THE GOOD, THE BAD AND THE UGLY: WHAT IS AND WHAT IS NOT AN EFFECTIVE *STOWERS* DEMAND

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CHAPTER 1

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- Represented DISH Network in a dispute concerning insurance coverage of a legal malpractice judgment. Texas jury awarded more than $34 million to the client. The Southern District of Texas's *Stowers* opinion is routinely cited in insurance law seminars. *OneBeacon Insurance Company v. T. Wade Welch & Associates, et al.*, No. H–11–3061 (S.D. Tex.) (2014), *aff'd*, 841 F.3d 669 (5th Cir. 2016).
- Represented Lennar Corporation in an insurance coverage dispute arising from the repair and replacement of defective synthetic stucco on hundreds of Houston-area homes. The decision by the Texas Supreme Court in favor of Lennar was listed in a review of national cases as one of the 10 most significant insurance coverage decisions in the country for 2013. *Lennar Corporation, et al. v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. Aug. 23, 2013).
- Testified as an independent expert witness on Texas insurance and indemnity law issues before the Court of First Instance in Bilbao, Spain. The dispute involved an all-risks insurance policy and damages arising from the rupture of an underwater tether chain securing the piping system for oil production from the Outer Continental Shelf of the Gulf of Mexico. When the chain ruptured, it caused the pipeline riser and related equipment to collapse to the sea floor, severing the connection between the wellhead and the surface thousands of feet above. The alleged damages are in excess of $400 million.

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I. INTRODUCTION

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

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

II. THE NECESSARY ELEMENTS OF A VALID DEMAND

In *American Physicians Insurance Exchange v. Garcia*, the Texas Supreme Court articulated the criteria for a valid *Stowers* demand: (1) at the time the offer is made, the amount sought against the insured must be within the scope of coverage; (2) the amount demanded must be within the insured's policy limits; and (3) the terms of the demand must be such that an ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. 876 S.W.2d 842, 849 (Tex. 1994). "When these conditions coincide and the insurer's negligent failure to settle results in an excess judgment against the insured, the insurer is liable under the *Stowers* Doctrine for the entire amount of the judgment, including that part exceeding the insured's policy limits." *Phillips v. Bramlett*, 288 S.W.3d 876, 879 (Tex. 2009); *see also Medallion Transport & Logistics, LLC v. AIG Claims, Inc.*, 2018 WL 3249708, at *1 (E.D. Tex. June 27, 2018) (applying Texas law) (rejecting carrier's *Stowers* liability where underlying judgment against insured was not yet final).

As a threshold matter, the initial question of coverage is typically not under the control of the plaintiff attorney drafting the demand. *See, e.g., AIG Spec. Ins. Co. v. Stoller Enterprises, Inc.*, 2017 WL 541533 (S.D. Tex. Feb. 7, 2017) (applying Texas law) ("Because neither the CGL Policy nor the Umbrella Policy provides coverage in this case, AIG's *Stowers* duty was not triggered"). However, whether the amount demanded is within policy limits and whether such amount is reasonable are two distinct prongs the drafter can control. Each of these two elements of a *Stowers* demand is susceptible to numerous variables that make determining their legal sufficiency less straightforward.

A. Settlement Figure Must Be Within Policy Limits

1. Policy Erosion

Although an insurance policy will state the amount of monetary coverage provided, claimants should bear in mind that this allotted figure may be tied to offsetting defense costs incurred by the carrier. In cases where the insured is covered under a "burning" or "eroding" policy, these costs will be deducted against the coverage available for settlement. If so, this contingency must be anticipated by the claimant's attorney when preparing a *Stowers* demand, either with a reduced settlement figure or by specifically seeking "policy limits." *See Montoya v. State Farm Mut. Auto. Ins. Co.*, 2017 WL 3726058 (W.D. Tex. Aug. 29, 2017) (applying Texas law) (finding the insured-plaintiff's petition failed to make a specific demand for "policy limits" where the petition merely alleged the carrier's actions in "settling with culpable and less injured claimants, also left [the insureds] unreasonably exposed for a judgment above the policy limits").

