the ***Stowers*** Insurers to prove that the Segers' claim is excluded from coverage under the policy." *Id.* (citations omitted). The jury found that the injured party was *not* a "leased-in" employee. The court proceeded to hold that the evidence was legally insufficient to support the jury finding, and thus judgment was rendered in favor of the carrier on coverage and on the *Stowers* claim.

2. Insurance Code—"Reasonably Clear " Distinguished

Undoubtedly, a "liability of the insurer is reasonably clear" standard, such as that set forth in section 541.060 of the Texas Insurance Code, certainly does not foreclose the consideration of coverage since a carrier would obviously consider coverage in determining whether to settle. One would expect the fact coverage was debatable would be potentially admissible under such a standard. The statutory standard certainly changes the focus from the insured's potential liability and focuses it on the "liability of the insurer."

If a close coverage question presents a defense, is it one the jury can decide? Frequently, experts in *Stowers* cases are permitted to provide such testimony. Moreover, insurers must be able to state at trial why they refused to settle even if it is not a defense.

Of course, this proposition is not with contentious debate. Some argue that Supreme Court decisions equate the *Stowers* duty with the statutory standard, suggesting there is no difference. *See Rocor International, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 77 S.W.3d 253 (Tex. 2002) ("There is nothing to indicate that the Legislature had in mind any standard other than the familiar ***Stowers*** standard" in enacting § 541.060(a)(2)(A); to activate an insurer's duty under that statute, the claimant must make a settlement demand within policy limits with terms that an ordinarily

prudent insurer would accept; an insurer has no contractual or implied duty to settle a claim that is not covered under the policy).. The battle of "perspective," insured's versus insurer's, continues to be waged.

3. No Duty to Settle As To Uncovered Claims

A carrier is under no obligation to pay more to settle covered claims in order to have the claimant include punitive damages within the settlement. For covered claims, the carrier has complete discretion to settle and cannot commit a tort unless a demand within the limits is unreasonably refused and there is a judgment for covered damages in excess of the policy limits. *Dear v. Scottsdale Ins. Co*., 947 S.W.2d 908, 916-17 (Tex. App. –Dallas 1997, writ denied)(Hankinson, J.). In *Rosell v. Farmers Texas County Mut. Ins. Co*., 642 S.W.2d 278, 279 (Tex. App.–Texarkana 1982, no writ), the carrier refused to accept a bulk offer to settle for two occurrence policy limits where one of the two claims was not, in the carrier's opinion, worth a full single limit. The court held that the carrier did not have to pay more for the weak claim in order to get a settlement of the strong claim. *Accord Pullin v. Southern Farm Bureau Cas. Ins. Co*., 874 F.2d 1055, 1056 (5th Cir. 1989) (Texas law).

In *St. Paul Fire & Marine Ins. Co. v. Convalescent Services, Inc.*, 193 S.W.2d 340, 342-43 (5th Cir. 1999, the court, quoting *American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d 842, 846 (Tex. 1994, held that a carrier excluding coverage for punitive damages has no duty to settle as to such uncovered claims. The court rejected arguments that a *Stowers* duty to settle was triggered where the carrier knew that the insured had significant punitive exposure and that the insured would be willing to contribute to settlement. The court also rejected *Ranger v. Guin* arguments to the effect that the carrier was negligent in its evaluation and in communicating that evaluation to the insured. *Id.* The court held that *Guin* was subsumed within *Stowers* and was strictly subject to its elements, including coverage and the need for a verdict in excess of limits, under current Texas law as reflected in *Garcia*, *Maryland Ins. Co. v. Head,* 938 S.W.2d 27, 28 (Tex. 1996, and *State Farm Automobile Ins. Co. v. Traver,* 980 S.W.2d 625, 628 (Tex. 1998. By analogy, the court looked to *Texas Farmers Ins. Co. v. Soriano,* 881 S.W.2d 312 (1994, noting that where there are multiple claims and inadequate proceeds, the carrier may look to only the merits of the particular claim and the corresponding particular liability of the insured. *Id.* at 344. The court reasoned:

> Thus, because the Texas Supreme Court does not impose a duty upon insurers to consider other *covered* claims when faced with a settlement

> demand by one claimant, we believe that the Court would not impose a duty upon insurers to consider claims that are *not* covered—here, the punitive damages claims—by its policy during settlement negotiations involving one claimant.

Id. at 345. The court also rejected the argument that the court of appeals opinion in *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 917 S.W.2d 29 (Tex. App.—Amarillo 1995), *aff'd in part, rev'd in part on other grounds*, 974 S.W.2d 51 (Tex. 1998), supported a claim for negligent claims handling. The court did so based on the then recent holding in *Traver, supra,* that the *Stowers* duty subsumes the duty of ordinary care in handling, investigating and evaluating the claim. Finally, the court refused to address the issue of whether the carrier could be found liable for damages not otherwise covered as a result of some tortious conduct. Numerous courts have found such claims barred because they seek to do indirectly what is not permitted directly in those jurisdictions, provide coverage for punitive damages. *Id.* at 346 n. 13.

The courts in other jurisdictions have refused to allow tort claims for bad faith and similar theories to be made with respect to punitive damages where coverage for such damages has been found to be contrary to public policy. For example, in *Zieman Mfg. Co. v. St. Paul Fire & Marine Ins. Co.*, 724 F.2d 1343 (9th Cir. 1983), the insured brought suit against the insurer alleging that the insurer breached the duty to defend and acted in bad faith in the handling/defending of a suit against the insured. The insurer provided a full defense through an outside firm. The insured also retained its own counsel. *Id*. at 1345. During the lawsuit, an offer to settle was made in the $200,000 to $250,000 range. The insured urged the insurer to settle and even offered to contribute $20,000 of its own funds. *Id*. The insurer rejected the offer, and the case was ultimately tried resulting in a verdict of $387,107 in compensatory damages and $30,000 in punitive damages. *Id*.

The insurer in *Zieman* paid the entire compensatory damages costs and defense legal fees. The insured subsequently sued the insurer for payment of the punitive damages award for failure to settle and exposing the insured to the risk of punitive damages. In response, the court stated the following:

> There is no basis whatever for that claim. [The evidence] clearly demonstrates that counsel retained for [the insured] and counsel for the other entities facing exposure to the Stewart claim conscientiously valued the same as having a jury verdict potential of no more than $100,000. They

> were wrong, of course, but that does not even suggest bad faith. The proposition that an insurer must settle, at any figure demanded within the policy limits, an action in which punitive damages are sought is nothing short of absurd.

Id. at 1346.

In *Soto v. State Farm Ins. Co.*, 635 N.E.2d 1222 (N.Y. 1994), a judgment for $420,000 in compensatory damages and $450,000 in punitive damages was rendered against the insured. An action was then brought against the insurer, for the full amount of the judgment alleging failure to settle within policy limits. *Id*. at 1223.

The insurer in *Soto* moved to dismiss the complaint for failure to state a claim because New York law held coverage for punitive damages was against public policy. *Id*. Both the trial court and the intermediate court accepted the argument, granting the motion and affirming respectively. *Id.* The New York Court of Appeals upheld the lower courts' decisions, stating:

> As we have noted on other occasions, since punitive damages are not designed to compensate an injured Plaintiff for the actual injury that the person may have suffered, their only real purpose is to punish and deter the wrongdoer [citations omitted]. While the deterrent value of the rule against indemnification may be somewhat attenuated in this context, the rule's equally important goal of preserving the condemnatory and retributive character of punitive damage awards remains clear and undiminished. That goal cannot be reconciled with a conclusion that would allow the insured wrongdoer to divert the economic punishment to an insurer because of the insurer's unrelated, independent wrongful act in improperly refusing a settlement within policy limits.

Id. The court added:

> Where an insurer has acted in bad faith in relation to an available pre-trial settlement opportunity, it is guilty only of placing its insured at risk that a jury will deem him or her so morally culpable as to warrant the imposition of punitive damages. Stated another way, an insurer's failure to agree to a settlement, whether reasonable or wrongful, does no more than deprive the insured of a chance to avoid the possibility of having to

> suffer a punitive award for his or her own misconduct. Regardless of how egregious the insurer's conduct has been, ***the fact remains that an award of punitive damages that might ensue is still directly attributable to the insured's immoral and blameworthy behavior.***
>
> Our system of civil justice may be organized so as to allow a wrongdoer to escape the punitive consequences of his own malfeasance in order that the injured plaintiff may enjoy the advantages of a swift and certain pretrial settlement. However, the benefit that a morally culpable wrongdoer obtains as a result of this system, i.e., being released from exposure to liability for punitive damages, is no more than a necessary incident of the process. It is certainly not a right whose loss need be made subject to compensation when a favorable pretrial settlement offer has been wasted by a reckless or faithless insurer.

Id. at 1224-25 (emphasis added).

The Supreme Court of Colorado considered similar issues in a suit entitled *Lira v. Shelter Ins. Co*., 913 P.2d 514 (Co. 1996). In Colorado, an insurer has no duty to settle the compensatory part of a suit in order to minimize the insured's exposure to punitive damages. *Id.* at 516. Therefore, the court concluded, that the insurance company's duty to settle "did not encompass a duty to protect the petitioner from exposure to punitive damages." *Id.* at 517. The court reasoned:

> The contract between the parties expressly precluded recovery for punitive damages incurred by the insured. The insured may not later utilize the tort of bad faith to effectively shift the cost of punitive damages to his insurer when such damages are expressly precluded by the underlying insurance contract.
>
> . . . .
>
> [To hold otherwise would] force insurers to settle cases involving punitive damages in order to avoid liability for the same punitive damages in subsequent bad faith actions. Such a result would be contrary to the principle that insurers have no absolute duty to settle in order to protect their insureds from punitive judgments. *See Zieman*, 724 F.2d at 1346.

Id. at 517. The court declined to extend the tort of bad faith to encompass liability for punitive damages from the underlying lawsuit. *Id.*

The California Supreme Court reached a similar conclusion in *PPG Industries, Inc. v. Transamerica Ins. Co.*, 84 Cal. Rptr. 2d 455 (1999). The court held that the insured could not recover amounts including punitive damages awarded in the underlying suit from the carrier in a bad faith case. The court concluded the insured caused this injury by its own heinous acts. Thus, the court expanded the public policy bar against indemnity for punitive damages to implied indemnity.

The leading case for the opposing point of view is *Ansonia Assoc. Ltd. v. Public Service Mut. Ins. Co.,* 257 A.D.2d 84, 692 N.Y.S.2d 5 (1999. In that case, the court found that the carrier's assertion that punitive damages were not covered was tantamount to economic duress. *Id.* at 7. The court noted that the insured is put in the position of having to choose between going to trial and getting hit for substantial uncovered damages or having to settle the claim and potentially lose coverage for compensatory damages by settling without the consent of the carrier. The court did not address whether the insurer's cavalier indifference to its insured's exposure to potentially ruinous punitive damages, without more, constitutes bad faith. *Id.* at 7-8.

C. Within Limits

It is axiomatic that you have to have the limits correct in order to make a valid demand. It is also a basic consideration to make sure that the demand is for a definite amount within the limits.

1. Policy Controls Limits

The policy controls the determination of the policy limits applicable. Thus, a claimant may rely upon the policy to determine how much to demand. *Yorkshire Ins. Co., Ltd. v. Seger,* 279 S.W.3d 755, 769 (Tex. App.-Amarillo, Jun 20, 2007), *discussed infra* at subsection (H)(2)(c). In the context of a declining limits policy, the claimant's counsel should seek to obtain an understanding of how much of the limits are left, but the offer should be for the remaining limits according to the terms of the policy. Anything else risks the argument that the demand exceeds limits.

Garcia is a classic example of a failure to make an offer within limits. The limits are often subject to a great deal of debate from a coverage analysis standpoint. The hard work of predicting the limits applicable has to be done prior to the making of the offer.

2. Outside Factors Altering the Amount Available

The policy limits are also altered by settlement of other claims. Thus, if payment has been made to one of multiple claimants, then a demand that is for the full policy limits, without reducing the amount based on the settlement, is not an offer within limits sufficient to invoke *Stowers*. *Soriano*, 881 S.W.2d at 315. Similarly, if the policy limits are exhausted through payment under a separate section of the policy, then no *Stowers* liability can attach because any offer of settlement would be an offer in excess of the limits. *Hanson v. Republic Ins. Co.*, 5 S.W.2d 324 (Tex. App.–Houston [1st Dist.] 1999, no writ).

An error of law by the claimant in making its demand for limits will still prevent the offer from being sufficient to satisfy the elements of *Stowers*. *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38, 41 (Tex. 1998). Thus, the ability to discover the policy and properly interpret it is critical for the claimant. Some plaintiff's counsel suggests that the need for accuracy regarding the limits of liability also requires disclosure of reservation of rights letters under some circumstances.

3. Working With Multiple Policies And Still Hitting the Target

As will be discussed below, in subsection (H)(2), offers within the aggregate limits of multiple policies, whether primary/primary or primary/excess, are generally found to be ineffective as to primary insurers to the extent the bulk offer exceeds the individual primary limits. Thus, for example, if the offer is within the combined primary limits of two pro rata primaries, but exceeds the individual limits of any one of those policies, it is ineffective as to either. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 776 (Tex.2007). Where the offer involves combined excess and primary coverage, the offer is conditional until the primary has actually tendered. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 701-02 (Tex.2000).

4. Declining Limits Demands

Making a proper demand on a declining limits policy is particularly tricky. The best approach here would appear to be to ask for a dollar less than the remaining limits,

allowing any necessary reduction for additional defense fees that must be paid to finalize settlement.

The issue of a proper declining limits offer was presented in part in *Westchester Fire Ins. Co. v. Admiral Ins. Co.,* 152 S.W.3d 172, 191-93 (Tex. App.--Fort Worth 2004, pet. pending), which is pending on petition for review before the Supreme Court. This type of policy has variously been described as exhausting, wasting, burning or eroding. In short, the costs of defense erode the policy limits. So, the limits are a moving target. In that case, the claimants orally indicated they were seeking "policy limits." A written settlement offer was made for the policy limits of the primary policy: $1 million. The letter added that the excess carrier should be apprised that the case could be settled "*at this time,* within the limits of the primary policy." *Id.* at 193. Oral testimony provided by the plaintiffs' counsel indicated he made a demand to settle for the policy limits of the primary policy, which he understood at the time to be $1 million. *Id.* The limits were actually less than $1 million because of defense cost erosion. While the letter indicated the offer was conditioned on the limits being $1 million, the plaintiffs' counsel testified that no condition was intended. The case subsequently went to mediation, where confusion continued to reign. Again, testimony was presented in the absence of a written document, indicating the offer was to take $1 million or whatever the limits were. Additional testimony showed that the plaintiffs said they would come off $1 million if the defendant would come up to $500,000. The plaintiffs never came down from $1 million. *Id.* Added to this mess was the expert opinion of Gary Beck, indicating that he thought a *Stowers* demand had been made. *Id.* at 195. Similar testimony was presented by Rickey Brantley, the ad litem for one of the claimants. *Id.*

The court held that this evidence amounted to more than a scintilla that there was a valid *Stowers* demand. This reasoning would appear to erroneously shift to the jury the responsibility of considered legal questions.

The court also addressed whether the carrier could have settled in light of the fact that the mediation settlement discussions did not involve a communicated ***consent to settle*** from the insured. *Id.* The defense counsel did not get the consent letter until after the mediation. *Id.* Strangely, the court held that the carrier "failed to conclusively prove that it did not have an opportunity to settle the claim after receiving" the insured's consent. *Id.* The ruling seems to erroneously presuppose the existence of a valid *Stowers* offer and a duty to initiate settlement.

D. Reasonable Offer and Assessing the Likelihood of Liability and Degree of Exposure

This portion of the *Garcia* three-part test is the most complex. On first-glance, it really reflects two separate requirements: (1) the terms of the demand must be such that "an ordinary prudent insurer would accept it," and (2) the assessment of reasonableness includes as a key factor consideration of the likelihood and degree of the insured's potential exposure to an excess judgment. Note also that some courts have suggested that this element may allow consideration of whether a reasonable person would settle where there are debatable issues of coverage presented. *American Western Home Ins. Co. v. Tristar Convenience Stores, Inc.*, 2011 WL 2412678, *12-13 (S.D. Tex., Jun 02, 2011)(Werlein, J.)(holding "The contention that there was questionable coverage would be better addressed to the third *Stowers* liability element, which American Western also argues, namely, whether a reasonable insurer would have accepted the settlement at the time it was offered.")

