STOWERS UPDATE – HANDLING EARLY STOWERS DEMANDS

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TABLE OF CONTENTS

Page

I. General Duties 1

II. Reasonable Opportunity to Prevent the Excess Judgment 3

III. Elements of Reasonable Opportunity 3

IV. Substantive Reasonableness 4

A. Offer within limits 4

B. Reasonably Prudent Insurer Would Accept 8

1. Likelihood of the degree of the insured's exposure to an excess judgment 9

2. Degree of insured's exposure to an excess judgment 9

V. Procedural Reasonableness 10

A. Timing of Demand 10

B. Time to Accept Offer 12

VI. Conclusion 13

TABLE OF AUTHORITIES

CASES

Allstate Ins. Co. v. Kelly,
680 S.W.2d 595 (Tex.App.—Tyler 1984) 11

Am. Centennial Ins. Co. v. Canal Ins. Co.,
843 S.W.2d 480 (Tex.1992) 2, 3

Am. Physicians Ins. Exch. v. Garcia,
876 S.W.2d 842 (Tex.1994) 1, 2, 3, 4, 5, 6, 7, 9

American Empire Surplus Lines Ins. Co. v. Occidental Fire & Cas. Of North Carolina,
2015 Wl 4496699 (S.D. Tex. 2015) 3

American Ins. v. Assicurazioni Generali,
228 F.3d 409 (2000) 3

Birmingham Fire Ins. Co. Of Pennsylvania v. American National Fire,
947 S.W.2d 592 (Tex.App.—Texarkana 1997) 3

Bramlett v. Medical Protective Co. Of Ft. Wayne, Ind.,
2013 WL 796725 (N.D. Tex. March 5, 2013) 3

Commercial Union Ins. Co. v. Med. Protective Co.,
426 Mich. 109, 393 N.W.2d 479 (Mich.1986) 2

Delaune v. Liberty Mutual Ins. Co.,
314 So.2d 601 (Fla.Ct.App. 1975) 11

Foremost County Mut. Ins. Co. v. Home Indem. Co.,
897 F.2d 754 (5th Cir.1990) 2

G.A. Stowers Furniture Co. v. Am. Indem. Co.,
15 S.W.2d 544 .... 1, 2, 5

Gen. Star Indem. Co. v. Vesta Fire Ins. Corp.,
173 F.3d 946 (5th Cir.1999) 2, 3

Glenn v. Fleming,
247 Kan. 296, 799 P.2d 79 (Kan. 1990) 11

Globe Indemnity Company v. Gen-Aero, Inc.,
459 S.W.2d 205 9

Hartford Acc. & Indem. Co. v. Texas Hospital Ins. Exchange,

1998 Wl 598125 (Tex.App.-Austin, Sep 11, 1998) 3

Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches,
215 S.W.2d 904 (Tex.Civ.App.1948, Writ Ref'd N.R.E).. 2

Insurance Corp. Of America v. Webster,
906 S.W.2d 77 (Tex.App.—Houston [1st Dist. 1995)... 3

Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co.,
405 F.3d 296 (2005)... 3

Mcdonald v. Home State County Mut. Ins. Co.,
2011 Wl 1103116 (Tex.App.—Hous. [1st Dist.] March 24, 2011) 3

Mt. Hawley Ins. Co. v. Lexington Ins. Co.,
2003 Wl 21467230 (N.D.Tex. June 23, 2003).. 2

Patterson v. Home State County Mut. Ins. Co.,
2014 Wl 1676931 (Tex.App., Apr. 24, 2014)... 3

Peter v. Travelers Ins. Co.,
375 F.Supp. 1347 (C.D.Cal.1974)... 2

Ranger County Mut. Ins. Co. v. Guin,
723 S.W.2d 656 (Tex.1987)... 2

Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.,
77 S.W.3d 253 (Tex.2002).. 2, 3

State Farm Lloyds Ins. Co. v. Maldonado,
935 S.W.2d 805 (Tex. App. San Antonio 1996, N.W.H.) 5, 6

State Farm Lloyds Insurance Co. v. Maldonado,
963 S.W.2d 38 (1998) 3, 6, 13

West Oaks Hospital Inc. v. Jones, Inc.,
2001 Wl 83528 (Tex.App.—Houston [1st Dist.] 2001)... 7

Westchester Fire Ins. Co. v. American Contractors Ins. Co. Risk Retention Group,
1 S.W.3d 872 (Tex. App.–Houston [1st Dist.] 1999)... 4, 7

D/983096v1

STOWERS UPDATE – HANDLING EARLY *STOWERS* DEMANDS

One of the situations commonly facing plaintiffs as well as insurers is the issue of an early *Stowers* demand. From the plaintiff's perspective, the plaintiff would, of course, like to obtain payment as quickly as possible. One mechanism that can be used in order to speed up this process is to send a *Stowers* demand to the insured-defendant. In certain occasions, the insured-defendant's interests may be aligned with the plaintiff. Depending upon the nature of the claim, the defendant may want to see that the claim is resolved within its policy limits as expeditiously as possible. This would guarantee the insured that there will be no excess verdict while at the same time eliminates the strain and stress of dealing with the litigation. Moreover, from the plaintiff's and defendant's standpoint, if the policy is an eroding policy limits and eroded by defense costs, the need for early settlement is even more pronounced. The longer the case goes on, the more defense costs are incurred. As more defense costs are incurred, the liability limits available to pay a judgment are further eroded. In most situations, this can be detrimental both to the plaintiff and to the insured.