In *Westchester Fire Insurance Company v. Admiral Insurance Company*, the Fort Worth Court of Appeals discussed the standard for a valid request in the context of an eroding insurance policy. Counsel for the claimant sent a written settlement proposal to the insured, which stated: "We are willing, *at this time*, to settle this case for the policy limits of the primary insurance policy: $1,000,000. I trust that you will apprise the excess carrier of the fact that this case can be settled, *at this time*, within the limits of the primary insurance policy." 152 S.W.3d 172, 192 (Tex. App.—

Fort Worth 2004, pet. denied) (emphasis in opinion). The primary insurer (Admiral), which was later sued by the excess insurer (Westchester) for failing to settle the case within policy limits, contended that the amount sought by the claimant exceeded the available policy limit[1] and, therefore, the letter was an ineffective *Stowers* demand. *Id*. at 180. Countering that position, Westchester offered the following testimony: "I think he used the magic words policy limits… [I]n my mind…that means policy limits as they may exist from time to time." *Id.* at 195.

Ultimately, the court of appeals took the middle ground and found a fact issue for the jury to decide. *Id*. at 191. Nonetheless, that outcome should not be seen as a vindication of the drafting technique employed. The demand written in *Westchester Fire* invites an unfavorable reading for the claimant. Specifically, the section offering "…to settle this case for the policy limits of the primary insurance policy: $1,000,000" would seem to equate the net policy amount available, post-erosion, with the unadjusted initial coverage limit. The saving grace for this particular demand seems to be the portion stating "…this case can be settled, at this time, within the limits of the primary insurance policy," though even that language arguably contains ambiguity. Thus, while *Westchester Fire* establishes a certain threshold for what constitutes a demand within policy limits, it remains an imperfect example. An even less tenable request, taken from an actual *Stowers* letter, reads:

Bad Demand

"The purpose of this letter is to grant each of the above-named defendants an opportunity to resolve this dispute with the plaintiffs in this case for an ***amount within*** *your respective client's* [sic] *insurance limits."*

(emphasis added). Problems with this offer are multifold. First, no specific dollar figure is included. This feature alone is not necessarily fatal to the sufficiency of any demand; a reference to seeking the limit of a policy would compensate for that omission. Second, the example above fails to reference the upper limit of policy coverage available and instead proposes settlement for an "amount within" this range, which, of course, could be any figure less than or equal to the upper limit. Such imprecision would not likely survive judicial scrutiny if challenged by a carrier for noncompliance with the *Stowers* doctrine. Contrast these points with the demand shown below:

Good Demand

"Our clients offer a full, final and complete release of their claims against [*your client*]*, in exchange for a payment of the lesser of $1 million* ***or*** *the remaining policy limits of* [*your client*]*'s applicable insurance policy."*

(emphasis original). This latter example illustrates the preferred drafting approach, by combining the specificity of an exact dollar figure as well as a hedge for the remaining policy limits, whatever the obtainable figure might be. Notably, in contrast with the demand at issue in *Westchester Fire*, the language here precludes conflation of each amount by highlighting the word "**or**" as a distinguishing modifier. While the situation described in this section, involved just one primary carrier, additional considerations arise in the event that multiple carriers are implicated in the settlement.

2. Stacked Policies

a. Consecutive Policies

The term "stacking" generally refers to losses which occur at a specific time, but to which more than one policy coverage applies. *See Upshaw v. Trinity Companies*, 842 S.W.2d 631, 632 (Tex. 1992). "Stacking" may also refer to losses which occur across more than one policy period and thus implicate the limits of consecutive policies. *See* 12 Lee R. Russ & Thomas F. Segalla, COUCH ON INSURANCE § 169:4 (3d ed. 1997). In the latter category, the Texas Supreme Court in *American Physicians Insurance Exchange v. Garcia* adopted a rule against stacking, holding that "consecutive policies, covering distinct policy periods, [cannot] be 'stacked' to multiply coverage for a single claim involving indivisible injury." 876 S.W.2d at 853. Thus, a settlement demand that attempts to aggregate the limits of multiple consecutive policies will not likely pass muster under the *Stowers* doctrine.