1. Reasonable Terms

Let's begin with a list of factors that the courts have noted as being a part of the analysis of whether the offer was one a reasonable insurer would accept:

- Terms are clear and undisputed
- Written offer
- Unconditional offer
- Offer of a complete release
- Identification of party or parties released, including whether all insureds are released or only some
- Time limits provided

As the discussion which follows demonstrates, each of these considerations has multiple subparts.

a. Clear and Undisputed

In *Rocor International, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253 (Tex. 2002), the Court set forth a basic "clarity" requirement that in many ways is a touchstone for determining whether a given offer is one a reasonable carrier would refuse. The Court held:

> [A]t 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 on both sides." *Id.* . . . Given the tactical considerations inherent in settlement negotiations, an insurer should not be held liable for failing to accept an offer when the offer's terms and scope are ***unclear or are the subject of dispute.***

Id. (emphasis added). We know that the Court in *Rocor* did not require the making of a "formal" offer. Exactly where the line is to be drawn is, therefore, not altogether clear. Comparable concepts might provide some guidance, such as the old "clear and unequivocal" rule for determining the enforceability of indemnity agreements for a party's own negligence. Even this rule had flexibility in that you did not have to state negligence of the indemnitor was included in "so many words," but this intent had to otherwise be clear.

b. In Writing?

Some cases suggest that a "formal" demand is probably not required. *Birmingham Fire Ins. Co. v. American Nat'l Fire Ins. Co.*, 947 S.W.2d 592, 599-600 (Tex. App.–Texarkana 1997, writ denied. However, informal or "back-channel" "suggestions" regarding what the case could be settled for, coming for example from either the plaintiff's attorney or the ad litem, are ***insufficient*** to satisfy *Garcia*. *Id.* An "offer" is "'[a] proposal to do a thing or pay an amount, usually accompanied by ***an expected acceptance, counter-offer, return promise or act.***'" *Id.* at 599 n. 2 (quoting BLACK'S LAW DICTIONARY 1081 (1990)). A ***demand*** within limits must be distinguished from a "suggestion." *Id.*

In *Trinity Universal Ins. Co. v. Bleeker*, 944 S.W.2d 672 (Tex. App.- Corpus Christi), *rev'd*, 966 S.W.2d 489 Tex. 1998),[7] the court directly addressed the validity of oral offers

[7] *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998), reversed this holding by determining as a threshold issue that the settlement offer in that case was not valid because it did not provide a full

and held that oral offers are valid in contract law to the same extent as written offers. The court rejected that argument that Rule 11 of the Texas Rules of Civil Procedure, which requires settlement offers to be in writing in order to be binding when accepted, creates a firm requirement that *Stowers* demands be made in writing. Rule 11 states:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it is in writing, signed, and filed with the papers as a part of the record, or unless it be made in open court and entered of record.

TEX. R. CIV. P. 11. The Texas Supreme Court reversed *Bleeker* on other grounds, finding that there had not been a sufficient offer to provide release from liens. The Court did not address the issue of whether the offer must be in writing.

In his article, *Essential Requirements to Trigger a Duty Under the Stowers Doctrine and Unfair Claims Settlement* Act, Brent Cooper suggests that the *Bleeker* court of appeals was wrong in its determination that Rule 11 does not apply to settlement offers. He cites *London Mkt. Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991, orig. proceeding), which illustrates the role of Rule 11 when parties dispute an agreement. The Court there explained that "once the existence of such an agreement becomes disputed, it is unenforceable unless it comports with these (Rule 11) requirements." However, it appears that this turns on whether a suit is "pending." Rule 11 specifically refers to a "suit pending" and the cited case discusses this rule in reference to discovery requests. Thus, for pre-suit demands, Rule 11 on its face would be inapplicable.

Other Texas law indicates that an oral offer will be sufficient so long as both parties agree that a *Stower* offer was made and that the terms were clear. In *Rocor International, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253 (Tex. 2002), the court explained that:

> 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 the 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,***

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release. Therefore, the Court did not confirm or reject the lower court's reasoning with respect to oral offers.

> ***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 on both sides." *Id.* . . . Given the tactical considerations inherent in settlement negotiations, an insurer should not be held liable for failing to accept an offer when the offer's terms and scope are ***unclear or are the subject of dispute.***

Id. (emphasis added).

The Court determined that the oral offer was not a proper settlement demand in *Rocor* because the proposal did not clearly state the settlement's terms, nor did it mention a release. Accordingly, the court found that there was no extra-contractual liability.

No one should bank on the Supreme Court finding that a purely oral *Stowers* demand is sufficient. While the Court suggested that a "formal demand" is not absolutely necessary, the demand's terms "must, at a minimum, be 'clear and undisputed'. . . ." D. Plaut, "Stowers Update: New Aspects of An Old Claim," South Texas College of Law--Texas Ins. Law Symposium, I-8 (Jan. 26-27, 2006)(discussing and quoting *Rocor*). Oral offers are subject to dispute and are rarely likely to be "clear and undisputed."

c. Unconditional Offer

(1) General Rule

Texas courts have repeatedly held that conditional settlement offers are insufficient to impose *Stowers* liability. *Jones v. Highway Ins. Underwriters*, 253 S.W.2d 1018, 1022 (Tex. Civ. App.--Galveston 1952, writ ref'd n.r.e.). In *Insurance Corp. of Am. v. Webster*, 906 S.W.2d 77 (Tex. App–Houston [1st Dist.] 1995, writ denied), the court held that two offers that were conditioned on the insurer's representations about the limits of coverage were in fact conditional and thus failed to satisfy *Stowers*. Because other insurance was in fact in existence, the carrier could not accept the settlement offers. Thus, the court held that liability could not be imposed on that carrier.

The situation presented in *Webster* is very troubling. This author has been involved in at least one case where an interesting variation of the *Webster* problem

arose. In that case, the plaintiff demanded settlement for the "carrier's policy limits." The parties disputed whether the plaintiff's attorney had ever inquired about whether there were other policies with different companies and thus whether there had been any representations regarding this issue. Certainly, if the offer does not indicate that it is contingent on there being no other such policies, then the carrier would not be able to avoid the demand for limits regardless of whether it knew of the existence of an additional policy or not.

The clear message from *Webster* is that plaintiffs need to set up a misrepresentation of limits claim as a hedge on whether there is additional coverage some place other than in their *Stowers* offer. It could be handled by using interrogatories, simply relying on disclosures, or through separate correspondence. Discovery involving the insurer should also be considered where appropriate. *In re Dana Corp.*, 138 S.W.3d 298 (Tex. 2004) (involving discovery of policies and information regarding the status of the remaining limits of liability; discussing in part Tex. R. Civ. P. 192.3(f)). Also, protection could be incorporated into the final settlement documents after acceptance of the offer. None of these methods is perfect, but they do assist in avoiding the problem of rendering the *Stowers* demand ineffective.

In *Willcox v. American Home Assurance Co.,* 900 F. Supp. 850 (S.D. Tex. 1995), the offer was conditioned on payment by two insurers whose policies could not be stacked. The court found that the offer was *conditional* in that it stated that it was for the amount stated unless the insured could demonstrate the limits were less, in which case the demand was automatically amended to equal that lesser amount. *Id.* at 858. The court found this violated the conditional offer rule expressed in *Webster, supra.*

The determination that the offer was conditional is confusing and seems erroneous. The requirement of a "demonstration" by the insured of lower limits might be considered to be a prerequisite to the lowering of the offer to the actual limits. In any event, the offer is certainly murky and fails to meet the clarity test required by the Supreme Court.

(2) Combo Primary/Excess Offers Within the Aggregate Limits of Multiple Policies

(a) Offer In Excess of Actual Primary Limits and Conditioned on Primary Tendering

An offer including both excess and primary limits is the most typical scenario involving demands for the limits of more than one policy. It must be understood such offers generally have two critical problems:

(1) The offer is, as to the primary carrier, in excess of the policy limits;

(2) The offer is conditional as to the excess carrier unless and until the primary carrier tenders its limits of liability.

AFTCO Enterprises, Inc. v. Acceptance Indem. Ins. Co., 321 S.W.3d 65 (Tex. App.—Houston [1 Dist.] 2010, pet. denied). An offer in excess of the primary limits is unreasonable and will not activate *Stowers*. *Westchester Fire Ins. Co. v. Am. Contractors Ins. Co. Risk Retention Group,* 1 S.W.3d 872, 874 (Tex. App.-Houston [1st Dist.] 1999, no pet.).

The *AFTCO* court observed:

> This appeal requires resolution of whether a settlement offer triggers an insurer's duty to settle when the plaintiffs' settlement terms require ***funding from multiple insurers***, and ***no single insurer can fund the settlement within the limits*** that apply under its particular policy-an issue that the Texas Supreme Court has expressly left unanswered. *See Am. Physicians Ins. Exchg.,* 876 S.W.2d at 849 n. 13; *see also Birmingham Fire Ins. Co. v. Am. Nat'l Fire Ins. Co.,* 947 S.W.2d 592, 599 (Tex. App.-Texarkana 1997, writ denied) (quoting *American Physicians* in refusing to impose on primary carrier duty of care owed to excess carrier independent of primary insurer's duty to its insured; excess carrier could assert existing duty to insured through subrogation).

Id. at *4.

(b) Aggregation of Co-Primary Policies

The court in *AFTCO* concluded that the Supreme Court held in *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.,* 236 S.W.3d 765, 776 (Tex.2007), that where there was concurring coverage under two primary policies, an offer to settle that fell within the combined limits of those policies, but exceeded the limits of any one policy, was insufficient to invoke *Stowers* Thus, primary policies must be viewed separately in assessing whether a demand on aggregate limits is within limits of each such primary policy.

(c) Policies Involving "Several" Liability of Insurers

The court in *Yorkshire Ins. Co., Ltd. v. Seger,* 279 S.W.3d 755 (Tex. App.—Amarillo, Jun 20, 2007), held that claimants need not make proportionate demands on each of multiple underwriters/insurers combining to write an insurance policy. An aggregate demand within the stated limits is sufficient. The court reasoned:

> [W]e believe that a claimant should be entitled to rely on the specific provisions of an insurance policy in making a settlement demand that is within the coverage of the policy. That it is the policy that dictates whether a settlement demand was within policy limits is bolstered by the Texas Supreme Court's indication that 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. [*Am. Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842, 848-49 (Tex.1994).]

279 S.W.3d at 769.

(d) No Coverage Upon Which to Base Duty for Excess Until Primary Limits Are Tendered

The other key decision relied on by the court was that in *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.,* 20 S.W.3d 692, 701-02 (Tex.2000). In that case, the Supreme Court held, as noted by the *AFTCO* court, that the ***Stowers*** duty does not arise for an excess insurer until the primary carrier has tendered its limits. *Id.*

The *AFTCO* court noted that it had reached a similar conclusion in *West Oaks Hosp., Inc. v. Jones,* No. 01-98-00879-CV, 2001 WL 83528, at *10 (Tex. App.-Houston [1st Dist.] Feb. 1, 2001, pet. denied) (not designated for publication). In that case, the court held that hospital insurers did not violate their *Stowers* duty where the lowest settlement demand was $725,000, while primary insurance coverage was $500,000. ***The court declined to expand the Stowers doctrine by recognizing a duty where the settlement demand fell within aggregate amount of coverage provided by available layers of coverage, but in excess of the primary coverage.*** The court in *Jones* reasoned:

> Jones provides no authority to support his contention that the *Stowers* doctrine was triggered because his lowest settlement offer ($725,000) was within the amount of the first two layers of the Hospital's insurance coverage (primary-$500,00; first excess-$1.5 million), but the amount of the verdict exceeded that amount of coverage. It should also be noted that the amount of the verdict was within the Hospital's total amount of insurance coverage, $10 million. ***We decline Jones's invitation to expand the well-recognized boundaries of the Stowers doctrine.*** *See Keck, Mahn & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 20 S.W.3d 692, 702 (Tex. 2000); *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842 (Tex. 1994).

Id. at *10 (emphasis added). ***Importantly, the court warned that the demand before it was within the amounts for which the carriers were in fact solvent given their shares of the loss and financial condition at the time.*** The court thus suggested that the limits could in effect be reduced where one or more of the severally liable insurers was insolvent.

Under *Garcia,* coverage is a critical prerequisite to a *Stowers* duty applying. Expanding on the observations in *AFTCO,* it should be emphasized that excess carriers generally have no coverage and thus no duty to accept a settlement within their limits until there has been a tender of the underlying limits or exhaustion of underlying limits by the primary carrier. *Employers Nat. Ins. Co. v. General Acc. Ins. Co.,* 857 F. Supp. 549, 551 (S.D. Tex. 1994) (excess insurer had no duty to act vis-à-vis a settlement until the primary carrier "'tendered' its limits, which would allow [the excess insurer] discretion to use [the primary carrier's policy limit] as it saw fit"); *Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 701 (Tex. 2000); *KLN Steel Products Co., Ltd. v. CNA Ins. Companies,* 278 S.W.3d 429, 443 (Tex. App.—San Antonio 2008, pet. denied)(holding that excess insurer does not have to contribute to settlement until

primary insurance is exhausted; noting: "(T)he various insurance companies are not covering the same risk; rather, they are covering separate and clearly defined layers of risk.").

(e) Must The Excess Carrier Be Defending?

Apparently, according to some authorities, the excess carrier must also have taken over the defense of the case. *Keck, supra.* 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 approved), and to an excess carrier's right to sue a primary carrier, under the theory of equitable subrogation, to protect the excess carrier from damages for a primary carrier's wrongful handling of a claim, *see American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 483 (Tex.1992). Neither of those circumstances are present in the instant case.
>
> . . . .
>
> Under *Stowers,* the insurer's duty to the insured, extends to the full range of the agency relationship as expressed in the policy**.** *See Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656, 659 (Tex.1987). [emphasis added]. That duty may include investigation, preparation for defense of the lawsuit, trial of the case, and reasonable attempts to settle. *See American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d 842, 849 (Tex.1994) (opinion on motion for rehearing). Here, ***Alliance had no duty to investigate, negotiate or defend Emscor*** under the terms of the excess policy or at law, and ***never undertook those responsibilities on its own.*** *See Emscor,* 804 S.W.2d at 197–99. Therefore, Alliance had no duty under *Stowers* and Emscor has failed to state a *Stowers* cause of action.

879 S.W.2d at 909 (emphasis added).

This approach is consistent with language utilized in the opinion adopted by the Supreme Court 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 there predicated the duty 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.

(3) **Bulk Offers**

Bulk offers of the claims of multiple claimants are not per se ineffective. Bulk offers made involving separate limits available to separate claimants are ineffective and improperly conditional where the demand in effect asks a carrier to pay limits for a weak claim in order to get a release and settlement of a strong claim.

As discussed above, in *Rosell v. Farmers Texas County Mut. Ins. Co.*, 642 S.W.2d 278, 279 (Tex. App.–Texarkana 1982, no writ), the carrier refused to accept a bulk offer to settle for two occurrence policy limits where one of the two claims was not, in the carrier's opinion, worth a full single limit. The court held that the carrier did not have to pay more for the weak claim in order to get a settlement of the strong claim. *Accord Pullin v. Southern Farm Bureau Cas. Ins. Co.*, 874 F.2d 1055, 1056 (5th Cir. 1989) (Texas law). .

Roselle and *Pullin* present a single bulk offer conditioned on the payment of two separate limits on two separate claims. Thus, it has no application to an offer by multiple plaintiffs to settle all of their claims for a single limit. If the aggregated claims present a liability and damages exposure that a reasonable insurer would accept for a single limit, then the fact that they are made together should not make the offer unenforceable.

As usual, there is one catch. Where the plaintiffs have not reached an appropriate agreement as to how the settlement amount is to be divided, the offer may be ineffective. The plaintiff's counsel may not on his or her own make the allocation for the collective plaintiffs given the conflicting interests of those parties. The preferred manner for presenting such an offer is to actually disclose how the parties intend to allocate the funds, such as the judicial appointment of an independent party to in effect arbitrate and determine how the allocation is to be done.

Bulk offers for a single limit can actually make the *Stowers* case much stronger. The insured in such a setting obviously is given a chance of getting much more for the

money. The damages exposure to be considered allows combining all of the exposure reflected in the claims being settled.

(4) Bifurcated Offers—Waiting for the Satisfaction of the Condition

A conditional offer can become valid under Stowers if the condition is satisfied in time for the carrier to respond to the offer. Thus, a so-called bifurcated offer can become valid. Offers requiring a contribution by the insured and the carrier are problematic if simply combined. In other words, if you offer to settle for $1.2 million, with $200,000 from the insured and the limits from the carrier, the insured would have to tender before the offer would be unconditional as to the carrier. The offer to the carrier is conditioned on the insured tendering their portion. Timing it so that the carrier gets time to respond once the condition is satisfied is critical. Bifurcating the offer so that the condition comes first and then the carrier portion follows once the condition is satisfied, with a separate time for responding, avoids the difficulties experienced in published cases.