The plaintiff wants to ensure that they will obtain the greatest recovery, particularly where the insured otherwise has no money. Likewise, the insurer wants to make sure that adequate funds are available for the payment of indemnity in the event such as need would arise. In those situations, the early *Stowers* demands may be critical for the insured as well as the plaintiff.

The situation, however, for the insurer may be dramatically different. The insurer has contracted with the insured for the right to control the defense of the case. This includes a proper investigation of the factual issues as well as the legal issues that may exist. In large part, the premiums that are charged are charged based upon the right of the insurer to control the defense and, in many cases, to defeat liability, thereby preserving the proceeds under the policy. Early *Stowers* demands tend to inhibit if not eliminate the ability of the insurer to control the defense of the case. In the event of an early *Stowers* demand, the insurer is on many occasions put on the horns of a dilemma. If they pay the demand, they have lost the opportunity to obtain a more favorable result by the exercise of their right and duty to defend. If they don't pay the demand, then they may have exposed not only the proceeds of the policy but amounts in excess of the policy. This paper will address early *Stowers* demands and how they are treated under the law. In particular, this paper will address the factors that courts have considered in determining whether an early *Stowers* demand is a valid demand.

It should be pointed out that the results tend to be factually oriented. There are few, if any, hard and fast rules regarding when a *Stowers* demand may be made and still be valid.

I. General Duties

Texas law recognizes that insurers owe an implied duty of ordinary care to their insured to accept reasonable settlement demands that are within policy limits. *See, e.g., Am. Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842, 849 (Tex.1994); *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App.1929, holding approved) (holding that

insurer "is held to that degree of care and diligence which a man of ordinary care and diligence would exercise in the management of his own business."). This doctrine is commonly referred to as the *Stowers* doctrine, and it is limited in scope. The Fifth Circuit, interpreting Texas law, has noted that "[t]he 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 that option." *Foremost County Mut. Ins. Co. v. Home Indem. Co.*, 897 F.2d 754, 758 n. 5 (5th Cir.1990). Moreover, although the *Stowers* doctrine imposes a duty of ordinary care on an insurer who assumes control of the defense and settlement of a case, it does not "impose any duty on an insurer ... to make or solicit settlement proposals." *Garcia*, 876 S.W.2d at 849-51 (discussing *Ranger County Mut. Ins. Co. v. Guin,* 723 S.W.2d 656 (Tex.1987)). Rather, a *Stowers* plaintiff must plead and prove that the claim against the insured is within the scope of coverage, that the settlement demand is within policy limits, and that the terms of the settlement demand are such that an ordinarily prudent insurer would accept the demand, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Id.* at 849. Implicit in the foregoing elements is the principle that an insurer cannot be liable unless it assumes control over settlement negotiations and is "presented with a reasonable opportunity to prevent the excess judgement by settling within ... policy limits." *Id.*; see *Stowers*, 15 S.W.2d at 548 (holding insurer to reasonable care standard in exercising its exclusive control over settlement negotiations); *see also Ranger County Mut. Ins. Co.*, 723 S.W.2d at 659 ("We held in *Stowers* that an insurer which, under the terms of its policy, assumes control of a claim ... is held to that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business."). The absence of a duty to defend does not vitiate a *Stowers* claim. *See Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co*., 77 S.W.3d 253, 263-64 (Tex.2002) (holding that insurer's assumption of exclusive control over settlement negotiations triggered *Stowers* duty absent duty to defend). And at least one Texas court has held that the *Stowers* duty exists even absent a demand by the insured that the insurer accept the offer. *See Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches*, 215 S.W.2d 904, 929 (Tex.Civ.App.1948, writ ref'd n.r.e) ("It was not a defense to Insurer that Insured did not demand acceptance of [the settlement offers]. Insurer must perform the duty imposed upon it without being activated by Insured.")