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

b. Concurrent Policies

Stacking is permitted in context of concurrent policies. *See Bethany Christian Church v. Preferred Risk Mut. Ins. Co.*, 942 F. Supp. 330, 337 (S.D. Tex. 1996) (applying Texas law) ("where there are multiple policies in effect for the same coverage period, those limits may be stacked."); *see also* 12 Russ & Segalla, supra, § 169:110 n.76 ("[I]f multiple policies are in effect for the same coverage period, those limits may be stacked."). The *Garcia* opinion offers limited guidance in this context, declining to 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." *Garcia*, 876 S.W.2d at fn. 25. "Other Insurance" clauses in the respective policies will also complicate this analysis, as those clauses will typically require policies providing concurrent coverage to contribute by limits or equal shares.

Thus, counsel for claimants must not assume that a settlement figure within the aggregate coverage of properly-stacked, concurrent policies will constitute a valid *Stowers* demand. Each insurer may not have a legal obligation to pay more than its percentage of the settlement—as determined by the "Other Insurance" clause—and the Texas Supreme Court has not yet directly addressed whether *Stowers* liability arises when multiple insurers are presented with a settlement demand by a plaintiff.

3. Excess Carriers

Another issue arises when a claimant demands an amount above the limits of the insured's primary insurance coverage but within the limits of the insured's *excess* insurance policy. *See Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692, 700 (Tex. 2000) ("[T]he excess liability insurer is not obligated to participate in the defense until the primary limits are exhausted."). Where an insured is covered by both a primary policy and an excess policy, the general rule is that the excess liability carrier is not obligated to participate in the defense until the primary policy limits are exhausted. *See Schneider Nat. Transp. v. Ford Motor Co.*, 280 F.3d 532, 539 (5th Cir. 2002) (refusing to allow an excess carrier to sue a primary insurer for equitable subrogation under a *Stowers* theory where there was never a demand within the primary limits); *see also* 4 Couch on Ins. § 200:41 ("[T]he general rule is that the excess liability carrier is not obligated to participate in the defense until the primary policy limits are exhausted.").

In *Keck*, the Supreme Court of Texas reviewed a situation where the primary insurer alleged that the excess insurer handled the dispute negligently by not trying to settle the claim, failing to investigate the merits of the claim, and not appearing at a deposition. *See* 20 S.W.3d at 701. The court held that the excess carrier's duty to defend was not invoked before primary insurer tendered or exhausted policy limits. *See id.* However, there are two potential exceptions to this rule: (1) when the excess carrier exercised control over the settlement process, and (2) when the excess carrier is put on notice that the amount is certain to exceed the primary policy limits. *See Keck*, 20 S.W.3d at 700 (Tex. 2000).

a. Taking Control

Texas courts have imposed a duty on the excess carrier if the excess carrier assumed control over the settlement process. *See Rocor International, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253 (Tex. 2002) (excess insurer owed a *Stowers* duty to the insured where it assumed control of settlement negotiations, canceled a scheduled mediation, and directed that no offer be made to plaintiffs). Taking control of the settlement process includes negligently disclosing information to plaintiff's counsel in a third-party claim against the insured. *See Birmingham Fire Ins. Co. v. American Nat'l Fire Ins. Co.*, 947 S.W.2d 592, 596 (Tex. App.—Texarkana 1997, writ denied). Texas courts have refused to impose a duty when the primary insured is insolvent. *See Emscor, Inc. v. All. Ins. Group*, 804 S.W.2d 195, 198 (Tex. App.—Houston [14th Dist.] 1991, no writ); *see also Harville v. Twin City Fire Ins. Co.*, 885 F.2d 276, 280 (5th Cir. 1989). Thus, actively participating in the negotiations may trigger *Stowers* for excess carriers. *See Emscor Mfg., Inc. v. Alliance Ins. Group*, 879 S.W.2d 894, 909 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("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").

b. Knowledge of the Claim

Courts outside of Texas have imposed a duty to defend on excess carriers when the excess carrier is put on notice that the claim will exceed the primary limits. *See Metlife Capital Corp. v. Westchester Fire Ins. Co.*, 224 F. Supp. 2d 374, 338 (D.P.R. 2002); *see also Royal Ins. Co. of America v. Reliance Ins. Co.*, 140 F. Supp. 2d 609, 618 (D.S.C. 2001) (holding that excess carrier's duty to defend was triggered when prayer for relief clearly implicated excess policy limits); *see also American Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669, 692 (W.D. Wis. 1982), judgment aff'd, 718 F.2d 842 (7th Cir. 1983) (where damages claimed in pleading exceeded primary policy limits excess carrier's duty to defend was triggered); *see also Celina Mut. Ins. Co. v. Citizens Ins. Co. of America*, 133 Mich. App. 655, 349 N.W.2d 547 (1984) (both primary and excess carrier's duty to defend was triggered when pleading suggested primary coverage would be exhausted).