Again, one cannot make a bifurcated offer without making a conditional offer. For example, if the offer to the carrier is contingent on the insured kicking in some of its own money, then the offer is conditional. Can it never be a valid Stowers demand? Yes.

The Supreme Court certainly suggested in *Maldonado* that proof that the carrier was informed of the insured's willingness to satisfy the terms of the "condition" would likely be sufficient to trigger the carrier's duty to settle. In that case, of course, the carrier did not receive sufficient notice.

One approach to this problem is to make the bifurcated offer in such a fashion that the insured is given a certain amount of time to consider whether it wishes to contribute as requested, and if the insured agrees, it then must notify the carrier, whose own duty will run a specified number of days from the date of the insured's notice to the carrier of its acceptance of the terms.

The goal is to make clear that there is in fact a conditional requirement, provide the mechanism for its satisfaction and then allow a reasonable time after the condition is satisfied for the carrier to accept. This is intended not fit the rule that even when an offer is conditional, it will be binding when the specified conditions have occurred. *Webster*, 906 S.W.2d at 77.

A similar approach can be taken with excess carriers. In other words, the offer needs to clearly state what is expected from the primary carrier and what is expected from the excess carrier. The mechanism for the satisfaction of the condition that the primary carrier tender limits should be part of the demand. Without a tender, the excess carrier has no duty to settle, generally. For example, the following offer could be made:

Plaintiff A and B agree to provide a complete release, including the release of any liens or other encumbrances, for the following consideration:

1. $1 million paid by Slippery Rock Ins. Co. (primary);

2. $5 million paid by Mondo Excess Ins. Co. (excess).

This offer will remain open to Slippery Rock for thirty days. If Slippery Rock agrees to the tender of the designated amount as part of a total settlement of $6 million, it will then provide notice to the insured and/or Mondo Ins. Co. The offer will then remain open to Mondo to accept this offer for the additional amount of $5 million for a term of 15 days.

The thought obviously is that while the offer is initially conditional, the satisfaction of the condition sets the stage for an unconditional offer. The communication and time enlargement provisions seek to solve problems such as those in Maldonado.

A similar difficulty exists where there is a self-insured retention or sizeable deductible. A bifurcated offer may be required in such settings, particularly where the coverage above is not invoked until there is a tender or exhaustion of the deductible/SIR.

SIR's are troublesome in any event. The insured in control of its own money is often more intransigent regarding settlement than a liability insurer. Currently, Texas law holds that a self-insurer has no *Stowers* duty to settle.

d. Complete Release

(5) *Bleeker* and Hospital Liens

A split of authority has arisen after *Garcia* as to whether the demand must include a promise to provide a complete release to the insured. In *Birmingham*, *supra*, the

court held that a demand from an excess carrier that the primary carrier tender its limits did not satisfy *Stowers* because it did not propose to release the insured fully. 947 S.W.2d at 599-600 (*citing Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314 (Tex. 1994)).

In *Trinity Universal Ins. Co. v. Bleeker*, 944 S.W.2d 672 (Tex. App.–Corpus Christi 1997), *rev'd*, 966 S.W.2d 489 (Tex. 1998), the Court of Appeals held that the settlement offer did not need to specifically offer a complete release in conjunction with the demand for policy limits if the letter mentions the *Stowers* doctrine by name. Also, the fact that the settlement demand made no comment regarding how outstanding hospital liens were to be handled did not render the demand ineffective. *Id.*

The Supreme Court disagreed, stating:

> As a threshold matter, "a settlement demand must propose to release the insured fully in exchange for a stated sum of money."

Trinity Universal Ins. Co. v. Bleeker, 966 S.W.2d 489 (Tex. 1998). In *Bleeker*, the offers to settle did not indicate that certain hospital liens would be released as well. Thus, the court held that any implied release was not a full release in the context of that case. *Id.* at 491.

One question left open by *Bleeker* is whether there is any available method for proving that the offer included a full release. In other words, if the letter did not state as much, then could common practice and understanding or even subjective testimony from the plaintiff's attorney supply the missing element? The Supreme Court appears to be moving towards greater certainty as to the terms and communication of the terms of *Stowers* demands. The emerging rule appears to be that *Stowers* demands are disfavored and thus must strictly and expressly comply with the applicable rules or be found insufficient to invoke the tort remedy of an extra-contractual claim. Thus, like conditions of forfeiture, the *Stowers* demand is disfavored in part because of its drastic potential consequences. Needless to say, the *Bleeker* ruling has led to a number of malpractice claims against plaintiff's counsel based on failed *Stowers* demands.

Another issue that has not been addressed since *Bleeker* is whether that decision requires a specific reference to liens if there are in fact no liens. Can a carrier attack an otherwise valid *Stowers* demand where the plaintiff fails to state liens will be released if

there are in fact no liens. Similarly, can this issue be raised if the liens are legally ineffective or unenforceable?

Since Bleeker, at least two cases have discussed *Bleeker* negatively. The first was in *Watters v. Guaranty Nat. Ins. Co.,* 300 Mont. 91 (2000). This Montana case declined to follow the holding in *Bleeker.* It also involved an automobile accident. The insurer argued that there was no valid settlement offer because there was not a full release offer. In effect, the insurer defined "settlement offer" to mean an offer within the policy limits in exchange for a full and final release. The *Guaranty* court concluded that the statutory cause of action at issue there did not include a definition of "settlement." The court held that treating a "settlement offer" as requiring an offer of a full release including liens in effect added words that the legislature did not include in the first instance. The court held that a "settlement" between the two parties was legally possible without executing full and final release of all liability.

The second case that discussing and applying *Bleeker* is *Nationwide Mut. Ins. Co. v. Chaney,* 2002 WL 31178068 (N.D. Tex. 2002). The claimant tried to rely upon an implied release of lien, urging that she never excluded a release of any pertinent lien. The court held that absent an offer to fully release that complies with section 55.007(a) of the Texas Property Code, there is no valid *Stowers* demand. The court found that the letter demand did not expressly or impliedly release the lien. The decision was affirmed by the Fifth Circuit on other grounds. 78 Fed. Appx. 348 (5th Cir. 2003).

(6) ***Home States*—Clarification Re Liens**

A significant decision regarding liens and the details surrounding them in the Stowers context was released last year. In *McDonald v. Home State County Mut. Ins. Co.,* 2011 WL 1103116 (Tex. App.-Hous. [1st Dist.] Mar 24, 2011), the demand letter stated that "full and final settlement of McDonald's claims could be made 'in exchange for payment to Edward McDonald' of the 'total amount of liability insurance available to cover your insured in this matter.'" *Id.* The court held: "To the extent the demand was intended to invoke the *Stowers* doctrine, its terms should have either made ***express reference to the liens*** or at least should not have instructed express terms for acceptance which ***left the insurer exposed to the risk of liability to the hospital***. *See Bleeker*, 966 S.W.2d at 491. McDonald's demand letter therefore failed to propose reasonable terms such that an ordinarily prudent insurer would have accepted them and assumed for itself the risk that the liens would be enforced. *See Phillips*, 288 S.W.3d at 879." *Id.* at *7 (emphasis added).

The court reached a number of important, discrete conclusions regarding the sufficiency of the demand:

(1) The court refused to find that a full release including liens was "implicit" in the offer;

(2) The carrier failed to ask for clarification and did not include liens in its own proposals regarding settlement;[8]

(3) ***The court refused to supplement the letter's terms based on the adjuster's admission that a full release including liens was standard and expected;***

(4) ***The court rejected arguments that the lien was invalid and thus irrelevant, thus justifying holding the demand was sufficient.***[9]

(5) A reference in the letter that it was intended to be consistent with the *Stowers* doctrine did not supply the missing requisites regarding liens;

The court noted that the insurer was informed by the hospital that it was seeking recovery under the lien ***before the settlement demand from the plaintiffs expired.*** *Id.* at *6. ***Query whether the carrier must actually know of the lien in order to challenge whether the demand offered a full and complete release.*** *Id.*

The court placed emphasis on the fact that the demand letter specifically instructed that payment of the settlement was to be made to the plaintiff, by and through his counsel. The letter further warned that any variation from its terms in the acceptance would be deemed to be a rejection of the demand. The court reasoned: "These express instructions in the settlement demand subjected the insurer to a risk that

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[8] "Evidence about the insurers' claims investigation and conduct during settlement negotiations is "necessarily subsidiary to the ultimate issue" of whether McDonald's demand itself was such that an ordinarily prudent insurer would accept it. *Garcia*, 876 S.W.2d at 849. Moreover, the failure to mention hospital liens in subsequent correspondence does not indicate that the insurers would not have required protection from liens in any formal documentation of a settlement-none of the insurers' communications were framed in the take-it-or-leave-it manner of McDonald's exploding demand letter." *Id.* at *6.

[9] "The record shows that the adjuster was aware of the existence of a purported hospital lien before the settlement demand expired, but it does not indicate whether the insurers saw the actual lien. We conclude, however, that the validity of the lien itself is irrelevant to whether the demand letter triggered a *Stowers* duty." *Id.* at *7.

a settlement on the offered terms would not be a full one." *Cf. Bleeker*, 966 S.W.2d at 491."

(7) *Pride* Transportation—All Insureds? All Claims?

In *Pride Transportation v. Continental Casualty Co.*, 511 Fed.Appx. 347 (5th Cir. 2013)(Smith, J.)(Texas Law), the parties agreed "that the insurers did not reject any demands" to settle as to either of two insureds, but, instead, the case involved "the insurers' liability for accepting a demand." *Id.* at *4. The court flatly refused "to use this case . . . to extend the *Stowers* duty to impose liability on insurers for accepting demands."

The insureds, Pride Transportation and its employee Harbin, were sued for severe injuries suffered by Wayne Hatley, including paraplegia, and for derivative damages suffered by the family. Pride had a $1 million primary automobile liability insurance policy with Continental and a $5 million excess/umbrella policy with Lexington. The same defense counsel initially represented both Harbin and Pride. His initial reports in the case indicated that attempts to seek an early settlement would be appropriate. After damaging testimony regarding falsification of records came out at Harbin's deposition, the defense counsel ceased representing Pride and continued to represent Harbin.

Just a short time after separation of the defense, the claimants made an offer to settle within the combined limits of the primary and excess policies to Harbin. The offer expressed reserved any and all claims the claimants had against Pride:

> "This demand shall in no way release Plaintiff's claims asserted against Pride Transport either for its direct negligence of for its responsibility under the *respondeat superior* or statutory employer doctrine."

Pride sought to convince Continental to tender its limits to Lexington so efforts to obtain a settlement for *both* insureds could be pursued. Continental tendered, and Lexington took control of the defense of the suit. The claimants rejected inquiries from Lexington as to a joint settlement with both insureds. Pride sought a joint counter-offer of $5 million for both insureds, but Harbin and her counsel refused to agree to this approach. Harbin demand acceptance of the demand within the total limits. Pride made clear that it had and would bring a claim for common law indemnity against Harbin even if Harbin settled. The settlement offer to Harbin did not in any way

protect Harbin from common law indemnity claims made by Pride. Nevertheless, Lexington complied and exhausted the limits of both policies.

Pride eventually settled with the Hatley's for $2 million "conditioned on Pride's recovery against the product-manufacturer defendants and the insurers. " Pride filed an indemnity claim against Harbin. The carriers refused to defend Harbin based on exhaustion of the policy limits from the settlement with the Hatley's. A default judgment was taken against Harbin. Harbin assigned her rights against the carriers to Pride, which brought suit against the carriers in federal court.

The district court in Pride granted summary judgment to the insurers. The Fifth Circuit affirmed. The court began its analysis by noting that third-party liability insurers have liability under *Stowers* for failure to settle and under breach of contract, but no other theory of tort liability is available. Id. at *11. The court treated the scenario presented as one involving multiple claimants, the Hatley's and Pride (indemnity). Accordingly, the court held that the only liability question was whether the settlement with the Hatley's was reasonable, viewing only the claims and exposure presented by the Hatley's. Id. The fact that the settlement eliminates coverage for another insured or for a second claim against the same insured may not be considered in determining if the settlement is reasonable. Id.

The Fifth Circuit in *Pride* reasoned: "'To be unreasonable, [Pride] must show that a reasonably prudent insurer would not have settled the [Harbin] claim when ***considering solely*** the merits of the [Harbin] claim and the potential liability of its insured on the claim.'" Id. at 316 (emphasis added). Pride argued that the settlement between the Hatley's and the Harbin's was unreasonable because it did not offer a complete release to Harbin since the indemnity claim was left open. Pride urged both the Hatley claim and the indemnity claim were based on the same conduct of Harbin and thus required a release of both potential claims.

The Fifth Circuit rejected Pride's arguments, noting that the indemnity claim could not affect the reasonableness of the settlement because the indemnity claim was not covered. The court noted that "the Lexington policy explicitly exempts claims or suits brought by one insured against another." *Id.* at *14. In Texas, a carrier has no responsibility under *Stowers* for accepting settlements involving claims or parts of claims that are not covered by the policy. *Id.* at *15 (citing and quoting *St. Paul Fire & Marine Ins. Co. v. Convalescent Services, Inc.*, 193 F.3d 340, 345 (5th Cir. 1999)). Thus, the court side-stepped the issue of whether the Hatley's offer to Harbin was reasonable in

light of the failure to include protection from the indemnity claim. Indeed, the court stated: "Although a full release is required to trigger a Stowers demand, we need not determine whether the Settlement satisfies, or even if it is required to satisfy, that prerequisite." *Id.* at n. 15.

The court refused to address whether a prerequisite to *Soriano* protection applying is that there has to have been a completely valid *Stowers* demand that was accepted. If the release offered was not a complete release, i.e., indemnity was left open, then one would think that the offer did not satisfy *Stowers.* The simple fact of the matter is that no reasonable person would pay $6 million to get a release from the claimants, but remain exposed to precisely the same liability on an indemnity claim. Indemnity is a derivative claim. *Stowers* requires the carrier to consider the interests of the insured and not just the insurer's own interest. Thus, whether the indemnity claim was covered or not under the Lexington policy has nothing to do with whether the acceptance of an offer to settle direct liability is reasonable given the continuing exposure of the same insured to the same liability.

e. Identification of Parties

The demand letter should clearly identify who is making the offer and to whom it is being made. This author frequently sees demand letters where there is confusion over who is offering and which entities are to be released. Vagueness or confusion in the letter imperils the chances the demand will stick.

Ethical issues obviously exist regarding joint plaintiff offers by a lawyer representing a group of plaintiffs. It is unclear whether a carrier would have the right to challenge the sufficiency of a demand based on ethical considerations.

In *Home State County Mut. Ins. Co. v. Horn*, 2008 WL 2514332 (Tex. App.-Tyler, Jun 25, 2008), the demand letter offered a release of the insured, which referred to one insured. The judgment in excess of limits was taken as to a different insured. Oral testimony cannot amend or supplement the letter to make clear that both insureds were intended to be covered, even if the testimony is provided by the adjuster.

f. Timing or Buying Time

(1) Practical Thoughts

Determining when to send the demand requires careful consideration of the reasonableness standard. The carrier needs to have had a reasonable opportunity to ascertain the basic facts impacting the liability and damages exposure in the case. This will thus result in timing be varied based on the nature of the case.

Few pre-suit *Stowers* demands will succeed. Most carriers do not even hire an attorney for the insured until after suit has been filed. They have no obligation to defend until a suit has been tendered to them by the insured.

The biggest problem for claimants regarding timing is consideration of whether there are multiple claimants and limited limits. *Soriano* encourages a race to make the *Stowers* offer. This pits one plaintiff's attorney against another.

The "me first" attitude is protective, but dangerous. If there has not been time to adequately asses the financial position of the defendant/insured, settling for low limits could result create malpractice exposure for the plaintiff's counsel.

One solution is for plaintiffs' counsel to band together early and seek a joint solution. One would expect this would require some form of agreement or consent from the clients as well. This approach assures no one will take the money and run. All concerned can assess the financial condition of the insured and make intelligent choices without a time-crunch.

Another solution is to seek to include in the pre-trial scheduling order an agreement or an order barring settlement and exhaustion of funds by a single party. Where coverage issues exist, the trial court can arrange to have such issues decided in a separate declaratory action. The best approach is to confirm any such arrangement with a Rule 11 agreement that is enforceable.

Timing can also be affected by pending, important coverage decisions. The pendency of the issue of the insurability of punitive damages is one example.