The *Stowers* duty arises only between the insurer and the insured, and Texas courts have never recognized the existence of a direct *Stowers* duty between insurance carriers. Texas law, however, permits an excess carrier to bring an equitable subrogation action under *Stowers* against a primary carrier. *See Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 482-83 (Tex.1992) (citations omitted). Texas courts have reasoned that primary carriers should not be relieved of the duty of care owed to the insured simply because the insured has separately contracted for excess coverage and has little incentive to sue the primary carrier.11 See *Id.* (*citing Peter v. Travelers Ins. Co.,* 375 F.Supp. 1347, 1350 (C.D.Cal.1974), and *Commercial Union Ins. Co. v. Med. Protective Co.*, 426 Mich. 109, 393 N.W.2d 479, 483 (Mich.1986)). Thus in an equitable subrogation action under *Stowers* brought by an excess carrier against a primary carrier, the excess carrier is said to " 'stand[ ] in the shoes' of its insured with regard to any cause of action its insured may have against a primary insurer responsible for the loss." *Mt. Hawley Ins. Co. v. Lexington Ins. Co.*, 2003 WL 21467230, at *5-*6 (N.D.Tex. June 23, 2003) (Fish, C .J.) (*citing Gen. Star Indem. Co. v. Vesta Fire Ins. Corp*., 173 F.3d 946, 949 (5th Cir.1999)). Accordingly, "before an excess insurer can recover from a primary insurer under the doctrine of

equitable subrogation, the excess insurer must first prove that the primary insurer failed to fulfill a duty owed to the insured." *Id.*

> The Canal court also noted that a primary carrier would have less incentive to settle reasonably if it were not liable to the excess carrier in equitable subrogation, and that wrongful failure to settle would likely result in increased excess coverage premiums. *See Canal Ins. Co.*, 843 S.W.2d at 483.

With these principles in mind, the court turns to St. Paul's motion for summary judgment on Continental and First Specialty's *Stowers*-based claims. In the instant case, resolving the question whether a legal duty arose under the *Stowers* doctrine turns on whether a reasonable jury could find that St. Paul assumed control over the settlement discussions and was "presented with a reasonable opportunity to prevent the excess judgment by settling within ... policy limits."

II. Reasonable Opportunity to Prevent the Excess Judgment

For twenty-five years, the Texas Supreme Court has included as an element of a *Stowers* claim proof that "the insurer was presented with a reasonable opportunity to prevent the excess judgment by settling within the applicable limits." *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 876 (Tex. 1994). Since that decision, numerous trial courts, courts of appeals, and supreme court opinions have reaffirmed the reasonable opportunity requirement. *See Id., Wilcox v. American Home Assur. Co.,* 900 F.Supp. 850 (SD Tex. 1995); *Insurance Corp. of America v. Webster*, 906 S.W.2d 77 (Tex.App.—Houston [1st Dist. 1995); *State Farm Lloyds Insurance Co. v. Maldonado,* 963 S.W.2d 38 (1998); *Hartford Acc. & Indem. Co. v. Texas Hospital Ins. Exchange,* 1998 WL 598125 (Tex.App.-Austin, Sep 11, 1998); *American Ins. V. Assicurazioni Generali,* 228 F.3d 409 (2000); *McDonald v. Home State County Mut. Ins. Co*., 2011 WL 1103116 (Tex.App.—Hous. [1st Dist.] March 24, 2011); *Bramlett v. Medical Protective Co. of Ft. Wayne, Ind*., 2013 WL 796725 (N.D. Tex. March 5, 2013); *Patterson v. Home State County Mut. Ins. Co*., 2014 Tex. App. LEXIS 4460, 2014 WL 1676931 (Tex.App., Apr. 24, 2014), *American Empire Surplus Lines Ins. Co. v. Occidental Fire & Cas. of North Carolina*, 2015 WL 4496699 (S.D. Tex. 2015); *Rocor Intern., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 77 S.W.3d 253 (Tex. 2002); Birmingham Fire Ins. Co. of Pennsylvania v. American National Fire,* 947 S.W.2d 592 (Tex.App.—Texarkana 1997); *Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co.,* 405 F.3d 296 (2005).

It is under this element that most questions regarding the handling of early *Stowers* demands are focused. Does an early *Stowers* demand present the insurer with a reasonable opportunity to settle the case and prevent the excess judgment? In order to determine whether a reasonable opportunity has been presented, one must know what it is encompassed and what are the elements of a reasonable opportunity. In order to make that determination, one must look at the factors that other courts have considered in determining whether the opportunity to settle was a reasonable opportunity or in fact was unreasonable.

III. Elements of Reasonable Opportunity

In reviewing the case law on the reasonable opportunity to settle, the cases can be broken into two broad categories. These categories are substantive reasonableness and procedural

reasonableness. They involve totally different elements and issues. In order for an offer to present a reasonable opportunity to settle, both elements must be present. In other words, the settlement demand must be reasonable from a substantive standpoint. In addition, the settlement demand must be reasonable from a procedural standpoint. If both elements are present, then the settlement demand is a reasonable one. However, if either one is missing, then the demand is not a reasonable opportunity to settle.