In the *Keck* concurring opinion, Justice Hecht explained that under the doctrine of "unclean hands" an excess insurer may be liable to refuse to involve himself in the defense of a claim if it is likely that the claim will exceed the primary insurer's policy limits. *See Keck*, 20 S.W.3d at 706 (Tex. 2000) (Hecht, J., concurring). Justice Hecht provided a helpful potential letter to an excess carrier if this situation were to arise:

"Good" Excess Carrier Demand (According to Justice Hecht)

"We know that you have no duty to assist in the defense of this case, but you do have the right under your policy to protect your own interests, and you should exercise that right now. P has made a settlement offer within primary and excess coverage although liability could be much greater. We are worried that not only could your limits be exhausted but that D himself could even be exposed personally. We have handled this case superbly to have obtained as low an offer as P has made. Attached is a complete summary of what we have done and what we have decided not to do. If P ultimately obtains by judgment or settlement much more than the present offer, as we almost certainly think he will, then it will not surprise us if you try to shift some of the responsibility for your inaction to us, claiming that we did not properly handle the case. If that happens, we want to be able to defend ourselves by showing that you were fully warned, and that any complaints you make against us are pretextual to cover your own ineptness. So if you sue us later, we intend to introduce this letter into evidence so that the jury can see what really happened."

Justice Hecht reiterated that the "weight of the learned commentary and the differences in the multitude of cases in the area convinces me that the Court should proceed more carefully than it does today." *Id.* at 706. Thus, we may see the duty to defend extend to carriers when they are clearly put on notice and have an opportunity to defend.

c. Other Considerations

The duty to settle may also attach to an excess insurer where all of the other excess insurers in the insured's tower of insurance have agreed to pay their policy limits. *See Cameron Int'l Corp. v. Liberty Ins. Underwriters, Inc. (In re Oil Spill By the Oil Rig "Deepwater Horizon" in the Gulf of Mexico)*, No. 2:10-md-02179-CJB-SS (E.D. La. Aug. 16, 2012) (Doc. No. 7129) (predicting Texas Supreme Court would find that settlement demand within limits of $250 million tower of insurance would trigger *Stowers* duty on the part of mid-level excess insurer with $50 million in coverage where all other insurers in the tower have agreed to fund the settlement).

A related issue is one in which a demand is made that exceeds the primary carrier's policy limits, but the insured is willing to pay the difference between the limits and the total of the demand. 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, fn. 13. At least one state appellate court has adopted the view that 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. In *State Farm Lloyds Insurance Company v. Maldonado*, the claimant offered to settle the suit for State Farm's policy limits of $300,000 plus $1 million from the insured's own pocket. 935 S.W.2d 805, 809 (Tex. App.—San Antonio 1996), *affirmed in part and reversed in part*, 963 S.W.2d 38 (Tex. 1998). The San Antonio Court of Appeals concluded that the "bifurcated nature" of the demand brought it within policy limits and triggered the *Stowers* duty. *Id*. at 815. The Supreme Court reversed the court of appeals on the specific facts of that case, and it ruled that the $1.3 million settlement demand "was not an unconditional offer to settle within policy limits and therefore did not trigger the *Stowers* doctrine." *Id*. at 41. The Court explains:

> In this case, State Farm claims Maldonado never made an unconditional offer to settle within State Farm policy limits. It is undisputed that Maldonado never made a settlement demand of less than $1.3 million. She nevertheless contends that Robert's offer to pay the $1 million above policy limits converted the $1.3 million demand into a $300,000 policy-limits demand. We disagree.

Id. However, in a footnote, the Court acknowledged that *Garcia* left open the question of whether a *Stowers* duty is triggered if an insured provides notice of his or her willingness to fund a settlement above the policy limits.