(2) Reasonable Time Limits

Most plaintiffs believe that short time limits increase the pressure on the carrier. It typically does not. Remember that the time within which the offer can be accepted will be part of the determination of whether the carrier was reasonable in refusing to settle. *American Ins. v. Assicurazioni Generali*, 228 F.3d 409 (5th Cir. 2000)(Texas law); *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595 (Tex. App.-Tyler 1984, no writ)(upholding negligence finding where 14 day time limit was given). Thus, the shorter the time provided, the more likely it is that the carrier's position of reasonableness is enhanced.

Recently, in *Bramlett v. Medical Protective Ins. Co.*, 2013 U.S. Dist. LEXIS 31044 (N.D. Tex. March 5, 2013), the court held that the fact the plaintiff's expert first provided an opinion critical of the insured five days before a *Stowers* demand was made, with a 14 day time limit, raised a fact issue as to reasonableness and could not be used as a matter of law defense. *Id.* at *19. The court reasoned:

> To begin with, the court recognizes that ***there may be cases in which an insurer has so little time to respond to a Stowers demand that no reasonable jury could find that it failed to act as a reasonably prudent insurer by rejecting the demand.*** But apart from such cases, the question whether an insurer has had a reasonable amount of time to respond to a Stowers demand will generally present a quintessential, constituent fact issue that is subsumed within the jury's application of the reasonably prudent insurer standard. In the present case, the court cannot say, as a matter of law, that MedPro had insufficient time to accept the second Stowers demand. This question is one of fact that must be resolved by the trier of fact.

Id. at *19-*20 (emphasis added).

The best philosophy is to "give them as much rope as they want." A basic thirty-day offer is standard. Freely granting extensions is also advisable. If the carrier obtains extensions and then refuses to settle, there are any number of negative implications harmful to their defense of the *Stowers* suit. Failing to give them the time again potentially gives them an out.

III. BASIC DUTIES AND DEFENSES

A. Duty

1. Impact of Sources and Nature

In *Stowers*, the court set forth the basic cause of action for the negligent failure of a carrier to accept a settlement offer within the policy limits of a liability policy. *Id.* at 547. Unlike some other jurisdictions, a carrier in Texas has no duty to initiate or make settlement offers absent a valid *Stowers* demand. *American Physicians Insurance Exchange v. Garcia,* 876 S.W.2d 842, 849 (Tex. 1994) (holding carrier has no duty to "make or solicit settlement proposals.").

Stowers is a negligence standard: "[A]n indemnity company is held to that degree of care and diligence which a man of ordinary prudence would exercise in the management of his own business." *Stowers*, *supra*. Thus, Texas has rejected theories of strict liability for excess judgments followed in some jurisdictions.

In *Stowers*, the court held that the right to control the defense and settlement of the underlying claim supported the duty to act reasonably regarding settlement demands within limits. The Court observed:

> As shown by the above-quoted provisions of the policy, the indemnity company ***had the right to take complete and exclusive control of the suit against the assured***, and the assured was ***absolutely prohibited from making any settlement, except at his own expense,*** or to interfere in any negotiations for settlement or legal proceeding without the consent of the company; the company reserved the ***right to settle*** any such claim or suit brought against the assured. Certainly, where an insurance company makes such a contract; it, by the very terms of the contract, ***assumed the responsibility*** to act as the exclusive and absolute agent of the assured in all matters pertaining to the questions in litigation . . . .

15 S.W.2d at 547 (emphasis added). As will be discussed more fully below, a number of decisions have held that an excess carrier cannot be subject to *Stowers* unless and until it has an obligation to defend or has assumed the duty to defend.

As the quote above demonstrates, at least three critical things were found important in terms of the contract in *Stowers* and the determination that a duty to exercise due care with regard to settlement existed:

1. A duty to defend and control of that defense.

2. Control of settlement and everything related to it, including negotiations, etc.

3. The insured is prohibited from settling on his or her own, unless at his or her own expense.[10]

See, e.g., American Western Home Ins. Co. v. Tristar Convenience Stores, Inc., 2011 WL 2412678, *2 (S.D. Tex., Jun 02, 2011)(Werlein, J.).

In *Rocor International, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 77 S.W.3d 253 (Tex. 2002), the Court held that the duty to settle may attach to an excess carrier that has no duty to defend under the terms of the contract but ***which exercises or assumed control*** over the settlement process. Accordingly, a duty may arise as a result of a ***voluntary assumption of the duty***.

"A *Stowers* claim is not a "bad faith" claim. *Maryland Ins. Co. v. Head Indus. Coatings and Services, Inc.,* 938 S.W.2d 27, 28 (Tex.1996); *Garcia,* 876 S.W.2d at 847; *cf. Arnold v. National County Mut. Fire Ins. Co.,* 725 S.W.2d 165, 167–68 (Tex. 1987) (recognizing an insurer's duty, sounding in tort, to deal fairly and in good faith with its insured). However, the *Stowers* claim does sound in tort based on the negligence of the insurer in performing its obligations to its insured under the policy. *See Maryland Ins. Co.,* 938 S.W.2d at 28; *Soriano,* 881 S.W.2d at 314; *see also Universe Life Ins. Co. v. Giles,* 950 S.W.2d 48, 60 (Tex.1997) (Hecht, J., concurring)." *Southern County Mut. Ins. Co. v. Ochoa,* 19 S.W.3d 452, 466-67 (Tex. App.-Corpus Christi, Mar 02, 2000).

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[10] "In Texas, an insurer whose policy does not permit its insured to settle claims without its consent [FN19] 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)); *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's basis in part "upon the insurer's control over settlement")." *American Western, supra,* at *2.

Of course, there is some disagreement of sorts in the case law. "The crux of the *Stowers* claim is negligence or bad faith by the insurer directed against the insured." *Foremost County Mut. Ins. Co. v. Home Indem. Co.,* 897 F.2d 754 (5th Cir. Tex., Mar 21, 1990) "The *raison d'etre* for the *Stowers* doctrine is that the insurer, when in control of the litigation, might refuse a settlement offer that its client, the insured, would want to accept if it had the option." *Id.* at 758.

Returning to the source, it would appear that *Stowers* itself focuses on due care, *not good faith.* In *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842 (Tex. 1994), the Supreme Court held that "the terms of the [plaintiff's settlement] 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." Under this negligence standard, the issue is *not focused on good faith* or whether the carrier had some improper motive. Instead, it is focused on whether the carrier exercised *due care*. *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches,* 215 S.W.2d 904 (Tex. Civ. App.-Beaumont 1948, no writ).

A carrier is not liable simply because the settlement determination subsequently proves to have been wrong. *Id.* at 928. Indeed, even where the plaintiff has proof that would make out a prima facie case of liability against the insured, the carrier is afforded discretion within the scope of due care to reject a demand within limits. *Id.* Thus, a *mere error in judgment* will not result in the carrier being found to have acted unreasonably; the carrier is afforded some degree of discretion in deciding whether to settle or not. *Id.* A mistake in judgment is not an absolute defense, however, and it is but one of the objective factors that makes up "due care." *Jones v. Highway Ins. Underwriters*, 253 S.W.2d 1018, 1023 (Tex. Civ. App.--Galveston 1952, writ ref'd n.r.e.). Thus, analysis of the demand and the reasonableness of accepting it depend upon consideration of the "the likelihood and degree of the insured's potential exposure to an excess judgment." *Id.* The Court has stated that an "***objective assessment of the insured's potential liability***" is required. *Franks, supra.* In other words, one may not necessarily consider subjective factors such as whether the insured has few if any funds. The standard, even if viewed from the insured's perspective, is still one of objective reasonableness, not subjective reasonableness.

A bad result alone does not prove negligence. It is clear that the mere fact that a judgment is entered in excess of policy limits does not mean that the carrier is automatically liable for the excess amount. Thus, the fact a decision to reject an offer

within limits proves to be wrong does not by itself create liability under *Stowers. Chancey v. New Amsterdam Cas. Co.,* 336 S.W.2d 763 (Tex. Civ. App.—Amarillo 1960, no writ). Only due care is required, and due care "leaves room for an error of judgment, without liability necessarily resulting." *Id.*

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 held that a carrier, in deciding whether to settle, must "exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances . . . ." The carrier should give the interests of the insured at least as great a consideration as the carrier's own interests.

2. Perspective

The Supreme Court has stated two different standards in its various decisions regarding the *Stowers* doctrine. In the decision in *Stowers* itself, the Supreme Court described the standard as being a reasonable person standard measured from the ***standpoint of the insured:***

> As shown by the above-quoted provisions of the policy, the indemnity company ***had the right to take complete and exclusive control of the suit against the assured***, and the assured was ***absolutely prohibited from making any settlement, except at his own expense,*** or to interfere in any negotiations for settlement or legal proceeding without the consent of the company; the company reserved the ***right to settle*** any such claim or suit brought against the assured. Certainly, where an insurance company makes such a contract; it, by the very terms of the contract, ***assumed the responsibility*** to act as the exclusive and absolute agent of the assured in all matters pertaining to the questions in litigation, and, as such agent, it ought to be held to *that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business; and if an ordinarily prudent person, in the exercise of ordinary care,* ***as viewed from the standpoint of the assured,*** *would have settled the case, and failed or refused to do so, then the agent, which in this case is the indemnity company, should respond in damages.*

G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved)(emphasis added). The court added: "Where one acts as

agent under such circumstances, he is bound to give the rights of his principal at least as great consideration as he does his own." *Id.* But, the court also more vaguely stated: "[A]n indemnity company is held to that degree of care and diligence which ***a man of ordinary prudence*** would exercise in the management of his own business." *Stowers*, *supra* (emphasis added).

In *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 WL 1252321, at *1 (Tex., May 27, 2005), the Court noted the contrary standard:

> We have said that the duty imposed by *Stowers* is to "exercise 'that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business.'" We have also said that the *Stowers* duty is viewed from the ***perspective of an insurer:*** "the terms of the demand are such that an ordinarily prudent insurer would accept it." ***Both statements are correct.***"

Frank's, supra. Interestingly, this discussion was omitted after rehearing in the Court's second opinion in *Franks.*

Undoubtedly, the insured's perspective, if adopted as the true standard, would seem to place more emphasis on consideration of settling when liability is unlikely but the damages are potentially catastrophic. Nevertheless, it should noted that the statutory standard under Tex. Ins. Code section 541.060 is from the perspective of the carrier, was the liability of the carrier reasonably clear. Nevertheless, the Court has otherwise held that *Stowers* defines what is reasonably clear. *Rocor International, Inc. v. Patterson National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253 (Tex. 2002).

B. Reasonableness—What the Carrier Knew or Should Have Known?

In *Bramblett v. Medical Protective Ins. Co.*, 2013 U.S. Dist. LEXIS 31044 (N.D. Tex. March 5, 2013), the court held that the fact that the carrier had not yet received statutorily required medical expert reports supporting the malpractice claim as of the time of the demand time limit did not amount to a defense as a matter of law to a *Stowers* claim. *Id* at *7. The court held that where the carrier was shown to be "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," a fact issue was presented. *Id.* at *14. Thus, the basis for the reasonableness evaluation does not appear to be limited to evidence developed and provided by the claimant or its

experts. Evidence the carrier had before it or could have had before it would appear to be an antidote to any attempt to avoid *Stowers* liability as a matter of law.

C. Fleshing Out the Standard—Legal Sufficiency Decisions

1. Advice of Counsel Not Controlling

In *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.,* 215 S.W.2d 904, 929 (Tex. App.--Beaumont 1948, writ ref'd n.r.e, the court held that reliance on the advice of defense counsel was *not* a complete defense to a *Stowers* claim. The court observed:

> Whether Alexander's offers should be accepted was a matter for the authorized and responsible officer of Insurer to decide; that he ***had the benefit of the opinion of the lawyers defending Insured*** is only a circumstance bearing on the issue of negligence and the standard of care required of lawyers has nothing to do with the case before us as was in effect held in American Indemnity Co. v. G. A. Stowers Furniture Co., Tex. Civ. App., 39 S.W.2d 956. To hold otherwise would abrogate the standard of conduct expressed in the quotations above.

Id. at 928.

2. Evidence of a Prima Facie Case of Liability Is Not Enough Alone

The court in *Lufkin* also noted that the single fact that the claimant's "proof made out a prima facie case of liability against [the] Insured did not automatically and as a matter of law subject Insurer to liability (under the applicable standard of conduct) for rejecting [the claimant's] offers." *Id.*

3. A Mere Difference of Opinion Does Not Prove Liability or the Lack of Liability—It Presents a Fact Question

The court in *Lufkin* also noted: "[T]he fact that room for a difference of opinion exists eventually makes the question one for the jury, not for this court." *Id.*

4. Material Conflicts in Testimony and Other Credibility Issues Can Impact the Reasonableness of the Decision Not to Settle

A conflict in testimony or issues affecting the credibility of witnesses is a consideration in determining the reasonableness of the refusal to settle. *Lufkin, supra.*

5. Where Damages Are Certain to Be Heavy

The decision not to settle can be made to appear less reasonable where the damages were certain to be very large and the liability suggests that it is more likely than not that the insured will be found liable. *Id.*

D. Other Factors?

In *Globe Indem. Co. v. Gen-Aero, Inc.,* 459 S.W.2d 205 (Tex. Civ. App.—San Antonio, Oct 07, 1970), the court summarized a somewhat outdated collection of factors in evaluating reasonableness:

> Certain guide lines in determining whether an insurer is negligent in failing to accept an offer to settle are set forth in an excellent comment in 38 Texas Law Review 233, 'Insurer's Liability for Judgments Exceeding Policy Limits', supra, and in the case of *Highway Ins. Underwr. v. Lufkin-Beaumont Motor Coaches, Inc.,* 215 S.W.2d 904 (Tex. Civ. App.—Beaumont 1948, writ ref'd, n.r.e.). These may be summarized in part 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).[11]
>
> (C) Failure to investigate all the facts necessary to protect properly the insured against liability.

[11] This factor has been supplanted by the rule from *Garcia* that a carrier has no duty to initiate or move settlement negotiations forward.

(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).[12]

(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.

*Id.*at 208.

E. Subsidiary Considerations

In *Garcia*, the court had stated that in the context of *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 a reasonable insurer would accept it.'" *Id.* Thus, these factors are part of the basic considerations regarding liability and damages exposure that are a part of the basic *Stowers* test.

F. Jury Instructions

1. Bad Result

In *Chancey v. New Amsterdam Cas. Co.,* 336 S.W.2d 763 (Tex. Civ. App.-Amarillo, May 31, 1960), the court upheld the following instruction given to the jury in a *Stowers* case:

> "You are instructed that under the law in Texas, an insurer is required to exercise ordinary care in considering whether an offer of settlement should be accepted, but an insurer does not necessarily become liable merely because the decision to reject an offer of settlement proves to be wrong; in other words, the duty to

[12] This factor is also outdated. As noted above, the duty under *Stowers* is one of objective reasonableness or due care, not subjective bad faith or motive.

> exercise ordinary care leaves room for an error in judgment without liability necessarily resulting therefrom."

Id. at 765. The court explained:

> As stated above in the *Stowers* case, due care is the required burden placed on the insurer in these cases. Other cases decided since the *Stowers* case have uniformly followed this basic principle. As stated in *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches*, Tex. Civ. App., 215 S.W.2d 904, 928: 'Only due care is required of Insurer, and therefore we agree with Insurer that Insurer did not become liable to Insured merely because a decision to reject Alexander's offers proved to be wrong. Due care leaves room for an error of judgment, without liability necessarily resulting.'

Id.

G. Varying the Elements?

In *Garcia, supra,* the court summarized the *Stowers* elements as follows:

> (1) [T]he claim against the insured is within the scope of coverage [at the time the offer is made], (2) the demand is within policy limits, and (3) the terms of the demand are 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. The courts have refused to allow variations on *Stowers* that go outside of the *Garcia* elements. For example, in *Fulks v. CIGNA Lloyds Ins. Co.*, 1996 Tex. LEXIS (Tex. App.–Houston [1st Dist.], July 25, 1996, no writ), the court held that absent coverage, *Stowers* did not apply. The court rejected arguments that liability could be predicated on the failure of the carrier to communicate its position regarding coverage, thus resulting in the claimant continuing the suit and not settling for the meager available policy limits.

H. Must The Insured Demand That The Carrier Accept The Demand?

In *Lufkin, supra,* the court held that it was "not a defense to Insurer that Insured did not demand acceptance of [the claimant's] offers. Insurer must perform the duty imposed upon it ***without being activated by Insured.***" (Emphasis added.)

