THE YEAR IN REVIEW 2014

The year 2014 was a time of firsts—the Affordable Care Act went into effect, Janet Yellen became the head of the Federal Reserve, same-sex marriage became legal in more than 10 states, and in Texas, a new governor was elected for the first time since Rick Perry took office in 2000. But 2014 also proved a roller coaster of dismay and joy. The Ukraine, Ferguson, Ebola, and ISIS stayed on our minds. We retweeted Ellen DeGeneres's selfie from the Oscars and watched Germany win the World Cup in Brazil. We raised more than $100 million for the ALS Association by taking the ice bucket challenge (and chuckled along to clips featuring George W. and Laura Bush, Kermit the Frog, Will Smith, and Bill Gates, to name a few participants). And, of course, we sang along to "Let it Go" and "Everything is Awesome!!!"

The year also brought significant developments to the legal profession and case law. The *Texas Bar Journal* Board of Editors has assembled a series of articles highlighting these issues. The topics featured are not exhaustive, and the opinions reflect only the views of the authors.

INSURANCE LAW BY MICHAEL W. HUDDLESTON

The continuing development of the *Stowers*[1] doctrine has been the subject of important decisions from both state and federal courts. These decisions are on appeal to higher courts, and they may well lead to filling in the gaps regarding previously unsettled issues involved in the application of the doctrine.

In *Patterson v. Home State County Mutual Insurance Co.*,[2] the court held that a purported *Stowers* demand including a release, which failed to include (a) all claimants (represented by a particular attorney) and/or (b) all insureds, was fatally defective. Such a release, the court observed, "did not constitute an unconditional offer to fully release the insureds in exchange for a settlement." It noted that the personal outside counsel for the insured did not want to settle without a release from all claimants and to all insureds. The court did not say that an insured's desire *not to accept* a given demand was a definitive and recognized defense to a *Stowers* claim.

Obviously, *Patterson* is diametrically opposed to the decision of the 5th Circuit in *Pride Transp. v. Continental Casualty Co.*[3] Simply put, the primary issue is whether a carrier *must accept* an otherwise reasonable settlement offer and exhaust its limits as to one of multiple insureds in a situation where other insureds will not be released and will remain exposed without policy benefits. A similar issue appears to have been presented as to whether the carrier may reject an offer that includes some but not all claimants, which would appear to be contrary to the holding in *Soriano* that a carrier could settle one of multiple claims if that particular settlement, viewed on its own and in isolation, was reasonable.

Judge Gray H. Miller, in *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*,[4] chose not to discuss or follow *Patterson*. Citing *Soriano* and *Citgo*, he held that an offer to an insured law firm that did not include the individually insured lawyers involved in the alleged wrongful acts was a valid *Stowers* demand as a matter of law. The court observed: "While the letter *did not include a release of claims against Wooten*, it did not have to include a release of claims against Wooten to be a proper demand under *Soriano* and *Citgo*."[5]

OneBeacon also addresses whether the carrier may present evidence that it was reasonable under *Stowers* in not settling because it had good faith and unresolved coverage defenses. Miller ruled that "[a]ny testimony or evidence that OneBeacon's 'good faith coverage' belief is a defense to *Stowers* liability should be precluded." Miller instructed the jury that evidence regarding coverage defenses could not be considered. The insured had urged: "[A] good faith coverage defense is no defense to *Stowers* liability …"[6] The insured noted that in *American Physicians Ins. Exch. v. Garcia*,[7] the court reasoned that if an insurer rejects an insured's *Stowers* demand as not being within the coverage, it "bears the risk that its point of view might have been incorrect, which could result in liability for any excess judgment."[8]

The insured also argued in *OneBeacon* that allowing testimony about viable coverage defenses would inappropriately turn *Stowers* liability into a species of a bad faith claim, which the Texas Supreme Court has expressly rejected.[9]

Miller rejected arguments that *Am. W. Home Ins. Co. v. Tristar Convenience Stores, Inc.*[10] supported the consideration by the jury of coverage defenses in determining reasonableness. As noted by the insured: "In *Tristar*, the court initially rejected the argument that an insurer could deny a *Stowers* demand simply on the basis of questionable coverage. However, the court went on to reason, without citation to authority, that the "contention that there was questionable coverage would be better addressed to the third *Stowers* liability element," suggesting without deciding that the insurer's coverage defenses could be relevant to *Stowers* liability.[11] The *Tri-Star* court did not discuss *Garcia*, *Soriano*, *Head*, and/or *Frank's II*.

With two prominent decisions addressing multiple critical *Stowers* issues, the coming year will once again be focused on the doctrine.

Notes

1. G.A. *Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved).
2. 2014 WL 1676931 (Tex.App.—Hous. [1 Dist.] 2014).
3. 511 F. App'x 347 (5th Cir. 2013) (unpublished)(Smith, J.)(Texas Law) (holding named insured trucking company could not sue the carriers for wrongful settlement on behalf of an insured driver; holding reasonableness of offer to driver was not affected by the fact that it offered no protection from derivative common law indemnity claims of the named insured trucking company, citing *Travelers Indem. v. Citgo Petr. Corp.*, 166 F.3d 761, 768 (5th Cir. 1999), and *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994)).
4. 4-11-03061 [Doc. 357] (S.D. Tex., Oct. 3, 2014).
5. *Id.* at 2 (emphasis added).
6. Plaintiffs' Mot. in Limine, *OneBeacon v. T. Wade Welch, et al.*, 4-11-03061 [Doc. 299-11] (S.D. Tex., Sept. 22, 2014).
7. 876 S.W.2d 842, 849 (Tex. 1994).
8. Plaintiffs' Motion, *supra*. (also discussing *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 46 (Tex. 2008) ("Frank's II") (holding that "an insurer that rejects a reasonable offer within policy limits *risks significant potential liability* for bad-faith insurance practices if it does not ultimately prevail in its coverage contest." [emphasis added]).
9. *Id.* (citing *Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 318-319 (Tex. 1994); *Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc.*, 938 S.W.2d 27, 28 (Tex.1996)).
10. CIV.A. H-10-3191, 2011 WL 2412678, at * 4 (S.D. Tex. June 2, 2011) (Werlein, J.).
11. Plaintiffs' Motion in Limine, *supra*, at 20-21.

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