B. Reasonableness

In addition to being within the scope of coverage and within the available policy limits, a settlement demand must be reasonable, such that an ordinary prudent insurer would accept it. Among other factors discussed below, satisfying this element hinges on the likelihood and degree of the insured's potential exposure to an excess judgment. Ensuring that a proposal meets the threshold criteria for reasonableness is the most intricate aspect of structuring a valid settlement demand, as well as the requirement given significant weight by courts during any judicial inquiry. "In a *Stowers* case, evidence concerning claims investigation, trial defense, and conduct during settlement negotiations is subsidiary to the ultimate issue of whether the claimant's demand was reasonable under the circumstances…" *Garcia*, 876 S.W.2d at 851.

1. Reasonable Amount of Time

One issue courts will consider in weighing the reasonableness of a settlement offer is whether its terms provide the carrier with sufficient time to develop an informed response. Although the exemplary *Stowers* letter will incorporate substantial legal authority, analysis and argument to justify its demands, insurers are entitled to a reasonable amount of time to consider the demand. As explained in *Bramlett v. Medical Protective Co.*, 2013 WL 796725 (N.D. Tex. 2013), determining reasonableness in this context is most often a question of fact. *See, e.g., Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 608 (Tex. App.—Tyler 1984, *writ ref'd n.r.e.*) (concluding that a settlement offer held open for 14 days was reasonable under the "facts and circumstances" of the case). Thus, no definitive rule has been established setting forth what constitutes a reasonable amount of time in *Stowers* cases. Consequently, counsel for claimants should bear in mind that an excessively onerous response deadline could undermine the viability of their demands or insurers' ability to accept them.

2. Release of Liability

a. Full Release

The *Stowers* doctrine presumes that an offer that does not convey a full release of liability is unreasonable from the standpoint of an ordinarily prudent insurer. The *Garcia* court affirmed this interpretation, observing that "a proper settlement demand generally must propose to release the insured fully in exchange for a stated sum." *Garcia*, 876 S.W.2d at 848-49. While this requirement works to insulate carriers from the pitfalls of nebulous demands, it also introduces complicating factors from the perspective of a *Stowers* plaintiff, particularly when multiple claimants pursue settlements against the same insured. Two particular contexts in which Texas courts have analyzed these developments are with respect to auto liability and hospital liens.

(1) Multiple Claimants

Importantly, in cases where an insured is liable for injuries to multiple plaintiffs, the policy limit represents the total compensation collectively available to all claimants. This dynamic creates a motivation for separate claimants not only to settle, but to settle quickly. As the Texas Supreme Court explained in *Texas Farmers Inurance. Company v. Soriano*, "[w]hen 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 proceeds available to satisfy other claims." 881 S.W.2d 312, 315 (Tex. 1994). Plaintiff attorneys should therefore structure their releases of liability so that *each* of the claimants they represent *entirely* relinquishes their claims to the insured for additional future recovery. Doing so will eliminate at least one basis for the carrier to reject a certain demand by claiming that it is unreasonable. And, in the context where competition exists between multiple claimants for the available policy limits, avoiding such a delay could prove the difference between securing full compensation for a particular client and encountering a depleted asset pool.

One Texas court of appeals has created new law in this area by arguably requiring that all claimants release all insureds sued by those claimants in order for a *Stowers* demand to be effective. In *Patterson v. Home State Mutual Insurance Company*, the underlying injury occurred when Diane Patterson was fatally struck by an eighteen-wheeler owned by Brewer Leasing and operated by Charles Hitchens, an employee of Texas Stretch. No. 01-12-00365-CV, 2014 WL 1676931, at *10 (Tex. App.—Houston [1st Dist.] April 24, 2014, pet. denied). The decedent's husband, Marcus Patterson, filed a wrongful death action against Brewer, Hitchens and Texas Stretch. *See id*. Brewer had an insurance contract with Home State that also covered anyone driving a "covered auto" with Brewer's permission. *Id.* at *2.