I. Is The Insured's Opposition To Settlement A Defense?

Undoubtedly, a forced turnover of an insured's potential *Stowers* action may not be made if the insured agreed with the carrier's refusal to settle and/or the insured did not believe the carrier did anything wrong. *Nationwide Mut. Ins. Co. v. Chaney*, 2002 WL 31178068. *4 n. 5 (N.D. Tex. 2002). *Charles v. Tamez*, 878 S.W.2d 201, 208-209 (Tex. App.–Corpus Christi 1994, writ denied)(holding that insured's right to sue insurer for failure to settle under the *Stowers* doctrine is subject to equitable subrogation and assignment; however, due to public policy concerns about the relationship between insurers and insureds, the court affirmed the judgment denying turnover of the *Stowers* claim, because the insured refused to assert the claim and denied dissatisfaction with his insurer)).

The court in *Gulf Ins. Co. v. Jones,* 2003 WL 22208551 (N.D. Tex., Sep 24, 2003), found that the insured's own evaluation that the case should not be settled for the amount demanded was a fact to be considered in determining the reasonableness of the rejection of a settlement demand within limits. The carrier will not be found to have acted unreasonably if it erroneously believed the insured's consent to settlement was required, so long as it had a basis for determining the demand was otherwise unreasonable. *Id.*

The court in *Continental Cas. Co. v. St. Paul Fire & Marine Ins. Co.,* 2007 WL 2403656 (N.D. Tex., Aug 23, 2007), held that "the *Stowers* duty exists even absent a demand by the insured that the insurer accept the offer."

The court in *American Ins. v. Assicurazioni Generali,* 228 F.3d 409 (5th Cir.(Tex.), Jul 24, 2000), indicated that consent may be a defense to a *Stowers* claim in the context of an equitable subrogation claim by an excess carrier against a primary carrier. The court noted the defense was not established as a matter of law where fact issues existed as to whether the insured was "adequately informed of settlement negotiations and trial proceedings . . . ." *Id.* at *9. Moreover, any such defense would require, the court observed, an "unequivocal decision by the insured to refuse the offer." *Id.*

In *Admiral Ins. Co., Inc. v. Arrowood Indem. Co.,* 2012 WL 1081776 (N.D. Tex., Mar 30, 2012), the court held that the failure of the insured to demand payment of additional limits under a separate, additional primary policy did not negate the duty of that primary carrier to settle. The limits and exhaustion are determined by the terms of the policy, not the insured, and the insured does not have unilateral power to determine exhaustion. Moreover, the court held that the insured's actions will not estop the excess carrier from urging the primary should have settled under *Stowers*. An "insured [cannot] decrease its primary policy limits in a way that was detrimental to its excess carrier." *Id.* (discussing *Royal Insurance Company of America v. Caliber One Indemnity Company*, 465 F.3d 614 (5th Cir.2006)).

The Fifth Circuit's opinion in *OneBeacon Insurance Company v. T. Wade Welch & Associates*, 841 F.3d 669 (5th Cir. 2016), suggested that where a company policyholder makes clear to the carrier that it only wants all claims and insureds settle, not piecemeal or partial settlements (leaving some insureds behind), the carrier cannot accept a settlement unless all insureds are included. The court held:

> 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. *Patterson v. Home State Cty. Mut. Ins. Co.*, No. 01–12–00365–CV, 2014 WL 1676931, at *10 (Tex. App.—Houston [1st Dist.] Apr. 24, 2014, pet. denied) (mem. op.).[10] 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 of the claims against both [the employer and the employee.]' " *Id.*

Id.

J. If There Is Alleged Confusion or Vagueness In The Offer, Must The Carrier Ask For Clarification?

In *Nationwide Mut. Ins. Co. v. Chaney*, 2002 WL 31178068 (N.D. Tex. 2002), the court held that a carrier need not inquire from the plaintiff as to any confusing or omitted elements of the demand made by the claimants. The court observed: "That Nationwide never affirmatively demanded or required a settlement offer that included

a full release does not change the result, because Nationwide, as the insurer, did not have the burden of making a valid *Stowers* settlement offer. *Garcia*, 876 S.W.2d at 851 (court concluded that public interest favoring early dispute resolution supported its decision not to shift the burden of making settlement offers under Stowers onto insurers)." *Id.* at *4

If the demand offers to answer any questions regarding any purported uncertainty, this would appear to go a long way towards solving the problem presented by *Chaney.* If a carrier is to give the interests of the insured in mind, then would that not include seeking clarification of an offer considered vague or even ambiguous? Further, would defense counsel not have an obligation to seek clarification, on behalf of the real client, regarding issues he or she knows to be considered "defects" by the carrier?

K. Can The Carrier Urge Technical Defects As Defense To A *Stowers* Claim If It Did Not Actually Rely On Those Defenses In Refusing To Accept the Offer To Settle At Issue?

Very often, carrier's counsel will come up with a vast numbers of reasons why a given *Stowers* demand is ineffective that were not the actual basis for the rejection of the demand. In fact, carriers typically do not mention in their written responses to demands the precise basis for rejection, stating opaquely that the "demand fails to satisfy *Stowers."* Should they do so? Must they do so? More precisely, is a carrier limited to the defenses to the demand that existed and that it was relying upon at the time it rejected the demand?

Post-hoc rationalization for invalidating a *Stowers* demand appears to have been rejected by the Fifth Circuit in *Am. Ins. v. Assicurazioni Generali*, 2000 WL 1056143 at *8 (5th Cir. 2000). The court there held::

> when considering whether to accept the Hinger plaintiffs' offer, Reynaud was not concerned with any future liability stemming from the structured settlement provision. *Generali's position in this litigation that the offer was conditional gives the impression of being a* ***post-hoc rationalization****.* There is no evidence whatever that Reynaud or anyone else on behalf of Generali ever concluded (or was advised)-certainly not prior to the institution of this suit by the Excess Carriers-that the settlement offer might be so construed as to authorize imposition of liability on Generali in the event the annuity company defaulted in the periodic payments to the Hinger

> plaintiffs that presumably would be called for under a structured settlement.

Id. at *8 (emphasis added). The law generally suggests that the focus of inquiry is focused on what was believed at the time of the demand. *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172 (Tex. App. – Fort Worth 2004, pet. denied). *But see McDonald v. Home State County Mut. Ins. Co.,* 2011 WL 1103116 (Tex. App.-Hous. [1st Dist.] Mar 24, 2011), discussed *supra.*

IV. NO DUTY OWED TO CLAIMANTS

A liability insurance carrier owes no duty to the claimant with respect to settlement under *Stowers,* good faith and fair dealing and/or claims under the Insurance Code for failing to settle when liability is reasonably clear. *Maryland Ins. Co.,* 938 S.W.2d at 28 (quoting *Tex. Farmers Ins. Co. v. Soriano,* 881 S.W.2d 312, 318 (Tex. 1994) (Cornyn, J., concurring)); *Allstate Ins. Co. v. Watson,* 876 S.W.2d 145, 149–50 (Tex.1994) (holding insurers do not owe third party claimants statutory first party duties under article 21.21, section 16 of the Texas Insurance Code and insurance-based DTPA actions); *see also Transp. Ins. Co. v. Faircloth,* 898 S.W.2d 269, 279–80 (Tex.1995) (extending *Watson* and holding insurer does not owe third party claimant duty of good faith and fair dealing); *Coats v. Ruiz,* 198 S.W.3d 863 (Tex. App.-Dallas, Aug 14, 2006)(holding no duty owed to claimants under common law or statutory theories); *Caserotti v. State Farm Ins. Co.,* 791 S.W.2d 561, 565 (Tex. App.-Dallas 1990, writ denied) (insurers do not own third party claimants first party duties even where same insurance company insures both third party claimant and insured).

V. WHEN DOES THE DUTY START AND WHEN DOES IT STOP

A. Not Before Insured Is A Party?

The court in *Hartford Acc. & Indem. Co. v. Texas Hospital Ins. Exchange,* 1998 WL 598125 (Tex. App.—Austin, Sep 11, 1998), the court questioned whether a duty under *Stowers* was owed to an insured who had not yet been made a party to the underlying suit. The court did not decide that issue, but it did hold that the carrier had no obligation or duty to inform the insured of a settlement offer made and expired before the insured became a party, even though it may have provided a means of releasing that insured.

B. *Stowers* Duty Post-Judgment?

In *Chancey v. New Amsterdam Cas. Co.,* 336 S.W.2d 763, 766 (Tex. Civ. App.-Amarillo, May 31, 1960), the court found no authority to support the applicability of the *Stowers* to an offer coming after judgment in the underlying suit. The court refused to extend the doctrine to this setting.

VI. *SORIANO* — TOO MANY CLAIMANTS, INSUREDS AND CLAIMS (COVERED AND NOT)

A. An Introduction to Soriano

> ***"We do not address the duties of an insurer faced with multiple and concurrent outstanding separate Stowers demands as to different insureds where the demands in total exceed the policy limits."***

Travelers v. Citgo, infra (emphasis added).

From the outset, it must be clear that the Texas Supreme Court has simply not addressed the obligations of a carrier facing multiple, simultaneous *Stowers* demands. While the decision in *Soriano* and its progeny may provide some guidance, it must be remembered that *Soriano* was ***not a Stowers*** case. It was submitted on a negligent claims-handling and a breach of the duty of good faith basis. Neither theory is still available under Texas law, at least as submitted in *Soriano.* Nevertheless, as the discussion so far has already indicated, the *Soriano* approach, known in the trade as "putting on *Soriano* blinders," has been extended to a number of areas, including the recent decision in *Pride* holding that the scope of release necessary to provide a "complete release" is governed by *Soriano.*

1. Court of Appeals' Decision

In *Texas Farmers Ins. Co. v. Soriano*, 844 S.W.2d 808, 813 (Tex. App.—San Antonio 1992), *rev'd,* 881 S.W.2d 312, 315 (Tex. 1994, Soriano, the insured, negligently operated a vehicle in which Lopez was a passenger. He struck a vehicle driven by Medina, whose wife was killed in the accident. Medina himself and two of his children also suffered serious injuries. Soriano's auto policy had minimum limits of $10,000 per injury, with a $20,000 per accident aggregate. The carrier attempted to get the Medina's to settle for policy limits early on, but they refused and sought investigation into Soriano's personal assets first. Two suits were subsequently filed, one by Lopez and one by the Medina family. The Medina's counsel had made clear he would not settle for less than the full

limit of $20,000. During jury selection at trial of the consolidated cases, the carrier settled with Lopez for $5,000, and subsequently offered the remaining $15,000 to the Medinas. The Medina family then obtained a judgment in excess of the policy limits against Soriano, who then assigned his rights against the carrier to the claimants.

The court of appeals affirmed judgment for bad faith and negligent claims handling against the carrier. The court rejected arguments to the effect that the jury should be required to consider only the reasonableness of the Lopez case that was actually settled. The court suggested that the carrier could have interpleaded the funds to avoid liability for amounts in excess of the limits.

The dissent by Justice Peeples lays out much of the rule structure later adopted by the Texas Supreme Court. Justice Peeples noted:

> Soriano does not contend that the Lopez settlement was made in bad faith ***when viewed alone***. He argues that it was unreasonable because the Medina cases were more serious and posed a greater threat to him. In his view, an insurer can be held liable even though the first settlement was reasonable and entered in good faith when viewed apart from the exposure in the second case. The premise of his lawsuit is that an insurer must assess the proportionate merits of each claimant that it's insured injured, and settle the cases accordingly. If its assessment is later considered wrong by a court, the insurer is liable beyond the policy limits.
>
> But Soriano's theory is contrary to the universal rule that a liability insurer can settle with some claimants in good faith even though the settlement may exhaust the insurance fund or so deplete it that a subsequent judgment creditor is unable to collect his judgment in full from the remaining insurance coverage.

Id. at 840-41 (omitting numerous citations).

Justice Peeples asserted that he had found no authority for the "comparative seriousness rule" urged by Soriano. *Id.* at 841. Peeples further reasoned:

> To begin with, the insurer has a duty to the insured to use care in handling *all* claims against him. An insurer that rejects any reasonable

> settlement offer within its policy limits-such as the Lopez $5000 offer-risks a *Stowers* suit.
>
> . . . .
>
> The general rule is also sound because it facilitates settlements. The law favors settlements.***842** *See Scurlock Oil Co. v. S* 724 S.W.2d 1, 4 (Tex. 1986); *McGuire v. C* 431 S.W.2d 347, 352 (Tex.1968). And settlements in multi-claimant cases involving underinsurance would be severely curtailed if an insurer acted at its peril by settling one of several claims

Id.

2. Supreme Court Decision

In *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994) (Enoch, J.), the Supreme Court held:

> We conclude that when 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 the proceeds available to satisfy other claims. Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly.

Id.

Note the use of the singular "demand." As noted, the most significant remaining issue after Soriano is what happens when there are multiple, contemporaneous demands from multiple claimants.

Under *Soriano,* an insurer is allowed to fulfill its *Stowers* duty to its insured by settling with one claimant, even though the result is to leave the insured exposed to another claim. *Id.* at 315. In *Soriano,* the insurer opted to settle a relatively minor claim for twenty-five percent of the policy limit when a formal demand was served, despite indications that a settlement with a significantly larger claimant at the policy limit might have been possible. The court held that an insurer could only be liable for settling a claim if (a) they had previously rejected a valid settlement offer within policy limits from the other claimant or (b) the settlement they reached was unreasonable

"considering *solely* the merits of the" settled "claim and the potential liability of its insured on" that "claim." *Id.* at 316 (emphasis added). Neither condition was met, so the insurer was entitled to settle the initial claim. Once the first settlement was reached, the insurer had no *Stowers* duty to settle, since the major claimant did not present a settlement offer within the *remaining* policy limit.

The Court in *Soriano* placed great emphasis on the fact that the carrier should not be penalized for exercising the reasonable care required of it under *Stowers* in responding to the Lopez' demand to settle for $5,000. The Court does not clearly state that the cause of action based on an unreasonable settlement depends upon the initial offer being a valid *Stowers* offer. Such an approach would certainly not be unreasonable. The assumption in *Soriano* was that the Lopez offer had to be accepted and that the failure to do so would have visited the carrier with *Stowers* liability. *Id.* at 315.[13] As noted, the Court makes no mention of what a carrier should or must do when faced with multiple simultaneous *Stowers* demands.

The Court in Soriano appears to have only addressed whether a tort duty would apply under Stowers given the entry by the carrier into a settlement with some but not all claimants. As will be discussed below, the contractual defense of exhaustion does not apply until actual "payment." Thus, if the Stowers duty were to be controlled by whether there was coverage after exhaustion, actual exhaustion under the terms of the policy would have to be shown.

A claimant may challenge the reasonableness of settlements made with other claimants. Thus, a carrier entering into unreasonable settlements with other claimants may still be subject to *Stowers* liability. Unreasonableness depends on traditional factors, such as the merits of the claim. *The mere fact that another claim may be more serious does not make the settlement with the lesser claim unreasonable. Id.* at 316. The test is whether a reasonably prudent insurer ***would not have settled the claim*** "when considering solely the merits of the" settled claim and the "potential liability of its insured on the claim." *Id.*

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[13] Query whether the insureds acceptance of the benefits of the settlement and release would in effect concede reasonableness. *Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools,* 2005 WL 1252321, at *1 (Tex., May 27, 2005) (motion for rehearing granted Jan. 6, 2006)(suggesting that insured's demand that carrier accept demand or acquiescence in or acceptance of benefits of settlement amounted to agreement as to the reasonableness of the settlement, thus allowing the carrier to seek reimbursement of the settlement amounts upon proof of non-coverage).

at 316. The court noted that in any event the insured must show that claimant would in fact have accepted the actual limits if the other claim had not been settled. *Id.* at 316 n. 4.

In short, *Soriano* deals with rules applicable to a (a) negligent claims handling cause of action that does not exist under Texas law at this time; and (b) a good faith cause of action that also has been found inapplicable to liability carriers as a matter of law. *See Maryland Ins. Co. v. Head,* 938 S.W.2d 27, 28 (Tex. 1996). It is unclear how, if at all, *Soriano* would actually impact or be applied in a true *Stowers* setting.

One can, at least, imagine that the exhaustion of limits would be treated as a defense based on non-coverage or used to establish that the second offer exceeded the policy limits. The reasonableness attack would then be a method by which those limits could be reinvigorated or replenished. As noted, it is somewhat unclear from the decision as to whether a successful unreasonableness attack requires proof that the settlement would not have been entered into by a reasonably prudent carrier or whether it would have been entered for a lesser amount.

Some carriers are already urging that the multiple claimant scenario, particularly where there are concurrent or simultaneous offers (individually within limits but collectively exceeding limits), is in and of itself proof that a carrier would not be acting unreasonably in refusing to accept a single demand from the multiple demands.

