



23nd Annual Insurance Symposium: Stowers Update

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Diana L. Faust

diana.faust@cooperscully.com

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Stowers

- Genesis of the Stowers extra contractual claim is the 1929 decision in *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm'n. App. 1929).
- Evolution of coverage law impacting the evidentiary burdens to prove a *Stowers* claim
- On the Horizon: *Seger v. Yorkshire Ins. Co., Ltd.*



Stowers

- In *Stowers*, the insurer refused to accept the third party's offer to settle within policy limits and a judgment in excess of policy limits resulted after trial. The court imposed a duty to handle settlement demands reasonably as a result of the carrier's control over the defense and settlement.



Stowers Elements

- *American Physicians Ins. Exch. v. Garcia*,
 - 876 S.W.2d 842 (Tex. 1994)
 - (1) the claim against the insured is within the scope of coverage;
 - (2) the amount of the demand is within the policy limits; and
 - (3) the terms of the demand are such that an ordinary prudent insurer would accept it, considering the likelihood and the degree of the insured's potential exposure to an excess judgment.



Evolution of Proving the *Stowers* Claim

- *Ranger Ins. Co. v. Rogers*,
 - 530 S.W.2d 162 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)
 - Insurers offer defense under ROR; Insured refused
 - Prejudgment settlement & assignment
 - P's damages awarded by agreed judgment without evidentiary trial



Evolution

- *Ranger Ins. Co. Key Holdings*

- Consent judgment has same degree of finality and binding force as does one entered by court at conclusion of adversary proceeding
- Had insurer accepted defense, it would have had opportunity to conduct defense in manner most likely to defeat P's claim or reduced damages
- Insureds not obligated to accept effort of insurer to limit its responsibility under contract through ROR, and ultimately settled case and obtained consent judgment; under these circumstances, insurer will not be regarded as stranger to consent judgment



Evolution

- *Allstate Ins. Co. v. Kelly*,
 - 680 S.W.2d 595 (Tex. App.—Tyler 1984, writ ref'd, n.r.e.)
 - No actual damages issue required to be submitted to jury because actual damages sustained by insured fixed as matter of law in amount of excess judgment rendered against insured
 - Insured had right to assign 2/3 *Stowers* to judgment creditor with agreement to share expenses



Evolution

- *Block v. Employers Cas. Co.*,
 - 723 S.W.2d 173 (Tex. App.—San Antonio 1986), *aff'd*, 744 S.W.2d 940 (Tex. 1988)
 - Wrongful refusal to defend
 - Prejudgment settlement and assignment
 - P's damages set by agreed judgment with no evidentiary trial



Evolution

- *Block Court of Appeals Holding:*
 - Once determined insurer wrongfully failed to defend insured, insurer barred from collaterally attacking final agreed judgment
 - Agreed judgment has same binding force and effect as judgment resulting from trial to court or jury, and subject to collateral attack only if court rendering judgment had no jurisdiction



Evolution

- *Block Supreme Court Holding:*
 - Insurer barred from collaterally attacking the agreed judgment by litigating the reasonableness of the damages recited therein



Evolution

- *State Farm Fire & Cas Co v. Gandy*,
 - 925 S.W.2d 696 (Tex. 1996)
 - Contractual duty to defend
 - Insurer attempted to defend under ROR; insured refuses and hires own counsel
 - Pretrial settlement and assignment of claims without notice to insurer
 - P's damage determined by agreed judgment without evidentiary trial



Evolution

- *Gandy* Holding:

- D's assignment of claims against insurer to P is invalid if (1) made prior to adjudication of P's claim against D in fully adversarial trial; (2) D's insurer has tendered a defense, and (3) either (a) D's insurer has accepted coverage or (b) D's insurer has made good faith effort to adjudicate coverage issues prior to adjudication of P's claims
- In no event is judgment rendered for P against D, rendered without fully adversarial trial, binding on D's insurer or admissible as evidence of damages in action against D's insurer by P as D's assignee



Evolution

- *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*,
 - 256 S.W.3d 660 (Tex. 2008)
 - No duty to defend
 - Insurer had notice & opportunity to participate in settlement discussions, but declined
 - Damages award determined by settlement (which insured obligated to pay if claim not covered)
 - Claim not assigned



Evolution

- **ATOFINA Holdings:**
 - *Gandy's* holding limited to specific set of assignments with special attributes, and its invalidation of assignments applies only to cases that present its 5 unique elements
 - What is important is notice to insurer & opportunity to participate in settlement discussions
 - Evanston's denial of coverage barred it from challenging reasonableness of ATOFINA's settlement, and bound to pay settlement