Patterson sent Home State three separate letters inviting settlement.[2] Patterson's first letter proposed that Home State pay out the policy limits to his and Diane's children, Daniel and Danae, and in relevant part read:

> *"This letter is sent as a settlement offer on behalf of Daniel Patterson and Diane Patterson. They will both settle their minors' claims against Brewer Leasing, Inc. and its insurance carrier…*[*and*] *will provide Brewer Leasing Company, Inc. with a full and complete release of all claims against Brewer Leasing in exchange for the payment of the policy limits."*

Id. at *21. As is clear from the excerpt above, this letter only purports to release the claims of the children, and not the claims of the father. Additionally, the children agreed to release Brewer, but not Hitchens, the driver. *Id.* In his follow up correspondence with Home State, Patterson confirmed these limitations: "I want to reaffirm that the settlement offer is made on behalf of Daniel Patterson and Diane Patterson. It does not include an offer of settlement from their father, Marcus Patterson, in his individual capacity." *Id*. at *22. In similar fashion, the second settlement proposal, which only included a release by Marcus Patterson and not the children, confirmed that not all of the *potential* insureds were being released:

> *"Marcus Patterson* [] *will provide Brewer Leasing, Inc. with a full complete, total, and unconditional release of any and all claims against Brewer Leasing and its insurance company in exchange for the payment of the policy limits…This also applies to any claim against Brewer Leasing by, through, or under Charles Hitchens. But we are not releasing Mr. Hitchens, Texas Stretch or their insurance carriers."*

Id. Finally, in his third settlement offer, Patterson included all of the claimants but not all of the *potential* insureds, namely Hitchens:

> *"This letter is sent as a settlement offer on behalf of Marcus Patterson, individually, Marcus Patterson as administrator of Diane's estate, Marcus Patterson as next friend of both Daniel and Diane Patterson, and Larry Goffney. They will settle all of their claims against Brewer Leasing, Inc. and its insurance carrier for the policy limits."*

Id. All three proposals were eventually rejected by Home State.[3]

With regard to the first two settlement offers, the court explained:

> A settlement offer must be both unconditional and . . . propose to release the insured fully to trigger the insurer's *Stowers* duty to settle. The purpose of the *Stowers* doctrine is to shift the risk of an excess judgment onto the insurer when the insurer has the opportunity to prevent an excess judgment by settling within the applicable policy limits. . . . Here, Patterson's first and second settlement offers did not propose to fully release Brewer, as it would still have been liable to an excess judgment to either Marcus Patterson, his children, or his wife's estate, whichever was not named in the settlement demand. Indeed, by settling in the full amount of the policy limits with only one of the claimants, Home State could have potentially exposed Brewer to an excess judgment by one of the other claimants. Accordingly, we hold that the first and second settlement offers did not trigger Home State's *Stowers* duty to settle.

[2] During the course of the underlying litigation, Home State tendered its limits into the registry of the court.

[3] Home State had filed its motion to interplead its policy limits before the third settlement letter was received.

Id. at *8 (citations omitted). Moreover, the court also found fault with the third settlement demand, which agrees to release all of the Patterson claimants. While that final demand released all claims against Brewer, it did not include Hitchens. According to the court,

> The insurance policy for Brewer expressly provided that those insured under the policy included "[a]nyone else while using with your permission a covered auto you own, hire, or borrow." Thus, Patterson's third settlement offer did not constitute an unconditional offer to fully release the insureds in exchange for a settlement.

Id. at *10. The court further pointed out that personal counsel for the Brewer and Stretch had advised that he did not want "any settlement demands to be accepted that didn't involve a release of all the Pattersons' claims against both Brewer Leasing and Mr. Hitchens." *Id*. The fact that the insured's counsel had apparently not wanted Home State to accept the offers was significant to the court.

Patterson arguably stands for the proposition that all claimants must release all *potential* insureds in order for a settlement offer to qualify as an effective *Stowers* demand. No court followed that same path prior to *Patterson* and no court has chosen to follow it since. Moreover, some have argued that the decision in *Patterson* directly conflicts with the Texas Supreme Court's decision in *Soriano*. 881 S.W.2d at 312. In *Soriano,* the Court held that an insurer owes separate *Stowers* duties in connection with each settlement demand that it makes. *Id.* at 315. The Supreme Court also held 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. *Id*. Some argue that this holding would not appear to make legal sense unless one of the claimants triggered the insurer's *Stowers* duty in the first place. Thus, they argue that *Soriano* stands for the proposition that a *Stowers* demand is effective even if it only offers to resolve one of several claims, or is made by only one of several claimants.

