

[IN PRACTICE]

THE DUTY NOT TO SETTLE

by R. BRENT COOPER

For years, the focus in Texas law has been an insurer's duty to settle claims against an insured. What some lawyers overlook, however, is that settlement may not be in an insured's best interest, and there can be a duty not to settle.

Texas Insurance Code §541.060(a)(2) makes it an unfair method of competition or unfair deceptive act or practice in the business of insurance to fail "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 reasonable clear."

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Under §541.060(a)(2), when claims on the insurance policy exceed policy limits, the insurer seeking to settle claims must ensure that settlements are reasonable, fair and equitable.

There is no exhaustive list of factors to determine whether an insurer has been reasonable, fair and equitable. The test is whether the insurer has failed in good faith to effectuate a settlement that is reasonable, fair and equitable. Some questions a lawyer must ask are:

- *Did the insurer attempt to settle all claims?* In attempting to minimize the magnitude of possible excess judgments against the insured, the insurer must demonstrate some attempt to settle all of the claims. The insured has limited resources and assets available in the insurance policy, and it is up to the insurer to see that those proceeds are prudently spent.

- *What demands did the insured make?* Was the insured demanding that any of the claims be settled, or was the insured demanding that claims not be settled, to preserve the insurance policy, which likely is the insured's primary asset?

For example, an insured may have relatively low policy limits but face a number of claims. The insurer's duty-to-defend obligation may be as or more important to the insured than the insurer's obligation to indemnify. If the insurer settles with one claimant, leaving the insured with nothing left in the policy, the insured may be exposed to greater liability from the other claims, because he does not have the insurance policy assets to defend himself.



- *Would a settlement fund the plaintiffs' case against the insured?* A corollary to the question above is whether the settlement would, in effect, fund the plaintiffs' case. On many occasions, one counsel represents several plaintiffs. For example, where a husband has been killed, the same lawyer may represent his wife, his children and his parents. A settlement with one or two of those potential wrongful-death beneficiaries often may do more harm than

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good to the insured, if the settling plaintiff reinvests her settlement proceeds in the remaining plaintiffs' litigation. The remaining plaintiffs now are in a position where they can swing for the fences.

The question also raises the specter of policy exhaustion. If the insurer pays out all proceeds of the insurance policy, it leaves the insured without money to fund a defense against the remaining plaintiffs — a worse position

than he was prior to the time of the settlement.

- *Does the settlement achieve a full release of the insured?* If the settlement does not offer to release the insured fully, then it does not meet the requirements of the *Stowers* doctrine — an insurer's duty to settle within policy limits, if reasonable — and the insurer should not have accepted the settlement in the first place.

- *What exposure will the insurer have if it does not settle?* In many situations, the insured will urge the insurer not to settle the case. In those circumstances, the insurer would have no exposure for refusing settlement. Additionally, if the insured requests that the insurer not settle and the company acquiesces, the insurer should not be held liable to the insured for any excess judgment.

The duty not to settle is one that has received little attention under Texas law. To serve clients well, it is a duty with which attorneys must become familiar. 



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