IV. Substantive Reasonableness

The first element which must be satisfied is the element of substantive reasonableness. Substantive reasonableness focuses on the question of whether it is reasonable for the insurer to settle the claim given the nature of the claim. An offer is reasonable from a substantive standpoint if both of these elements are satisfied: (1) The offer is within the policy limits, and (2) An ordinarily prudent carrier would accept it, considering the likelihood and degree of the insured's potential exposure.

A. Offer within limits

In *American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d 842 (Tex. 1994), the Texas Supreme Court set forth three prerequisites which must be met in order for a *Stowers* duty to be activated. The second element in the list was that the demand is within the policy limits. *Id.* at 849. While this requirement would seem fairly simple, in practice it is not. There are a number of variations of this rule which make the application difficult in certain circumstances.

Courts are in agreement that where there is a demand by the plaintiff which is in excess of the policy limits provided by the insurer, no *Stowers* duty has been triggered. *Westchester Fire Ins. Co. v. American Contractors Ins. Co. Risk Retention Group,* 1 S.W.3d 872 (Tex. App.– Houston [1st Dist.] 1999). The insurer is not in a position to accept the demand and bring about a conclusion to the litigation in this particular instance. As a result, no *Stowers* duty is triggered, and no duty exists on the part of the insurer to respond to the settlement demand. In fact, in Footnote 13 of the Garcia opinion, the Supreme Court specifically stated that:

> A liability policy requires an insurance company to indemnify an insured only up to the insured's contractual limits with that company. Thus, insurers have no duty to accept over the limit demands.

Garcia, 876 S.W.2d 849, n. 13

As a general rule, a demand in excess of the policy limits will not trigger a duty under the *Stowers* doctrine. *Garcia,* 876 S.W.2d at 855. However, this does not mean that a settlement offer in excess of the policy limits could never trigger a *Stowers* duty. In Footnote 13 of the *Garcia* opinion, the majority noted that:

> We do not reach the question of when, if ever, a *Stowers* duty may be triggered if an insured provides notice of his or her willingness to accept a reasonable demand above the policy limits, and to fund the settlement, such that the insurer's share of the settlement would remain within the policy limits.

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

According to Keeton, if the insured is willing to contribute the difference between the insurance policy limit and the total settlement demand, then the *Stowers* duty on the part of the insurer would be triggered. Keeton Insurance Law, § 7.8(d).

> Windt imposes a more onerous burden on the part of the insurer. According to Windt, an insurance company must do two things in order to satisfy its obligations to the insured:
>
> First, it must, if reasonable to do so under the circumstances, attempt to engage the plaintiff's counsel into discussions in an effort to reduce the settlement demand.
>
> Second, if the insurer is unable to obtain a settlement offer that is within the policy limits, it must communicate the higher settlement offer to the insured, since the insured might be willing to make up the difference.

A. Windt, Insurance Claims and Disputes, § 5.07.

This interpretation has been followed by at least one Texas court. The San Antonio court of appeals held that a jury's finding that the insurer was negligent in failing to settle constituted an implied finding that a demand for $1 million in addition to the policy limits was a "demand within policy limits." *State Farm Lloyds Ins. Co. v. Maldonado,* 935 S.W.2d 805, 815 16 (Tex. App. San Antonio 1996, n.w.h.). In *Maldonado*, the underlying suit involved Maldonado's claims against Robert for defamation arising out of Robert's statements accusing Maldonado of being a thief and prostitute. *Id.* at 808. The trial court rendered judgment for Maldonado for $2 million plus prejudgment interest. *Id.* Robert and Maldonado sued State Farm for breach of its *Stowers* duty regarding settlement of the defamation suit. *Id.*

During the underlying suit, Maldonado's attorney orally offered to settle the suit for State Farm's policy limits of $300,000 plus $1 million from Robert's own pocket, and that the offer would expire in thirty days. *Id.* at 809. On the 29th day, State Farm made a written offer to settle for $50,000 and informed Robert that Maldonado had made a demand in excess of the policy limits, and advised Robert to seek advice of a personal attorney. *Id.* Eleven days later, Maldonado again extended the demand for $1.3 million for another 3 days. *Id.* Although State Farm did not accept the settlement offer, Robert entered into an agreement to pay Maldonado $1 million, and did not assign his causes of action against State Farm. *Id.* After the settlement deadline passed, Maldonado denied State Farm's request for an extension of time to accept the settlement offer. *Id.* Later, State Farm offered its policy limits, but Maldonado declined the offer. *Id.* at 810.