Though the Texas Supreme Court has still not spoken directly on the issue of whether an offer to settle must release all insureds, the Fifth Circuit has. *See OneBeacon Ins. Co. v. T. Wade Welch & Assoc.*, 841 F.3d 669 (5th Cir. 2016) (applying Texas law). In *OneBeacon*, a former client offered a full release of its legal malpractice claims against the insured law firm in exchange for policy limits, but the demand did not offer a release to the individual attorney who handled the client's case. *Id*. at 678. OneBeacon, the malpractice insurance carrier, rejected the demand because it did not offer to release all insureds—namely, the handling attorney, Wooten. *Id*. The United States Court for the Southern District of Texas held that the former client's offer was a valid *Stowers* demand as a matter of law, despite its failure to include the individual attorney. *Id*. On appeal to the Fifth Circuit, OneBeacon urged the Court to apply *Patterson*, arguing the former client's demand did not constitute a valid *Stowers* demand because it did not offer to release all insureds. *Id*. The Fifth Circuit distinguished the Houston Court of Appeals' decision in *Patterson*, and instead relied on its prior decision in *Citgo* and the Texas Supreme Court's decision in *Soriano*:

> 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." In coming to this conclusion, we were persuaded by the Texas Supreme Court's decision in *Soriano*.
>
> 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. 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 the claims against both [the employer and the employee.]'"

Id. at 678-79 (internal citations omitted). Accordingly, the Fifth Circuit concluded the district court did not err in holding that the former client's demand letter was a valid *Stowers* demand that OneBeacon improperly rejected. *Id*. at 679.

Nonetheless, with the *Patterson* decision now firmly planted in the midst of other Texas *Stowers* decisions, claimants should be mindful that a demand from less than all of the claimants, and a release of less than all potential insureds, may not qualify as a valid *Stowers* demand under Texas law. And, the Fifth Circuit's decision in OneBeacon

makes clear that—though not required by the policy—obtaining the insured's consent for a partial release may, as a practical matter, protect the carrier from an adverse finding of liability.

(2) Hospital Liens

Another context in which structuring a full and complete release of liability has proven problematic for plaintiff attorneys is when a medical care provider files liens for hospitalization costs. This issue emerged in *Trinity Universal Insurance Company v. Bleeker*, which involved multiple claimants seeking compensation for personal injury claims against the insured. 966 S.W.2d 489 (Tex. 1998). Bleeker, the insured, struck a parked vehicle while driving intoxicated, inflicting fatal and life-threatening injuries on fourteen individuals. *Id*. at 490. Medical bills quickly exceeded the minimum legal coverage amount of $40,000 per accident that Bleeker carried under his auto policy (reinsured by Trinity) and the treating hospital proceeded to file its lien claim. *Id*.

Counsel for the claimants sent Trinity a letter demanding that it deposit the $40,000 policy limits into the registry of the court for distribution to his client, but did not expressly mention the hospital lien or agree to release the claims against Bleeker. *Id*. Trinity declined to pay the policy limits. *Id*. After a judgment was rendered against Bleeker for nearly $11.5 million, Bleeker his assigned his potential *Stowers* claims against Trinity to the plaintiffs. *Id.*; *see also Hernandez v. Truck Ins. Exch.*, 553 S.W.3d 689 (Tex. App.—Fort Worth June 1, 2018, pet. filed) (finding, as matter of first impression, standing to assert a *Stowers* claim even in the absence of an assignment of the claim or of a turnover order granting party entitlement to insured's claim).

The primary issue that reached the Texas Supreme Court was whether the claimants, in compliance with the post-*Stowers* decisions in *Garcia* and *Soriano*, sufficiently offered to release their claims against Bleeker *fully*. The Supreme Court held that they did not. *Id*. Assuming that the demand to deposit funds into the registry of the court constituted a settlement offer, the Court found that, when a hospital lien exists, a release is not valid unless:

- the hospital's charges were paid in full before execution and delivery of the release;
- the hospital's charges were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release; or
- the hospital is a party to the release.