3. *Soriano* as Anachronism—Some Observations on the Future

Soriano is very much an anachronism caught in the Texas Supreme Court's curtailing of duties on the part of liability carriers. Since *Stowers* is ostensibly the only true claims settlement/handling tort available, and its elements do not necessarily fit the handling of multiple claims with insufficient limits, there is no tort home for claims like *Soriano* to fall.[14] If you look at the causes of action submitted in that case, they have all

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[14] In *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842 (Tex. 1994), the court summarized the *Stowers* elements as follows:

> (1) [T]he claim against the insured is within the scope of coverage, (2) the demand is within policy limits, and (3) the terms of the demand are 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.

essentially been eliminated by the Supreme Court: (1) there is no general tort of negligent claims handling; and (2) there is no duty of good faith owed by liability carriers. These were the theories submitted. No *Stowers* issue was submitted. Indeed, no instruction was requested seeking to limit the jury's consideration of reasonableness to solely the facts of the Lopez claim that was settled. Thus, it is hard to compare other jurisdictions' treatment of the multiple claim issue since those jurisdictions invariably recognize causes of action against liability carriers under more general torts than *Stowers.*

It is indeed curious that *Soriano* was not simply decided in the first instance based on the fact that there was apparently never a proper *Stowers* demand by the Medina's to settle within the correct policy limits.[15] While there had been oral suggestions that they would do so, the Medina family made no written demand nor any made any direct communication, according to the courts, that other elements of a proper *Stowers* demand were satisfied, such as the offer to offer a full release and protection from and against all liens. If *Stowers* is the only cause of action, and the elements of *Stowers* are not satisfied, the matter is at an end and the claimant cannot recover from the carrier.

Also, a traditional *Stowers* analysis would consider whether the offers suggested for $20,000 were valid offers within the policy limits. The Lopez settlement obviously reduced the limits. There was no coverage available for $20,000 after this settlement was paid. Thus, an additional element of *Stowers* was not satisfied, the need to make an offer within limits.

The reasonableness of the settlement with Lopez is simply not a factor to even be considered in conjunction with the above-stated elements of *Stowers.* The primary factor to which reasonableness would be applicable would be in determining whether the carrier was reasonable in rejecting the Medina's offer, assuming arguendo one was made. This reasonableness is obviously much broader than simply the reasonableness of another settlement. Indeed, in determining whether the carrier unreasonably refused to settle, one would think that the jury could generally examine whether the pendency

[15] Strangely, it is only in the "bad faith" discussion in the opinion that mention is even made to the failure to make an offer. Instead of referring to *Stowers,* the Court cites to *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842 (Tex. 1994). The Court assumes the existence of a duty of good faith, but it appears to decide there was a reasonable basis as a matter of law for the carrier's actions in rejecting an offer to settle for $20,000 by the Medina's after the settlement with the Lopez family. 881 S.W.2d at 317-18.

of other claims would justify refusing to settle. Remember, the Supreme Court at one time has characterized the standard as follows:

> We have said that the duty imposed by *Stowers* is to "exercise 'that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business.'" We have also said that the *Stowers* duty is viewed from the ***perspective of an insurer:*** "the terms of the demand are such that an ordinarily prudent insurer would accept it." ***Both statements are correct.***"

Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc., 2005 WL 1252321, at *1 (Tex., May 27, 2005) (motion for rehearing granted Jan. 6, 2006). Nothing in this standard excludes consideration of the pendency of other claims.

Given that the insured has the burden of proving the unreasonableness of the settlement, there will likely be an assertion by the carrier that the attorney-client and work product privileges are waived since they cannot be used as a sword and a shield. Thus, damaging information regarding the liability of the defendant insured and its actions would be potentially subject to discovery.

Soriano is ironic in a sense. The court allows for a post-hoc reasonableness challenge when the carrier unilaterally decides to settle a given claim against the insured. If an insured, however, unilaterally settles with the claimant, any resulting agreed judgment is not binding on the carrier. *State Farm Fire & Cas. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996). The Court in *Gandy* based its holding in part on the notion that post-hoc relitigation of reasonableness was time-consuming. The Court expressed concern about the insured making unilateral settlement agreements that might be based on something other than the real value of the liability or culpability of the insured. Of course, one could express similar concerns about unilateral settlement decisions in the multiple claimant/insufficient limits context. The carrier clearly has an interest in eliminating defense costs. Prompt exhaustion eliminates this problem. The Court in *Soriano,* however, rather than barring any recovery, has allowed a reasonableness attack, with all of its foibles.

B. Requirements for Soriano Protection

Does Soriano protection depend upon whether there was a valid *Stowers* demand made in conjunction with the settled claim? The Texas Supreme Court in *Texas Farmers*

Ins. Co. v. Soriano, 881 S.W.2d 312, 314 (Tex. 1994, certainly seemed to indicate that a carrier wanting protection from multiple claims must have a duty to settle under *G.A. Stowers Furniture Co. v. American Indemnity Co.,* 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved), as to the claim/s settled. This duty is only activated by a valid *Stowers* settlement demand. The demand must at the very least identify the releasing parties, the parties to be released, be for an unconditional amount within policy limits and propose to release the insured/s fully for a stated sum of money, including a release from any outstanding liens. *Id.*; *see also Trinity Universal Ins. Co. v. Bleeker,* 966 S.W.2d 489, 491 (Tex. 1998); *Insurance Corp. of America v. Webster,* 906 S.W.2d 77, 81 (Tex. App.--Houston [1st Dist.] 1995, writ denied.

Note, however, that the recent decision of the Fifth Circuit in *Pride Transportation v. Continental Casualty Co.*, 2013 U.S. App. LEXIS 2575, (5th Cir. Feb. 6, 2013)(Smith, J.)(Texas Law), suggests that a valid demand under *Stowers* may not be required in order to invoke the protections of *Soriano.* The court stated that "this court does not need to determine whether there was a valid *Stowers* demand" in order to resolve the case under *Soriano* and *Citgo. Id.* at *15. In that case, the claimants' offer was made to an employee and made clear that claims made against the employer were not included. The employer had its own common law indemnity claim. Thus, the settlement offer by the claimants offered no protection as to this claim for precisely the same liability and damages.

An offer from a carrier is not a *Stowers* demand invoking a duty to settle under *Soriano.* A carrier has no duty to initiate or make settlement offers absent a valid *Stowers* demand. *American Physicians Insurance Exchange v. Garcia,* 876 S.W.2d 842, 849 (Tex. 1994)(holding carrier has no duty to "make or solicit settlement proposals.").

Note that some decisions, such as *Mid-Century Ins. Co. v. Childs,* 15 S.W.3d 187, 188 (Tex. App.—Texarkana 2000, no pet. hist.), suggest that a carrier may take action to avoid *Stowers* in the absence of an actual, valid *Stowers* offer to settle. The court there held: "Because Mid-Century acted promptly in settling claims that, if taken to trial, would have probably resulted in an excess judgment against Childs, and because Mid-Century had the right to take action to avoid a *Stowers* claim, we conclude that it acted reasonably in exhausting the policy limits, and that because such limits were exhausted, Mid-Century's obligation to defend Childs terminated." The court notes in a footnote that the *Stowers* duty exists when "(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." *State Farm Lloyds Ins. C* 963 S.W.2d 38, 41 (Tex. 1998); *G.A.* Comm'n App. 1929, holding approved)." Thus, the court's reasoning is confused. The court's discussion of the record does not indicate that a *Stowers* offer was actually made in *Childs.*

The need for a valid *Stowers* demand in connection with the first settlement is dictated by the *Soriano* Court's emphasis on the Catch-22 a carrier is placed in when facing multiple claimants with insufficient limits. Whatever it does, it will likely be facing a *Stowers* claim. Cast another way, would it be unreasonable for a carrier to settle for limits with one of many claimants if the demand made was invalid under *Stowers*?

C. Approach of Other States

Other jurisdictions have generally taken the approach that where the insured is being sued by more than one person and the limits are insufficient to resolve all claims, the "insurance company has a duty to manage the insurance proceeds in a manner reasonably calculated to protect the insured by minimizing total liability." A. Windt, Insurance Claims & Disputes, sec. 5:8, at 522 (4th ed. 2001). Most jurisdictions appear to follow a "good faith" approach, which allows for fairly open consideration of the overall liability picture. *See, e.g., Millers Mut. Ins. Assoc. of Illinois v. Shell Oil Co.,* 959 S.W.2d 864, 870 (Mo. Ct. App. 1997). Some jurisdictions discourage the carrier from seeking a comprehensive settlement, noting that it essentially should act to extinguish as much liability or potential liability as possible. *Id.* at 524. At least one jurisdiction follows a "first in time, first in right" approach to settlements with multiple claimants. *See, e.g., David v. Bauman,* 196 N.Y.S.2d 746 (N.Y. Sup. Ct. 1960). Finally, a minority of jurisdictions allows for a "pro rata" approach to settlements after the limits are tendered into the registry of the court. *See, e.g., Underwriters for Lloyds of London v. Jones,* 261 S.W.2d 686, 688 (Ky. 1953). All jurisdictions this author has reviewed indicate that it is critical to keep the insured informed and involved in the settlement process. *See generally* Annot., "Basis And Manner Of Distribution Among Multiple Claimants Of Proceeds Of Liability Insurance Policy Inadequate To Pay All Claims In Full," 70 A.L.R.2d 416 (2006 supp.)

The basic approach suggested by the decisions in other jurisdictions to resolving multiple claimant problems is one based on simple logic. A number of practical approaches can be used to navigate these sometimes difficult waters:

- Attempt to get the attorneys for the multiple claimants together to resolve an equitable distribution on their own.

- Claimants who are dilatory may have to be cut out of the loop. If the claim is an obvious and very dangerous one, then direct contact should be attempted to get them into the loop.

- Propose a mediation or arbitration to resolve remaining disputes between the claimants or an interpleader in the alternative.

- Consider tendering the funds to the insured to use to resolve the claims or at least involve the insured in the decision-making process.

If none of this works, then the goal should be to get the most for the insured's money under the circumstances presented. Settle the worst claims first. Carriers should remain cognizant of whether any one claimant has demanded the then existing limits. Carriers should make sure that their investigation is sufficient to determine early on which claims are worst and/or to permit an accurate response to early individual *Stowers*/*Soriano* demands.

D. Exhaustion of Limits

Most liability policies contain exhaustion provisions such as the following:

> We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted ***by payment*** of judgments or settlement.

Actual payment, not merely the entering of a settlement agreement, is required in order for exhaustion to have occurred. *See, e.g., In re Consolidated Freightways, Inc.*, 75 S.W.3d 147, 152 (Tex. App.--San Antonio 2002, orig. proceeding) (holding that settlement agreement entered into by carrier that was not funded prior to the insolvency of the carrier did not result in the exhaustion of the limits under the insolvent carrier's policy because no "payment" had been made as required by the policy terms). Settlements that result in exhaustion of policy limits excuse further performance by the insurer on behalf of the other insureds. *American States Ins. Co. v. Arnold,* 930 S.W.2d 196, 201 (Tex. App.—Dallas 1996, writ denied).

If there has in fact been a true exhaustion through payment, then there is no continuing duty to defend on the part of the carrier. *Mid-Century Ins. Co. v. Childs,* 15 S.W.3d 187, 188 (Tex. App.—Texarkana 2000)(including an exhaustion clauses similar to that quoted above). Arguments that exhaustion without resolution of all pending claims creates a conflict of interest that somehow prevents settlement with some but not all claimants have been flatly rejected. *Id.* at 189.

The decision in *Kings Park Apartments, Ltd. v. National Union Fire Ins. Co.,* 101 S.W.3d 525 (Tex. App.—Houston [1st Dist.] 2003, pet. rev. denied), present a marvelously convoluted treatment of a number of exhaustion and *Soriano*-related issues. One thing is clear, this decision stands for the proposition that an insured may certainly attempt to argue and litigate whether the monies paid were in fact for covered claims involving the claims settled against the putative insureds. There, one insured argued that payments were made for bad faith, noting that the settlement agreements allocated only a "peppercorn" as consideration for the release of bad faith claims. *Id.* at 532.

The court in *King's Park* noted that the fact that some of the underlying bodily injury claims were not released and dismissed with prejudice, thus facilitating continuing efforts to recover from the excess carrier. ***Nevertheless, the court found that these facts were not dispositive proof that the underlying agreement did not amount to a payment exhausting the policy limits of the primary policies. Id.*** Thus, despite the lack of a release, the court found that payment by the primary insurers in return for a covenant not to execute against the insureds was still sufficient to evince payment for purposes of exhaustion of the limits. *Id.*

The fact that a carrier obtains a covenant not to execute instead of a release as a basis for concluding that exhaustion has *not occurred* is an issue that was belatedly raised but not considered in *Judwin Properties, Inc. v. United States Fire Ins. Co.,* 973 F.2d 432, 436 (5th Cir. 1992)(Texas law). That court did in fact hold that a carrier commits no harmful act preventing its protection under exhaustion principles when it settles part of the claims made against multiple insureds, noting the separation of insureds clause in the GL policy there mandated that the carrier use due care to settle on behalf of all of its insureds. *Id.*

The court in *Judwin* rejected attempts to go around the recitation of consideration in the underlying settlement agreements. The court reasoned that under Texas law the

court must presume that the consideration recited is legally sufficient consideration. *Id.* at 435 n.3.

The reasoning in *King's Park* and *Judwin* would appear to be somewhat problematic in light of the heavy emphasis in Texas case law on the need for a valid *Stowers* offer to include a promise of a complete release. *Trinity Universal Ins. Co. v. Bleeker,* 966 S.W.2d 489, 491 (Tex. 1998). We do know that the failure of the carrier to obtain a release of a defense of contributory negligence to a simultaneous civil action involving the same parties is not actionable against the carrier and does not defeat *Soriano* protection. *Coats v. Ruiz,* 198 S.W.3d 863, 882-83 (Tex. App.—Dallas 2006, no pet. hist.)(Moseley, J.).

E. Attacks on Reasonableness

The focus of a reasonableness attack under *Soriano* is based solely on the settled claim. *Soriano, supra,* at 316. As noted, the *mere fact that another claim may be more serious is* ***no evidence*** *that the settlement of the lesser claim was unreasonable. Id.* at 316. The test is whether a reasonably prudent insurer ***would not have settled the claim*** "when considering [a] solely the merits of the" settled claim and the [b] "potential liability of its insured on the claim." *Id.* at 316. Thus, the Court clearly suggests that proof that the settled claim could have been settled for less money is insufficient. The decision suggests that the proof must show that a reasonably prudent carrier would not have settled the claim at all. The Court's discussion in footnote 4 is somewhat inconsistent with this language in the opinion.

In footnote 4, the Court held that the insured must offer proof that the negligent failure of the carrier to settle was a proximate cause of damages to the insured. The Court explained that even if it were shown that the carrier should have settled for a lesser amount, the non-settling insured must still show that the claimants would have settled for anything less than the full policy limits. *Id.* at 316. The Court recognized that the insurer in that case had failed to raise a point of error as to whether the insured had failed to prove proximate cause. *Id.* at n.4.

The *Soriano* Court noted that in any event the non-settled claimant would have to show that it ***would in fact have accepted the actual limits*** if the other claim had not been settled. *Id.* at 316 n. 4. In *Soriano,* evidence that the larger claimant was willing to settle within policy limits (but had not then made an offer) was deemed irrelevant in the absence of evidence that the settlement reached with the other claimant, considered

alone, was unreasonable. *Id.* at 315-16. The Court emphasized that there was no evidence of a definite demand to settle within the limits of the policy. *Id.*

> The fact that the unsettled claims were more serious than the settled claims "is not evidence that the" settled claim was unreasonable. *Soriano,* 881 S.W.2d at 316.

The court of appeals in *Mid-Century Ins. Co. v. Childs,* 15 S.W.3d 187, 188 (Tex. App.—Texarkana 2000), detailed a number of facts showing reasonableness of the initial settlement/s. The court there noted that the two claimants settled had medical expenses almost equal to the available limits. The parties agreed that either of the claims settled would have exposed the insured to liability in excess of the policy limits by itself. *Id.* at 189. "In light of those facts, it was reasonable for the insurer to settle promptly for the $50,000 limit of the policy." *Id.*

F. Multiple Insureds—Can An Insured Be Left Behind and the Offer Still Activate Stowers?

1. Other Jurisdictions

The general rule in other jurisdictions is that an insurance company "cannot prefer one its insureds over another" with respect to settlement. Windt, *supra,* at 526-27. The source of this rule is the decision of the New York courts in *Smoral v. Hanover Ins. Co.,* 37 A.D.2d 23, 322 N.Y.S.2d 12 (1971). *Id.* at 527. Some states use the duty of good faith to test the carrier's actions in the context of multiple insureds and insufficient limits. *Id.* at n.3. The Fifth Circuit, interpreting Texas law, has rejected the approach in other jurisdictions, disagreeing as to the prevalence of the rule that a carrier cannot prefer one insured over another. Stated another way, the Fifth Circuit clearly believes that an offer to settle as to some but not all insureds is still sufficient under *Stowers.* In other words, a carrier can leave an insured behind.