The court concluded that the "bifurcated nature" of the demand brought it within policy limits, triggering the *Stowers* duty. *Id.* at 815. The court explained that the demand was tendered both orally and in writing, although the bifurcation of the demand was not reduced to writing. Indeed, no writing is necessary to trigger the *Stowers* duty. *Id.* The court characterized

the demand as "an offer of a policy limits settlement . . . made to State Farm if Robert would pay $1 million out of his own pocket." *Id.* The court stated:

> We note that the present case presents an unusual factual situation. However, the supreme court, while not reaching the merits of the applicability of *Stowers* in such a circumstance, acknowledged that such a situation was feasible. . . . We find little distinction between a demand such as this one made in the present case and a more traditional *Stowers* demand. In both cases, the demand to the insurer is limited to the coverage provided in the policy. As such, a demand such as the one in the present case places no additional burden on the insurer. If the insured is amenable to funding the portion of the demand in excess of policy limits, as he was in the present case, the demand to the insurer falls within those limits.

Id. at 816 (quoting *Garcia,* 876 S.W.2d at 849 n.13).

The supreme court disagreed with the application of the law of the facts in that case. The court noted that in American Physicians, the supreme court had left open the question of whether a *Stowers* duty is triggered "if an insured provides notice of his or her willingness to accept a reasonable demand above the policy limits, and to fund the settlement, such that the insurer's share of the settlement would remain within the policy limits." *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842, 849, n. 13. However, in this case, the court went on to state that:

> Because State Farm did not know that Robert made an unconditional offer to pay the $1 million excess, we are not confronted with the situation, and we therefore decline to decide it here.

State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 41 n.6 (Tex. 1998).

Another area that is problematic to both the plaintiff and the insurer is the situation where there is a primary policy with excess policies stacked on top. First, it should be noted that the supreme court in the Garcia opinion specifically refrained from addressing this situation. There the Court held that:

> Nor do we address the *Stowers* duty when a settlement requires funding from multiple insurers and no single insurer can fund the settlement within the limits that apply under its particular policy.

American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849, n. 13

The supreme court in *Garcia* further stated in Footnote 25 that:

> Although we have discussed the process of allocating indemnity or settlement costs among multiple insurers, this opinion does not address what responsibilities a *Stowers* duty imposes when two or more insurance companies, excess insurers, or reinsurers must jointly fund a settlement.

Id. at 855, n. 25.

In a stacked situation, if the demand is within the primary limits, there is no question that a *Stowers* duty can be triggered. The key in this situation is that the insurer has the ability on its own to accept the demand and bring about a termination of litigation. The fact that there may be other excess policies above the insurer will not obviate this duty. However, this situation may be changed if there are concurrent policies available to fund the settlement.

If the demand is in excess of the primary limits, a different question is presented. In this case, the primary insurer has no ability to bring about a termination of the litigation by paying its limits. In *Westchester Fire Ins. Co. v. American Contractors Ins. Co. Risk Retention Group,* 1 S.W.3d 872 (Tex. App. Houston [1st Dist.] 1999, no pet). American Contractors was the primary insurance carrier for the insured with a policy limit of $250,000. Westchester was a third level excess carrier responsible for amounts over $2 million and up to $4 million. At a mediation conference, the plaintiff made a demand of $1.8 million. This offer was rejected by American Contractors. After trial, judgment was rendered for in excess of $7.5 million. The carrier settled with the plaintiff for $4.3 million, of which Westchester paid $1.3 million. The court of appeals held that the demand of $1.8 million was not within the American Contractors' policy limits and therefore no *Stowers* duty was triggered.

This principle was also reaffirmed in *West Oaks Hospital Inc. v. Jones, Inc.* 2001 WL 83528 (Tex.App.—Houston [1st Dist.] 2001). In that case, the lowest settlement demand of the plaintiff was $725,000. The primary insurance coverage available to the insured was $500,000. As a result, the court of appeals held that since the demand was above the primary policy limits, even though reasonable, it did not trigger a *Stowers* duty on the part of the primary carrier.

In some cases, there may be multiple policies available to pay the claim but instead of the policies being stacked, they may apply on a concurrent primary basis. Again, in Footnotes 13 and 25 of *American Physicians Ins. Exchange v. Garcia,* the Supreme Court specifically refrained from addressing the situation of where funding from multiple insurers was required to settle a case.

To address this question, one must first reconcile the other insurance clauses of the policies. If the policies have other insurance clauses typical in most general liability policies, they will provide for a contribution by limits or equal shares. While an insurer' s duty to defend is not limited by the existence of other insurance, the insurer's duty to indemnify is. The obligation of insured to contribute toward a judgment or settlement is restricted by the "Other Insurance" clause. The insurer has no legal obligation to contribute toward a settlement more than its percentage of the settlement as determined by the "Other Insurance" clause. For example, if there were two primary policies which apply to a lawsuit and each have policy limits of $1 million and a settlement offer was received for $1.5 million, each would have a contractual obligation only to contribute $750,000 to the settlement if the policies provided for contribution by limits of equal shares. The obligation under the policy would be for each carrier only to contribute $750,000.