Evolution

- **ATOFINA: Justice Hecht dissenting & concurring:**
 - Insurer who breaches duty to defend claim cannot later complain amount of settlement unreasonable, absent evidence of collusion
 - *An insurer that wrongfully refuses to defend a claim, leaving its insured to defend himself, can hardly be allowed to argue that it would have done a better job.*



Stowers & Excess Damages

- *Yorkshire Ins. Co. v. Seger*, 407 S.W.3d 435 (Tex. App.—Amarillo 2013, pet. granted) (argued Sept. 2015)
 - “Lloyd’s of London type CGL” issued by subscribing insurers
 - Insurers refused to provide defense
 - Multiple demands to settle within \$500,000 limits of CGL
 - Insured demands carrier settle within limits
 - Insured’s counsel withdraws
 - Insured subpoenaed for trial as witness, but does not otherwise participate
 - No pretrial agreements between P & D
 - Damage awarded by court after full day of evidentiary trial
 - Judgment and record provided to insurers timely but insurers refuse to challenge
 - No assignment until almost 30 days after judgment



Seger v. Yorkshire Ins. Co.

- Key Holdings by Court of Appeals

- Insured's assignment is valid under *State Farm Fire & Cas. Co. v. Gandy*
- While assignment is valid, the underlying judgment must be result of a fully adversarial trial
- Determination of the reliability of the underlying judgment's assessment of damages depends entirely on extent of insured's participation in underlying proceeding
- When judgment is an agreed judgment, default, judgment, or when underlying D's participation so minimal as to evidence that hearing was not adversarial, the judgment resulting from that hearing not admissible as evidence of damages in the *Stowers* action



Seger v. Yorkshire Ins. Co.

- Supreme Court Granted Review

- Whether post-answer default judgment may establish damages in a *Stowers* action against an insured assigned to wrongful death plaintiffs.
- Whether *Evanston v. ATOFINA* (holding that insurer may not challenge settlement's reasonableness when the insurer refuses a defense or coverage) conflicts with *Gandy* (reasoning that an insured's valid damages evidence must result from fully adversarial trial)



Seger v. Yorkshire Ins. Co.

- Questions Court May Address:
 - What is a fully adversarial trial?
 - If fully adversarial trial requires insured D to mount its own defense in insurer's absence at underlying trial, what happens when D's inability to mount vigorous defense is result of insurer's wrongful refusal to defend?
 - Should determination of P's damages in assigned *Stowers* claim be treated differently than when *Stowers* claim is asserted directly by insured? If an insured is effectively precluded from assigning its *Stowers* claim to buy peace with P, how can an insured protect itself from consequences of excess judgment while *Stowers* action pending?



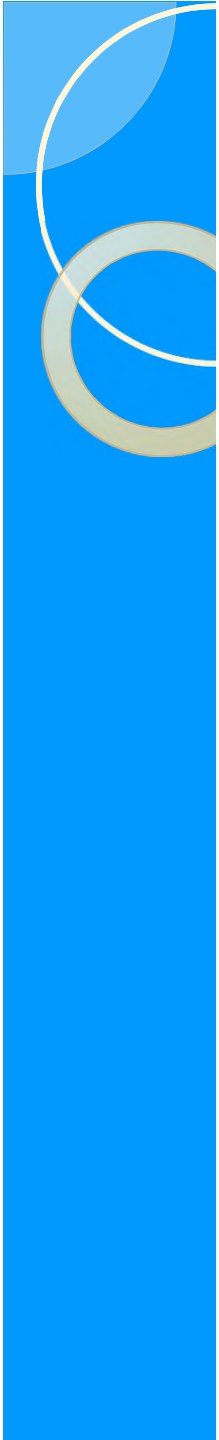
Seger v. Yorkshire Ins. Co.

- Questions:
 - Should postjudgment assignments be treated differently than prejudgment assignments?
 - Should damage awards determined by agreement between P and insured be treated differently than those determined by trial court after evidentiary proceeding?
 - Is collusion between P and insured required to invalidate the underlying judgment award?



Seger v. Yorkshire Ins. Co.

- Questions:
 - What is an insured's duty after its insurer wrongly refuses to defend? What happens where, as in *Seger*, the insured cannot afford to pay for its own defense?
 - Should any safeguards be put into place to prevent a grossly unfair damage award to P even after insurer has wrongly refused to defend?



THE END

Thank you!