2. Travelers v. Citgo

The Fifth Circuit applied *Soriano* to a situation where the carrier settled on behalf of one insured, leaving claims against another insured under the policy. *Travelers Ins. Co. v. Citgo Petroleum Corp.,* 166 F.3d 761 (5th Cir. 1999). The court held the applicable test is whether the carrier would have settled the particular claim against the particular insured when considering solely the merits of the claim and the potential liability of its

insured. *Id.* at 765 (citing *American States Ins. Co. of Texas v. Arnold*, 930 S.W.2d 196 (Tex. App.–Dallas 1996, writ denied)(suit by excess carrier against primary who left the excess with defense and indemnity of additional insured after settling on behalf of another insured and exhausting limits) and *Vitek, Inc. v. Floyd*, 51 F.3d 530 (5th Cir. 1995)(involving additional insured barred by bankruptcy court permitting carrier to exhaust limits as to debtor/insured)). The court explained the carrier's dilemma as follows:

> The *Stowers* duty creates difficulties, however, when multiple parties and other potential claims in excess of policy limits are involved. In such cases, fulfillment of the *Stowers* duty will reduce the funds available to satisfy the claims of other plaintiffs or the defense of other insured parties. However, if insurers are subject to both liability for failure to settle under *Stowers* and liability for disparate treatment of non-settling insureds, insurers would find the policy limits they carefully bargained for of little utility. Under *Stowers*, they would be obliged to settle up to the limit of a policy or face a lawsuit by the covered insured as to whom the settlement within policy limits was offered. But if they in fact settled, they would leave themselves open to claims by the insureds excluded from the settlement, and any additional recovery would be in excess of the limits they had originally relied on.

Id. at 765.

The court in *Citgo* expressly rejected arguments that *Soriano* was distinguishable because it involve rights of or obligations owed by the carrier to competing claimants. The court reasoned:

> Citgo attempts to distinguish *Soriano* by pointing out that an insurer owes a higher duty to its insured than it does to claimants. Thus, Citgo argues, while the lesser "duty" (if any) to claimants may allow an insurer to choose which claimant to settle with, a similar discrimination is not permitted when the interests of multiple insureds are at stake. While this may be correct as far as it goes, and *Soriano* is not directly applicable, we find the case persuasive in this instance because the party complaining in *Soriano* was not the second claimant-it was the insured. The insured argued

> that its insurer had settled the "wrong" claim, exposing him to personal liability in the more dangerous suit. *Id.* at 314. *Soriano,* like the case before us, involved the insurer's duty to its insured.

Id.

The Fifth Circuit in *Citgo* also rejected arguments that it should focus on whether the settlement was reasonable "in light of all potential claims against all the insured parties." *Id.* The court supported its holding as follows:

> [T]he *Soriano* court made it clear that reasonableness would only be measured by looking at the initial demand for settlement in isolation. *Id.* 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 and the potential liability of its insured on the claim."). In *Soriano,* evidence that the larger claimant was willing to settle within policy limits (but had not then made an offer) was deemed irrelevant in the absence of evidence that the settlement reached with the other claimant, considered alone, was unreasonable. *Id.* at 315-16.

Id.

The court noted that Texas case law in addition to *Soriano* supported its position:

> In *American States Insurance Co. of Texas v. Arnold,* a Texas court confronted a situation in which an insurer, having settled up to its policy limits and obtained a release on behalf of its named insured, refused to defend an additional insured in a separate action arising out of the same accident. 930 S.W.2d 196 (Tex.)(Hankinson, J.). The excess insurer of the additional insured conducted the defense and sued the primary insurer to recover its costs. The court reversed summary judgment in favor of the excess insurer and rendered judgment for the original insurer, finding it breached no duty in obtaining the settlement, and its duties to the additional insured terminated when the settlement exhausted the policy limits. "We conclude that, under the unambiguous policy language and circumstances of this particular case, American States' settlement of Cassady's personal injury claim against Mayes's estate for its bodily

> injury policy limits terminated any obligation to defend Arnold, as an additional insured, in the Cassady lawsuit." *Id.* at 202-03.

Id. The court noted that "[w]hile several out-of-state courts have found that there is a general duty not to favor one insured over another, the weight of contemporary authority is in line with *Arnold*." *Id.* at 766.

The court also rejected arguments that the purpose of *Soriano,* encouraging settlements, was not served in the multiple insured setting. The court stated:

> Citgo argues that when multiple insured parties rather than multiple claimants are involved, the *Soriano* approach will discourage settlement. This, Citgo asserts, is because the partial settlements obtained under an *Arnold* rule do not prevent continued litigation against the exposed co-insured, with the plaintiff now bankrolled by the proceeds of the settlement. Thus, according to Citgo, the encouragement of partial settlement by *Arnold* 's rule discourages true, global settlement that would keep a case out of court entirely.
>
> It is true that an *Arnold* rule may encourage a certain level of strategic behavior on the part of plaintiffs. It would encourage plaintiffs to first sue defendants with inadequate resources, or defendants that had not only a large potential exposure but also a low probability of being found ultimately liable.
>
> However, the *Soriano* court was also keenly sensitive to the plight of an insurer presented with a valid claim for settlement under *Stowers.* "Had Farmers opted not to settle . . . but, in the face of that demand, to renew its offer [to the party with the larger claim] instead, Farmers would surely face ***questions about*** liability under *Stowers* for failing to settle [with the other, lesser claimant]." *Soriano,* 881 S.W.2d at 315. Citgo's position in essence means that ***fulfilling*** the *Stowers* duty by exhausting policy limits (or reducing them to a level inadequate for further settlement) triggers potential liability to any other insured that is not included in the settlement. Thus under Citgo's proposal, an insurer faced with liabilities of multiple insured parties that exceed its policy limits ***would face an***

> ***excess liability threat regardless of whether it attempted to create a comprehensive settlement or acted as Travelers did here***. Allowing the insurer to focus on only the claim actually before it, and rely on the bright-line test of *Soriano,* avoids this dilemma.

Id. at 766-67 (emphasis added). The court further explained:

> Moreover, while we recognize that the Travelers' position may lead to some strategic behavior on the part of plaintiffs, we are skeptical that the rule proposed by Citgo would better serve the policy goal of encouraging settlements in these cases. In essence, Citgo is asking that ***settlement holdout power be given to each insured party, regardless of whether or not it has actually been sued.*** The difficulty with this position is readily apparent when one considers the type of situations in which *Stowers* intersects with multiple insured policies to produce the dilemma seen here. 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.

Id. at 767. The court then added:

> If Citgo's rule were adopted, the only rational course for insurers would be to formally or informally make all their insureds parties to any settlement negotiations. No insurer would settle at its policy limits with potential excess liability to a disgruntled co-insured lurking in the background. And because the proposed "no insurer may favor one insured over another insured" rule would seem to come into play whenever any party received a larger percentage of the policy coverage than another, in practice any settlement would have to be backed by an agreement amongst *all* the insureds regarding liability or a judicial allocation.

Id. at n.5.

The *Citgo* court recognized that in the case before it a policy limits demand had been made as to the insured the carrier settled on behalf of and not the other insured. ***The court noted that it was not addressing the duties of a carrier faced with simultaneous Stowers demands.*** *Id.* at 767.

The court in *Citgo* also rejected arguments that there was an "independent contractual duty to act reasonably in performing the contract." *Id.* at 768. The court's response to this argument is circuitous and simply wrong. The court errs in (a) mixing and matching tort law responsibilities with contract, when they are in fact separate and distinct; and (b) confusing the duty to defend with the duty to indemnify, suggesting that ***a carrier has no duty to settle or indemnify until the insured has been sued and served in the underlying litigation***. Note that the policy there provided: ***"'We may investigate or settle any claim or suit as we consider appropriate. Our duty to defend or settle ends when the Liability coverage limit of insurance has been exhausted by payments of judgments or settlements.'"*** *Id.* n.8 (emphasis added). The court explained its rejection of Citgo's arguments as follows:

> Under *Soriano* and the explicit language of the policy, Travelers had a right to settle when it was presented with a demand within its policy limits. Indeed, Travelers apparently had a *Stowers* duty to Wright to settle as it did; Citgo does not contend to the contrary. Further, under Texas law, an insurer's duty to defend an insured is only triggered by the actual service of process upon its insured and its relay to the insurer. *See, e.g., Members Ins. C* 803 S.W.2d 462, 466-67 (Tex. App.-Dallas 1991, no writ). At the time of the settlement, this duty on Travelers' part had arisen as to Wright, a defendant in the lawsuit, but not as to Citgo, which had not then been sued. ***However, Citgo contends that the duty to defend and the duty to indemnify are separate, and the facts surrounding the case could trigger the latter, even though the duty to defend Citgo was not yet implicated.*** This is incorrect. While a party may have a duty to defend but ultimately determine there is no duty to indemnify, without a predicate triggering of the duty to defend, indemnification does not arise. *See Farmers Texas County Mutual Insurance Co. v. G* 955 S.W.2d 81, 82-84 (Tex.1997). Once this settlement had exhausted the policy limits, the provisions of the policy terminated Travelers' duties under the contract, including its

> duties to Citgo as a co-insured. Since Travelers was ***entitled-indeed apparently required-to settle the initial claim*** against its insured, and since Citgo has not alleged that the settlement, standing alone, was unreasonable, we find that the decision to settle on behalf of Wright constituted reasonable performance of the contract as a matter of law.

Id. at 768-69 (emphasis added). The court in *Citgo* also briefly addressed conflict of interest issues raised regarding claims against multiple insureds.

3. Inconsistency With *Citgo*—Timing of Settlement in Order to Get An Exhaustion Defense

In *Western Alliance Ins. Co. v. Northern Ins. Co.*, 176 F.3d 825 (5th Cir. 1999), the court held that exhaustion through settlement for two of multiple insureds did not provide a defense where the carrier had rejected an earlier settlement within limits that would have obtained releases for *all insureds.* The court held that there was a fact issue as to whether the rejection of that settlement was reasonable. The carrier argued in part that it refused to settle because it had good faith, although ultimately unsuccessful, coverage defenses.

4. *Davalos*—Disqualifying Conflicts of Interest Relating to Multiple Insureds?

Query whether the dilemma presented by multiple claims and insureds in *Citgo* raised a conflict of interests that disqualifies the carrier from controlling the defense and/or settlement of the underlying claims. The court in *Citgo* dismissed any such claims. The court held that since the insured was not actually served in the suit until after the exhaustion of the policy limits by payments on behalf of another insured, no harm could have been suffered by the non-settling insured. *Id.* at 769.

Since *Citgo,* the Texas Supreme Court has revisited the issue of conflicts of interest generally. In *Northern County Mut. Ins. Co. v. Davalos,* 140 S.W.3d 685, 688 (Tex. 2004), the court examined the circumstances under which an insured may reject a tender of defense by the carrier. In that case, the carrier accepted coverage. The dispute between the parties centered over whether venue should be changed and who got to make that decision.

The Supreme Court began by noting that there are defined circumstances when a carrier "may not insist upon its contractual right to control the defense." *Id.* The court noted that in *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998), it had held that where the carrier has the authority to make "defense decisions as if it were the client 'where no conflict of interest exists.'" 140 S.W.3d at 688. Not every conflict or disagreement about the defense is a conflict of interest that would invoke the right of the carrier to control the defense. To so hold would basically eliminate the carrier's right to control as set forth in the policy terms.

The court clearly held that a conflict regarding the existence or scope of coverage would amount to a disqualifying conflict. *Id.* The court added that the reservation of rights "creates a potential conflict of interest." *Id.* Importantly, the court observed that it is ***only*** when "the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends," that the conflict "will prevent the insurer from conducting the defense." *Id.* (citing 1 Allen D. Windt, Insurance Claims and Disputes, sec. 4.20 at 369 (4th ed. 2001)). Relying again upon Windt, the court observed that there are four circumstances when "the insured may rightfully refuse to accept the insurer's defense":

> (1) when the defense tendered "is not a complete defense under circumstances in which it should have been," (2) when "the attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interests at the expense of the insured's," (3) when "the defense would not, under the governing law, satisfy the insurer's duty to defend," and (4) when, though the defense is otherwise proper, "the insurer attempts to obtain some type of concession from the insured before it will defend."

Id. It is hard figure out exactly what all of this means. It is clearly based on an out-of-state commentator's musings about decisions in other jurisdictions. Moreover, it is quintessential dicta to a large extent. It will, however, undoubtedly lead some to urge that a mere reservation of policy defenses does not create a "conflict" sufficient to allow the insured to select its own counsel at the expense of the carrier. One would expect that if such a change had really been considered and intended, it would have required some discussion of *Steel Erectors* and the numerous other such cases. It would also require some reconciliation of the court's holding in *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988), that a reservation creates a conflict sufficient to destroy privity and thus leads to the carrier not being collaterally estopped based on the judgment in the

underlying suit. How can the conflict be such as to negate privity but not be sufficient to allow the appointment of independent counsel?

5. Other Post-*Citgo* Decisions

In *Mid-Century Ins. Co. v. Childs*, 15 S.W.3d 187 (Tex. App.–Texarkana 2000, no pet. h.), the court held that the carrier acted properly by settling two claims out of multiple claims for the policy limits. Following *Soriano*, the court concluded that as long as the settlement was reasonable, the carrier violated no duty to the insured by resolving claims that would have otherwise resulted in a judgment in excess of policy limits. The court also rejected the holding of the trial court that the failure to get releases from all potential claimants created a conflict of interests and that the carrier had a duty to more fully investigate the remaining claims.

The court, in *In Re Enron Corp.*, 2006 WL 1663383, at *8 (S.D. Tex. 2006), held that under Texas law "an insurer may enter into a reasonable partial settlement that exhausts policy limits and thus leaves other insureds exposed." In short, "an insurer does not have to provide funds for all its insureds before exhausting policy limits." *Id.*

6. Pride—Indemnity or Derivative Claims

The Fifth Circuit in *Pride Transportation v. Continental Casualty Co.*, 511 Fed.Appx. 347 (5th Cir. 2013)(Smith, J.)(Texas Law), the carriers settled for an employee/insured, exhausted the limits and left the corporate/insured exposed to liability. The corporate employer insured still had a claim for common law indemnity against the employee insured. The court held that the failure of the claimants to offer protection regarding this additional claim was analogous to a situation with multiple claimants and limited insurance. The carrier, they opined, had the right to enter a reasonable settlement and thus prefer one insured to another. The only issue was whether that settlement was in and of itself reasonable.

7. *Patterson v. Home State County Mutual Ins. Co.*—Another New Twist

In *Patterson v. Home State County Mut. Ins. Co.,* 2014 WL 1676931 (Tex. App.-Hous. (1 Dist.) 2014, pet denied), the court held:

(1) An insurer does not have a *Stowers* duty to settle where multiple claims are alleged against an insured but a policy limits demand is made by only one of the claimants.

(2) An insurer does not have a *Stowers* duty to settle if the claimant's demand does not release *all* insureds covered by the policy.

In that case, the claimants consisted of (a) the husband of the, victim and (b) the children of the victim. Home States issued a policy to the (a) owner of the truck involved; (b) this policy also covered permissive users of the truck, including the driver in this claim. Claims were also made against the third-party employer of the driver.

The plaintiffs sent simultaneous demands to the Home States: (a) one on behalf of the children of the deceased, and (b) one on behalf of the father, individually and as administrator of the estate of the deceased victim. The carrier rejected the settlement demands. In subsequent litigation, it was revealed that there were several other parties claiming damages from accident. Home State then filed an interpleader, seeking protection from all the claims as a part of the court's determination of the proper allocation among the various claimants. *Id.* at *2.

