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Alerts

Paying Policy Limits to Resolve a Covered Claim for One But Not Both Liable Insureds Acceptable in Texas

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Insurance Coverage Alert

In *Pride Transportation vs. Continental Cas. Co. and Lexington Ins. Co.,* Case No. 4:08-CV-007-Y (N.D. Tex. 2011), an employee of an insured transportation company rear-ended a truck while she was driving one of the insured's vehicles. The truck driver was consequently rendered a paraplegic and subsequently sued the insured and the employee. The insured was covered by a primary policy issued by a first insurer with a policy limit of $1 million and an excess policy issued by a second insurer with a policy limit of $4 million. The employee was an additional insured. The insurers attempted to settle the lawsuit for the policy limits on behalf of both the insured and the employee, but the claimants would not agree. The claimants made a *Stowers* demand for the combined primary and excess policy limits to resolve all claims against the employee alone.

Under Texas law, an insurer can be held liable for negligently failing to settle a claim within the policy limits.*G.A. Stowers Furniture Co. v. Am. Indem. Co.,* 15 S.W.2d 544, 547 (Tex Comm'n App. 1929). An insurer has been effectively "Stowerized" in Texas when: (1) the claim against the insured is within the scope of coverage; (2) the demand is within the policy limits; and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the potential exposure to the insured. Courts in Texas have held that in light of the *Stowers* duty, an insurer that is faced with a settlement demand arising out of multiple claims but inadequate proceeds may enter into a reasonable settlement with one of several claimants, even though the settlement exhausts the policy limits. The same is true when the insurer is defending multiple insureds that share one limit applicable to the claim.

Here the insured claimed that the insurers were not protected by this case law because the demand to them did not constitute a valid *Stowers* demand and the only reason that the insurers settled the lawsuit on behalf of the employee alone was so that they could claim that the policy limits were exhausted and avoid incurring further defense costs and expenses. The insured contended that the demand did not trigger a *Stowers* duty because it did not propose to release all claims against the employee. The insured filed a cross-claim for indemnity against its employee that was not released in the settlement. The court concluded that the release was complete enough for *Stowers*, noting that all of the claims of the claimants were released. The insured also claimed that the demand was not valid under *Stowers* because it exceeded the limit of each policy. But the first insurer tendered its $1 million limit to the second insurer prior to the time the settlement demand expired. So the demand met the combined limit of $5 million, which was under the second insurer's control.

The court concluded that the demand appeared to meet the *Stowers* standard. It also determined, however, that whether or not the insurers were duty bound under *Stowers* was not dispositive; rather the test the insurer had to meet was whether "an ordinary and prudent person would have accepted the [claimants'] demand." Given the potential personal liability faced by the employee had the insurers not settled the action, the court held that the insurers acted reasonably in accepting the demand even though the result was that their other insured, the transportation company, remained exposed.

Practice Note

When faced with a situation in Texas such as was the case in *Pride Transportation*, insurers should first make a serious attempt to convince the claimants to accept the policy limits in exchange for a release of the claims for all of the insureds.

Insurers should also proceed with settling on behalf of only one insured in cases where it is reasonably clear to everyone on the file, including defense counsel, that the case is a “policy limits case.” And an insurance company should not withdraw from the defense after paying its limits unless the policy specifically affords the insurer that right. Finally, under the Texas unfair claims settlement practice statute, it is an “unfair or deceptive” practice for an insurer to fail to attempt the prompt settlement of a claim when the insurer’s liability is reasonably clear. Tex. Ins. Code Ann. Sec. 541.060(a)(2). This does not, however, require an insurer that receives a lawsuit to instruct defense counsel to immediately call plaintiff’s counsel with a settlement offer—the statutory duty is not triggered until the claimant has made a proper settlement demand within policy limits.

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