The more difficult question presented in this situation is where there is a demand within the limits of any of the concurrent policies. Clearly in this situation, the insurer would have the ability to settle the case. However, under the contractual terms of the policy, it is only obligated to pay its pro rata share of the judgment or settlement. Since there has been no guidance

provided by the supreme court in this situation, the more prudent course of conduct for the insurer would be to go ahead and pay the limits to settle a case and seek subrogation against the other insurer who was recalcitrant.

An easier situation is presented where the demand is in excess of any of the concurrent primary policies but within the limits of all the policies. In this case, none of the insurers have the ability to settle the case by paying their limits and, similar to the situation which exists with respect to stacked policies, no *Stowers* duty is triggered. However, if the carrier does believe that the settlement demand is reasonable and that the case should be settled, the more prudent course of action would be for the willing carrier to tender its percentage of the settlement. At least one commentator believes that in this situation the company who refused to contribute its share would be responsible and that the carrier who agreed to contribute its share would have no liability. Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1152 (1954).

B. Reasonably Prudent Insurer Would Accept

The second element of substantive reasonableness is the question of whether a reasonably prudent insurer would accept. Over the years, the courts have looked at several factors in making that determination.

One of the earlier tests included the following factors:

1. The seriousness of the claimant's injuries and the facts and circumstances surrounding the injury;

2. The insurer's actual knowledge, or knowledge that the insurer could have gained through the exercise of ordinary care, of the facts and circumstances surrounding the original injuries;

3. Evidence that the insurer followed rules requiring it not to make settlement offers, or to accept settlement offers only if they were under a certain percentage of policy limits;

4. Existence of an opportunity to settle during the course of investigation or trial;

5. Insurer's failure to carry on negotiations to settle or failure to make a counteroffer after receipt of an offer to settle;

6. Insurer's failure to investigate all the facts necessary to properly protect the insurer against liability;

7. Whether liability was clear at the time the offer to settle was made;

8. Whether the insurer acted negligently, fraudulently, or in bad faith;

9. Whether conflicts in evidence existed which increased the uncertainty of the insured's defense to the injured party's claim.

See Globe Indemnity Company v. Gen-Aero, Inc., 459 S.W.2d 205, 208 (Tex.Civ.App.—San Antonio 1970, writ den'd).

However, in 1994, the Texas Supreme Court for the first time adopted its own factors for substantive reasonableness of the settlement demand. This was in the *American Physicians Ins. Exch. V. Garcia*, 876 S.W.2d 842 (1994). There the supreme court held that:

The *Stowers* duty is not activated by a settlement demand unless 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.

APIE at 849. Therefore, under the new and revised standards for determining the substantive reasonableness of a settlement offer, the supreme court has directed the court and the parties to look to two issues: (1) the likelihood of the insured's exposure to an excess judgment; and (2) the degree of the insured's exposure to an excess judgment. In reviewing these two elements, they encompass many if not all of the elements set forth in the *Gen-Aero* case. However, the court by employing these two broad terms is indicating that the court or the jury is not limited to a specific enumeration of items.

1. *Likelihood of the degree of the insured's exposure to an excess judgment*

The first element is the likelihood of the insured's exposure to an excess judgment. The term "likelihood" is defined by Merriam Webster's Ninth Collegiate Dictionary as "probability." Under this factor, the greater the likelihood of an excess judgment, the more reasonable it is for the insurer to accept the settlement demand. On the other hand, if the likelihood of an excess judgment is very low, then it would not be unreasonable to reject the settlement demand. Therefore, under the first element, the court is looking to factors that would be indicative of the probability of an excess verdict. This would encompass liability defenses such as immunities, indemnities, statutes of limitation, statutes of repose, contributory negligence, etc. Other critical evidence on the likelihood of the insured's exposure to an excess judgment would be defense counsel reports and their assessment of liability. In addition, the court will look at reports of the adjusters and how the claims handler viewed the liability issues prior to going to trial. Analyses of venue will be critical. In some venues, it is much easier to get a plaintiff's verdict than in others. Also included in this assessment would be an analysis of the defense counsel, plaintiff's counsel, as well as analysis of the trial judge.

2. *Degree of insured's exposure to an excess judgment*

The second element in determining substantive reasonableness of a settlement demand is the degree of the insured's exposure to an excess judgment. Merriam Webster's Ninth Collegiate Dictionary defines "degree" to mean "the extent, measure or scope of an action, condition, or relation." Under this factor, the fact finder must focus on the issue of if there is an excess verdict, how much larger than the policy limits will it be?

Critical issues on the degree of the insured's exposure to an excess judgment will include jury verdicts in the venue, defense counsel reports, the availability of settlement credits and offsets, statutory caps that may exist, as well as potential reductions for contributory negligence on the part of the plaintiff. In addition to these, additional factors include limitations on damages that may exist by statute, contractual limitations, and settlements by other defendants. If an excess verdict does occur and it is only going to be a few thousand dollars above the policy limits, that would weigh in favor of not accepting the settlement demand. On the other hand, if an excess verdict does occur and the result would be five to ten times the policy limits, then the degree of insured's exposure to an excess judgment would militate that the demand be accepted.