A third offer was made by the original Patterson claimants. This demand sought policy limits and promised only to release the owner of the vehicle. *Id.* Shortly thereafter, the trial court in the interpleader allowed Home State to deposit the limits into the registry of the court, ordered the claimants to resolve their respective rights vis-à-vis one another, and released Home States to the extent of the funds deposited, noting that no release was being provided as to any *Stowers* claims.[16] The insureds were apparently ***not released.***

The Patterson claims proceeded to trial, but the claimants did eventually reach a settlement with the owner of the vehicle in the accident "individually" and the employer of the driver. As to the owner, the Patterson claimants exchanged a covenant not to execute as to any judgment against the owner in its other capacities in exchange

[16] The order stated: "This Order has no effect on, and is not intended to dispose of or absolve HOME STATE of any potential liability under the ***Stowers*** doctrine. The discharge of HOME STATE discharges their liability as to the $1,000,004 tendered to the registry but does not discharge, adjudicate, or affect any potential liability relating to any allegations of negligent failure to settle within the policy limits before the funds were deposited with the clerk." *Id.* at *2.

for an assignment if rights against Home States. *Id.* The settlement agreement further provided:

> . . . .
>
> 4. If there is a judgment rendered in [Patterson's] favor in the Lawsuit against Brewer, [Patterson] and [his] attorneys hereby agree, and covenant, they will seek execution of such judgment solely against any and all insurance companies which issues policies to Brewer that may or may not provide coverage to Brewer for [their] claims.
>
> 5. It is expressly understood and agreed that [Patterson] will look solely to the insurance companies covering Brewer and shall never be entitled to enforce or execute on any judgment in favor of [Patterson] against Brewer or those entities identified herein.
>
> 6. Nothing in this Agreement precludes [Patterson] from any of the following, all of which [he] intend[s] to do:
>
> . . . .
>
> D. Collect any judgment against [the owner] from Home State pursuant to an assignment and in enforcement of the almost 100 year old *Stowers* doctrine implemented by the Texas Supreme Court to protect injured people and companies from negligent insurance companies who fail to reasonably accept settlement offers within the policy limits.

The driver obtained a high/low agreement as part of the settlement with a maximum recovery of $200 and a minimum recovery of $100. *Id.*

Court approval of the settlement was obtained. The trial court then allowed counsel for the owner to withdraw. The jury was dismissed and a bench trial then held without an appearance from the owner. The court found the driver negligent and that he was the statutory employee of the vehicle owner. *Id.* The court found damages of approximately $5.8 million. *Id.*

Home States asserted an interesting package of defenses in the *Stowers* suit then filed by the assignee, Patterson claimants:

1. The insured owner had communicated that it would not accept the demands;

    a. Testimony of defense counsel that in-house counsel would not settle without releases for the driver and the owner;

2. Carrier had no duty to settle where an insured was going to be left behind without a release;

3. One of the demands was conditional;

4. Interpleader was filed before the last demand was made;

5. Failed to get a judgment after a fully adversarial trial;

6. Defended until entry of interpleader.

An incredible wrinkle in the case was that while it was pending, the claimants succeeded in overturning the underlying judgment based on fraudulent inducement by the owner, who allegedly hid the fact the driver was found to have massive amounts of cocaine in his system. The court also overturned the settlement agreement, covenant and assignment. The court of appeals held that the reversal of the judgment upon which standing and the damage claims in the *Stowers* action were predicated did not result in the appeal of the grant of summary judgment to Home States being moot.

8. *OneBeacon v. Welch*—An Insured May Be Left Behind and *Stowers* Is Still Activated

In *OneBeacon*, the *Stowers* demand offered a release to the insured law firm sued for vicarious liability for malpractice of one of its lawyers, but the offer did not offer a release to the lawyer/wrongdoer himself. The Fifth Circuit reasoned:

> 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."8 In coming to this conclusion, we were persuaded by the Texas Supreme Court's decision in Soriano. *Citgo,* 166 F.3d at 765 (citing *Soriano,* 881 S.W.2d at 314–16).9

Id. at 678. The Fifth Circuit refused to follow *Patterson, supra,* noting:

> 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. *Patterson v. Home State Cty. Mut. Ins. Co.*, No. 01–12–00365–CV, 2014 WL 1676931, at *10 (Tex. App.—Houston [1st Dist.] Apr. 24, 2014, pet. denied) (mem. op.).[10] 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 of the claims against both [the employer and the employee.]' " *Id.* We conclude that the district court did not err in holding that DISH's July 14, 2011, letter demanding policy limits in exchange for a full release of its claims against the Welch Firm was a valid *Stowers* demand which OneBeacon rejected.

Id. at 678-79 (footnotes omitted). Given the distinction of *Patterson,* policyholders wanting to avoid being left behind need to inform defense counsel hired by the carrier and the carrier do not want partial settlements of some insureds and not others. Of course, the policy does not require the insured's consent to settlement, but common law *Stowers* protections might require the carrier to follow the insured's clearly expressed wishes. Of course, we know from *Pride* what happens when one insured asks for any settlement, partial or otherwise, and the insured company asks for a comprehensive settlement, not a partial one.

G. First-Party Parallels

Even in the context of first-party claims under underinsured/uninsured motorists coverage ("UIM"), where there is a duty of good faith, the courts have refused to alter

the rules of *Soriano* to impose extra-contractual or additional liability beyond the stated policy limits.

In *Lane v. State Farm Mut. Auto. Ins. Co.*, 992 S.W.2d 545 (Tex. App.–Texarkana 1999, pet. denied), the insured was killed in an automobile accident while riding as a passenger in a friend's vehicle. *Id.* at 548. At the time of the accident, the insured lived with his grandparents, and was covered as an additional insured under their automobile insurance policy. The grandparents notified State Farm of the death of their grandson, and presented a claim for funeral expenses they incurred as a result of the accident. *Id.* State Farm tendered the $5,000. limits of the personal injury protection provision of the policy.

State Farm also informed the grandparents that the remaining $20,000. uninsured/underinsured motorists ("UIM") coverage would be available to the insured's parents. State Farm offered to split the proceeds by giving $10,000. to each of the parents, in accordance with the intestacy provisions of the Texas Probate Code. *Id.*

Lane, the insured's mother, rejected the settlement offer and filed suit against State Farm and the driver of the vehicle in which her son was a passenger. *Id.* The claims against State Farm included breach of contract, breach of the duty of good faith and fair dealing, and violations of the insurance code. *Id.* at 548-49. The trial court granted State Farm's motion for summary judgment, from which Lane appealed. *Id.* at 549.

Because this was a first-party claim, the court noted that its first task was to determine who the covered persons were under the policy. Based on the policy's language, the policy covered both the insured and his parents. *Id.* at 551. The court determined that State Farm properly paid the insured's estate, even though the ultimate recipients were the insured's parents via intestacy.

Lane argued that State Farm breached its contract by paying one claimant over others, and the court noted that this was an issue of first impression in Texas. However, the court observed that other jurisdictions had rejected such a theory, "even when the settlement depletes or exhausts the policy proceeds." *Id.* at 552 (citations omitted). The court went on to note that:

> This analysis fits squarely within the logic outlined by the Texas Supreme Court in [*Soriano*] . . . . [W]e hold that State Farm's

> settlement of the UIM policy proceeds was reasonable and not a breach of contract.

Id.

As to the bad faith claim, the court noted that State Farm did not try to evaluate which claimant was more deserving of the policy proceeds. Nevertheless, the court stated:

> [State Farm] settled with an insured, Michael's estate, according to its interpretation of the Probate Code. The settlement offer exhausted the UIM proceeds, thereby effectively denying any other claim.

Id. at 553. Concluding, the court held:

> However . . . insurers will not be liable in bad faith claims for settling reasonable claims with one of several claimants under a liability policy, thereby reducing or exhausting the proceeds available to the remaining claimants. The summary judgment evidence established that State Farm reasonably settled the survival cause of action under the UIM proceeds and thus cannot, as a matter of law, be liable under the tort of breach of the covenant of good faith and fair dealing.

Id. (citing *Soriano*, 881 S.W.2d at 315).

Similarly, in *Carter v. State Farm Mut. Automobile Ins. Co.,* 33 S.W.3d 369, 372 (Tex. App.—Fort Worth 2000, no pet. hist.), the court held that "an insurance company does not breach its contract by settling with covered persons, even when the settlement depletes or exhausts the policy proceeds." A mere request to multiple UIM claimants that they "come together for a settlement conference to determine a fair division of the policy proceeds" is not a violation of the duty of good faith. The court noted that the plaintiff's attorney in that case had insisted that it would be "premature" to settle the claim, rather than unreasonably late, because his client was still being treated for injuries. *Id.* The same attorney refused to settle for less than the full limits at a subsequent settlement conference. *Id.* The court concluded:

> State Farm did not act unreasonably in settling with the two remaining claimants who were still willing to negotiate the settlement of their claims. An insurer will not be liable in had faith claims [sic] for settling reasonable claims with one of several claimants even if such settlement exhausts or diminishes the proceeds, when faced with multiple demands arising out of multiple claims and inadequate proceeds.

Id. (citing *Soriano, supra*).

H. Special *Stowers* Problems Presented by Bulk and/or Conditional Offers

For example, in *Rosell v. Farmers Texas County Mut. Ins. Co.*, 642 S.W.2d 278, 279 (Tex. App.–Texarkana 1982, no writ), the insurer refused to settle for the per occurrence policy limit on the bulk offer made on behalf of a mother and daughter. The court stated that the policy limits controlled the maximum settlement "an insurance company is required to offer each claimant." The court noted that its approach discouraged the "use of insurance policy per occurrence limits as (trust funds to divide between various plaintiffs as they see fit or requiring insurance companies to accept (package deal settlements from multiple plaintiffs." *Accord Pullin v. Southern Farm Bureau Cas. Ins. Co.*, 874 F.2d 1055, 1056 (5th Cir. 1989) (Texas law). Further, the court believed that the offers in this case were conditioned upon acceptance of settlement "in bulk," as opposed to a separate demand for individual per person limits. Texas courts have repeatedly held that conditional settlement offers are insufficient to impose *Stowers* liability. *Jones v. Highway Ins. Underwriters*, 253 S.W.2d 1018, 1022 (Tex. Civ. App.–Galveston 1952, writ ref'd n.r.e.).

In *Pullin v. Southern Farm Bureau Cas. Ins. Co.*, 874 F.2d 1055 (5th Cir. 1989). Southern Farm issued an automobile liability policy to Pullin. The policy contained limits of $100,000 per person and $300,000 per occurrence. On July 20, 1980, Pullin was involved in an automobile accident that injured seven persons. Two of the personal injury claims were settled for $34,000. The remaining five claims belonged to members of the Schlueter family. The most severe claim belonged to Lennard Schlueter, whom the accident rendered a quadriplegic with brain damage. The Schlueters' first offer of settlement called for payment of the remaining $266,000 under the policy limits. This settlement offer was broken down into $100,000 for Lennard, plus amounts ranging from $6,500 to $90,000 for the other family members. Southern Farm counter offered the $100,000 policy limits for Lennard's claim and reduced amounts for the other family

members. Eventually, the other family members' claims were settled for an aggregate of $125,000. Lennard's claim went to trial, resulting in a judgment of $950,000. Following the judgment, Southern Farm Bureau paid its $100,000 policy limit.

The Pullins filed suit against Southern Farm following the judgment. The Pullins contended that the insurance company should have settled for the inflated values of the claims of the four other Schlueter family members in order to make more money available to cover Lennard's claim and in order to avoid any excess judgment. The Pullins argued that the existence of per person bodily limits should not be a defense to an insurance company's offer to settle for less than the per occurrence limit of liability if the tender of the per occurrence limits would relieve any particular insured from exposure to a judgment in excess of the policy limits.

The Fifth Circuit Court of Appeals affirmed the trial court's summary judgment, holding that the *Stowers* doctrine does not require an insurance company to artificially inflate some claims so that the per person limit can in effect be exceeded on a more serious bodily injury claim. *Id*. at 1056. The court specifically noted that the cases cited by the Pullins in no way supported the proposition that an insurer has a duty to effect a settlement beyond its policy limits. *Id*. at 1057. (citing *Employer's Nat'l Ins. Co. v. Zurich Am. Ins. Co.*, 792 F.2d 517, 519 (5th Cir. 1986); *Texoma AG-Prods. v. Hartford Accident & Indem. Co.*, 755 F.2d 445 (5th Cir. 1985); *Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656 (Tex. 1987). The court recognized in *Pullin*, 874 F.2d at 1056 that the Pullins' argument had been specifically rejected by the Texas courts in *Rosell v. Farmers Texas Mut. Ins. Co.*, 642 S.W.2d (Tex. App.–Texarkana 1982, no writ). The court concluded that the duty sought by appellants was nothing more than an attempt "at generosity with the insurance company's money," which would require ignoring the specific terms of the liability policy. *Pullin*, 874 F.2d at 1057.

I. No Duty to Settle Under *Stowers* as to Uncovered Claims

In *St. Paul Fire & Marine Ins. Co. v. Convalescent Servs., Inc.*, 193 F.3d 340 (5th Cir. 1999), the court held that a carrier has no duty under Texas law to settle as to uncovered aspects of the claim against the insured. In that case, the policy excluded punitive damages. Even though the carrier did not reserve its rights on this issue, the insured admitted it knew that such damages were not covered based on other similar claims handled under the policy. In fact, the insured had contributed to prior settlements for the punitive exposure on those claims.

The court rejected arguments that there is some form of general duty to handle liability claims with reasonable care. The court held that the only negligence duty in this setting was *Stowers. Id.* at 343. The court noted that in *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842 (Tex. 1994), the court held that evidence concerning improper claims handling, investigation conduct during settlement negotiations, and other such conduct were only actionable in the context of a *Stowers* claim meeting all the elements, including the fact the claim had to be covered. *Id. Garcia* clearly stated that statements suggesting the contrary in *Ranger County Mut. Ins. Co. v. Guin,* 723 S.W.2d 656, 659 (Tex. 1987), were dicta.

The court rejected arguments that *St. Paul Surplus Lines Ins. Co. v. Dalworth Tank Co.,* 917 S.W.2d 29 (Tex. App.–Amarillo 1995), *aff'd on other grounds,* 974 S.W.2d 51 (Tex. 1998), supported a finding of a general duty not to handle claims negligently. The court reasoned that the decision in that case predated the decision of the Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Traver,* 980 S.W.2d 625, 628 (Tex. 1997), reaffirming the *Garcia* holding that all other claims handling conduct should be considered in the context of and as proof in a *Stowers* claim. *Id.* at 343 n. 8. *Accord Ford v. Cimarron Ins. Co.,* 1999 WL 184126 (N.D. Tex. 1999)(Solis, J.). It should be noted that *Dalworth* was a case involving an offer within limits, but the carrier was held responsible for the default judgment because it allegedly received notice of the suit and failed to answer.

The court drew analogies to *Texas Farmers Ins. Co. v. Soriano,* 881 S.W.2d 312 (Tex. 1994). The court reasoned:

> Thus, because the Texas Supreme Court does not impose a duty upon insurers to consider other covered claims when faced with a settlement demand by one claimant, we believe that the court would not impose a duty upon insurers to consider claims that are not covered . . . by its policy during settlement negotiations with one claimant.

Id. at 345.

The court determined that because it ruled as it did, it was unnecessary to address arguments presented by St. Paul that tort law should not be used to obtain coverage for punitive damages through some sort of extra-contractual claim because coverage for punitive damages is contrary to public policy. *Id.* at 343 n. 5.

J. Interpleader

Interpleaders can become a quagmire unless all concerned, the claimants and the insured, agree. Care should be taken not to admit the liability of the insured. Remember, if the interpleader is unsuccessful, the claimants may bring the insured in directly and seek a judgment on which they can then use to get at the insured's personal assets. There are serious concerns as to whether an interpleader is even legally permissible in a liability context.

A settlement offer made by one claimant to exonerate the carrier if it deposited the entire policy into the registry of the court was approved 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 carrier may not avoid liability by insisting that it would not settle until all claimants gave releases. *Id. But see Charles v. Tamez*, 878 S.W.2d 201, 208-209 (Tex. App.–Corpus Christi 1994, writ denied)(holding turnover of *Stowers* claim properly denied where insured said that he would not have accepted offer to settle without releases from all claimants and hospitals holding liens).

In *Trinity Universal Ins. Co. v. Bleeker*, *supra*, the court of appeals held that a carrier was liable where one of multiple claimants demanded that it settle by tendering the limits of liability into the registry of the court by way of interpleader. The court noted that while such action would not have prevented a direct action against the insured, it would have made sure that none of the limits were taken without submission to the interpleader proceeding. The court noted that the carrier left the "claimants no alternative but to sue [the insured] directly." The court even upheld DTPA claims of unconscionability against the carrier based on the failure to tender the limits into the registry of the court. The court strangely makes no mention of the fact that settlement practices were not actionable under the DTPA or the Insurance Code at the time of this decision, particularly after *Garcia* and *Watson*.