Id. at 491. Since counsel for claimants neglected to fulfill this essential criteria, no *Stowers* duty was triggered and recovery was therefore denied. *Id*. The *Bleeker* holding reemphasizes that an offer to release the insured from liability should be at once comprehensive and free of ambiguity. In response to this case, at least some practitioners have seen fit to reference *Bleeker* by name in their settlement proposals, as the following example shows:

Good Demand

"This release would include a full release of any and all liens – including liens for medical expenses and subrogation rights that may be pending, now or in the future – as well as standard indemnity provisions. In addition, pursuant to the Texas Supreme Court's decision in Trinity Universal Ins. Co. v. Bleeker, [*claimant*] *offers to release your insured fully and to make all hospital, Medicare, Medicaid, subrogation, or other lienholders, if any, party to the release."*

While perhaps non-essential, citing *Bleeker* certainly represents the wary approach to communicating settlement terms to an insurer—particularly when hospital liens either are, or could be, at issue. This "abundance of caution" is consistent with the principle and best practice that a drafter can hardly be too specific when composing a *Stowers* letter.

b. Unconditional Release

Underneath the same umbrella requirement of reasonableness which mandates a full and complete release of liability, so too must the settlement proposal qualify as unconditional. Since the decision in *Stowers*, Texas courts have required "an *unconditional* offer to settle before there can be said to be a breach of the insurer's duty to settle." *See Danner v. Iowa Mut. Ins. Co.*, 340 F.2d 427 (5th Cir. 1964). The First Court of Appeals addressed the distinction

between conditional and unconditional *Stowers* demands in *Insurance Corp. of Am. v. Webster*, 906 S.W.2d 77 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

In *Webster,* appellant challenged a lower court ruling which held the carrier liable for gross negligence in failing to settle a medical malpractice claim, on the grounds that no unconditional offer was ever tendered by appellee. Counsel for appellee submitted two separate settlement demands to the insurer, the first of which read, in relevant part:

Bad Demand

"You have now informed us that Webster has only $100,000.00 in insurance. Based upon your representation, [*my client*] *has authorized me to offer to settle her case against Webster for $1,000,000. Obviously, if there is other insurance, this offer shall be null and void."*

Webster, 906 S.W.2d at 80. The court observed that, "[i]n order to make performance specifically conditional, a term such as 'if', 'provided that', 'on condition that', or some similar phrase of conditional language must normally be included. *Id.* at 81 (citing *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990)). In this instance, the dependent clauses within the offer above, *i.e.*, "Based on your representation …" and "… if there is other insurance …" appear to raise the same sort of red flags. The second demand sent on behalf of the claimant, shown below, was deemed similarly problematic:

Bad Demand

"You and your client, Dr. Ross Webster, have represented in Answers and Interrogatories that the liability insurance coverage on Dr. Webster is only $100,000.00. In reliance upon your representations to that effect, I, on behalf of my client, the Plaintiff, hereby offer to settle the case with Dr. Webster for the sum and amount of $99,999.00."

Webster, 906 S.W.2d at 80. The second quoted letter contains the words "in reliance on" which the court decided is also conditional language. Read in context, this portion rendered the letter as a whole conditioned on the accuracy of Webster's representations that no excess insurance coverage existed. *Id.* at 81.

In fact, as the opinion states, an excess insurance policy covering Webster was in effect. Thus, the court explained, "[t]he absence of additional insurance was a fact that had to exist before [appellant] could accept the offer and form a contract to settle the case. . . . Because other insurance was in existence even before the offers were made, it was impossible for [appellant] to accept them." *Id.* Since the conditional language of the offers conveyed by appellee's attorney essentially precluded the insurer from accepting their terms, each demand was held to be ineffective; no *Stowers* duty therefore applied and the claimant was denied recovery.

III. CONCLUSION

As illustrated by the examples and case discussions above, drafting a valid *Stowers* demand is difficult under the best of circumstances and often involves factors out of the plaintiff's attorney's control. However, using the case law above as guidance on the more technical aspects the *Stowers* requirements, one can at least avoid making certain mistakes that are still very prevalent in well-intended demands written every day.