It should be pointed out that the list mentioned above is by no means exclusive. The apparent intent of the supreme court in using the broad categories was to insure that there was no specific list of categories. Rather, the trial court is free to include or not include categories which, according to the evidence introduced at the trial, may be relevant.

V. <u>Procedural Reasonableness</u>

Procedural reasonableness encompasses the timing to accept the demand as well as information available to the insurer at the time of the demand. Similar to substantive reasonableness, procedural reasonableness also consists of two components. These two components are broad in nature and intended to give the trial court some latitude in determining what evidence would or would not be relevant. These two elements are (a) timing of demand and (b) time to accept.

A. <u>Timing of Demand</u>

Factors to be considered in determining whether the settlement demand meets this aspect of procedural reasonableness includes the following:

- date of incident;
- state of discovery;
- is the policy eroding;
- availability of reports from defense counsel;
- consent to settle if required;
- opportunity to evaluate liability and damages reserves;
- availability of opinions from experts;
- availability of necessary documentary evidence including medical records;
- cost of defense; and
- trial setting.

The first element under procedural reasonableness is the timing of the demand. In the Garcia case, the Texas Supreme Court said:

In the context of a *Stowers* lawsuit, evidence concerning claims investigation, trial defense, and conduct during settlement negotiations is necessarily subsidiary to the ultimate issue of whether the claimant's demand was reasonable under the circumstances, such that an ordinarily prudent insurer would accept it.

What the court is focusing on in this element is whether the insurer has had a reasonable opportunity to conduct an investigation into the case and make an appropriate assessment regarding the liability of the insured. If the insurer has had a reasonable opportunity, then the procedural missed aspect of the procedural reasonableness would have been met. If not, then this aspect of procedural reasonableness will not have been met. For example, if the case has only been reported to the insurer for a week and the insurer has had little or no opportunity to investigate the case, then this element of procedural reasonableness would not have been met. On the other hand, if it is the Friday before trial and the insurer has had the case for two years and had plenty of opportunity to investigate, depose witnesses, seek evaluations from defense counsel, and round-table the case, then this element of procedural reasonableness will have been met.

The trial and appellate courts reviewed several other cases in reaching their conclusions. The district court relied on *DeLaune v. Liberty Mutual Ins. Co.*, 314 So.2d 601 (Fla.Ct.App. 1975) and *Glenn v. Fleming*, 247 Kan. 296 (1990), 799 P.2d 79 (Kan. 1990).

In *DeLaune v. Liberty Mutual Ins. Co*., 314 So.2d 601 (Fla.Ct.App. 1975), the Florida Court of Appeals held that there was no negligence in refusing an offer to settle for the policy limits that was open for ten days when the offer was received approximately six weeks after the occurrence of the underlying accident and only eight days after the defense counsel received the file. In addition, on the tenth day, a Friday, the defense counsel informed plaintiff's counsel he could likely have a response by Monday but plaintiff's counsel refused an extension, and on Monday the insurance company attempted to settle for the policy limits but the plaintiff refused.

Likewise, in *Glenn v. Fleming,* 247 Kan. 296, 799 P.2d 79 (Kan. 1990), the court held that the failure to accept a policy-limits offer within the two weeks allowed was not evidence of bad faith where "the case was less than four months old. Discovery had scarcely begun. There were several defendants. . . . No report of the incident was submitted . . . [to the insured] until the suit was filed."

In *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595 (Tex.App.—Tyler 1984), the court held that a fourteen day term of offer to settle the case under those particular facts was not unreasonably short. In *Kelly,* the accident occurred on April 21, 1978. On April 26, 1978, the attorney for the plaintiffs wrote a letter to the insurer indicating his representation. On November 13, 1978, an offer was made to settle the case for the $50,000 policy limits. The letter was received on November 15, 1978. Under the terms of the letter, the insurer had fourteen days to accept the demand. There was testimony in the case that as early as July 31, 1978, the adjuster had requested authority to offer the entire $50,000 policy limits. The adjuster had evaluated the case as being in excess of the policy limits. The authority to settle for the policy limits was granted

on November 9, 1978. The demand letter was made solely on behalf of Sandra Kelly. Allstate demanded a release from Sandra as well as her husband, Joe Kelly. Plaintiff's counsel indicated that he only represented Sandra Kelly and not her husband and that he could only provide a release for Sandra Kelly.

B. Time to Accept Offer

The second component of procedural reasonableness is the time that the insurer has to accept the offer. In *American Insurance Company, et al. v. Assicurazioni Generali,* Civil Action No. H-93-1801 (S.D. Tex. 1999), the district court held that:

> For the offer to be procedurally reasonable, Generali must be allowed time to consider the offer, and the time allowed must be in direct proportion to the circumstances of the offer. Things that affect the appropriate length of time include: Total costs, secondary impacts, complexity of the case, and the settlement plan, availability of evaluation sources, and numerosity and complexity of alternatives.

This involved a case where the insured was sued in a personal injury case. On November 10, 1992, plaintiffs offered to settle for the remaining policy limits. However, the acceptance of the settlement must be before twelve o'clock noon on November 11, 1992. When the insurer called the plaintiffs' counsel with further questions about the offer, they were told that the offer had expired. The offer had been presented to the insurer at 4:00 p.m. on November 10th. The insurer in that case only had twenty hours to accept the settlement offer. As a result of the failure to accept the offer, the case was tried and the excess carrier was required to contribute over $10 million in order to settle the case. The excess carrier argued that:

- a twenty-hour window was reasonable;
- that the director of Non-Marine Claims for Assicurazioni was the sole decision maker and was sufficiently familiar with the facts that he did not need time to consult; and
- the director of Non-Marine Claims would never have agreed to the settlement in any event.

The primary carrier pointed out that the following was done by the primary carrier:

- they contacted special counsel to evaluate the case;
- they flew from Atlanta to Albuquerque to review the defense file;
- they interviewed defense counsel.

Based upon the facts in this case, the trial court concluded that the primary carrier was not given sufficient time to determine that the uncertain but unconditional settlement offer was reasonable from a perspective of a reasonable carrier. The court held that because the offer was procedurally unreasonable, a duty to settle was never triggered.

The case was appealed to the Fifth Circuit where the same arguments were made by the parties. The Fifth Circuit concluded that:

> Although the issue is indeed a very close one, we conclude that on the present record whether Generali acted reasonably in not accepting the Hinger plaintiffs' November 10th offer is a fact question appropriate for a jury determination, not summary judgment. The district court erred in granting Generali summary judgment on the basis that it acted reasonably as a matter of law.

In *State Farm Ins. Co. v. Maldonado*, 963 S.W.2d 38 (Tex. 1998), the case was set for trial on November 25, 1991. In October, Maldonado made a settlement demand to State Farm of $1.3 million which was to remain open until November 15, 1991. The policy limits of the State Farm policy were $1 million. The insured apparently offered to make up the difference between the $1.3 million settlement demand and the $1 million policy limits, but the court found that "there is no evidence that State Farm knew, at a point when it had a reasonable amount of time to respond, that Robert had made an unconditional offer to pay the excess." Because State Farm was not afforded a reasonable opportunity to pay its limits and settle the entire case, the court held that the procedural reasonableness component had not been met.

From a review of the case law, the following elements are a non-exclusive list of factors to be taken into consideration as to whether the time to accept the offer is reasonable:

- number of days to accept the offer;
- number of business days versus weekends and holidays to accept the offer;
- availability of management to provide authority;
- settlement authority of the adjuster;
- reserves set on the case; and
- attempts by the insurer to settle.

Again, this list is a nonexclusive list of factors that courts have looked to in determining whether this aspect of procedural reasonableness has been met. There certainly are other factors that can be taken into consideration. The one thing that should be kept in mind for all insurers and insureds is that most courts have treated the issue of procedural reasonableness as a fact issue. One should keep in mind that in the *Generali* case, there were only 20 hours in which to accept the offer. However, the court of appeals held that as a matter of law this was not unreasonable and that it would be a fact issue for the jury.

VI. Conclusion

In conclusion, handling early *Stowers* demands focuses more on the procedural reasonableness rather than the substantive reasonableness requirements of a *Stowers* demand. Unfortunately, there are no hard and fast rules that apply. Each case will in large part depend

upon the specific facts of the case. As with many cases, if one of those facts are changed, the entire result may be effected.

However, there are some general propositions that can be drawn from the case law. The first is the closer the settlement demand is to the date of loss, the less likely it is to be a reasonable settlement demand from the standpoint of procedural reasonableness. On the front side, the closer the case is to trial, the more likely a court will find it to be a reasonable settlement demand from the standpoint of procedural reasonableness. If the insurer decides that it cannot pay the demand based upon the timing of the demand, the reasonableness for its inability to pay or make a determination should be carefully documented in its file. It should be noted that most of the cases where an attack was made on the procedural reasonableness of the claim, more cases in which the insurer's inability to respond to the settlement demand was carefully documented in the file. One additional point should be made. In many cases, the policy limits of the insured are clearly inadequate to address the injuries sustained by the plaintiff. In such a case, the desire of plaintiff or plaintiff's counsel will be for the insurer to blow the *Stowers* deadline in order to create unlimited policy limits for the claim. In those circumstances, the insurer should be on its toes and resolve most, if not all, questions or issues in favor of settlement.