Duty to Settle: The Texas Stowers Doctrine and Approaches Adopted in Other Jurisdictions

American College of Coverage Counsel
2022 Law Symposium
Southern Methodist University Dedman School of Law
Dallas, TX
November 11, 2022

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DRI 2022 INSURANCE COVERAGE AND CLAIMS INSTITUTE

March 21 - 23, 2022

TIME-LIMITED DEMANDS: THE LATEST DEVELOPMENTS FROM ACROSS THE COUNTRY[1]

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Session Title: *Time Limit Demands: The Latest Developments From Around the Country.*

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TIME-LIMITED DEMANDS[2]

A time-tested strategy to maximize settlement or, in certain circumstances, to create an opportunity for recovery in excess of policy limits is the use of time-limited settlement demands. In light of the potential "bad faith" awards that can follow a mishandled time-limited settlement demand, navigating these demands is an important part of claim handling in any liability matter. This article discusses the nature and details of time-limit demands and presents strategies for evaluating and responding to these demands, with a particular emphasis on Texas law. At the outset, we note that each state has its own laws governing the requirements for time-limited demands, and, in some cases, responses. This article examines the laws of a few states by way of example and some common themes across jurisdictions, but the reader is, of course, encouraged to closely evaluate the laws of the relevant jurisdiction.

"A negotiator should observe everything. You must be part Sherlock Holmes, part Sigmund Freud."

– Victor Kiam

I. THE DUTY TO SETTLE

Foundationally, an insurance carrier's right and duty to settle claims derives from the express terms in the policy contract that give the insurer the exclusive right to control the insured's defense.

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SECTION I - COVERAGES

1. Insuring Agreement

a. *We will pay those sums that the insured becomes legally obligated to pay as damages* … to which this insurance applies. *We will have the right and duty to defend* the insured against any "suit" seeking those damages…

* * *

… We may, at our discretion, investigate any "occurrence" *and settle any claim or suit that may result* …

* * *

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

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* * *

2. Duties in the Event of Occurrence, Offense, Claim or Suit

* * *

d. *No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent…*

(emphasis added).

Almost 100 years ago, Texas courts noted: "The provisions of the policy giving the indemnity company absolute and complete control of the litigation, as a matter of law, carried with it a corresponding duty and obligation, on the part of the indemnity company, to exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances, and a failure to exercise such care and prudence would be negligence on the part of the indemnity company." *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved). *See also Rocor Int'l v. National Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 263 (Tex. 2002) (noting that *Stowers* duty is based in part on the insurers' control over settlement); *Sloan v. State Farm Mut. Auto Ins. Co.*, 85 P.3d 230, 237 (N.M. 2004); *Cernocky v. Indem. Ins. Co. of N. Am.*, 69 Ill.App.2d 196, 216 N.E.2d 198, 207 (Ill. App. 1966); *Haddick v. Valor Ins.*, 198 Ill.2d 409, 763 N.E.2d 299 (2001); *Farmers Inc. Exch. v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977).

Similarly, an implied covenant of good faith and fair dealing exists in every insurance contract, which provides that neither party will do anything to injure the rights of each other to receive benefits under the agreement. *See Communale. v. Traders & Gen. Ins. Co.*, 50 Cal.2d 654, 659 (1958). This covenant includes an obligation that the insurer conduct good faith settlement negotiations, which requires it to consider the interests of the insured equally with its own, and evaluate settlement proposals as though the insurer alone carried the risk of loss. *Johansen v. California State Auto Assn. Inter-Ins. Bureau*, 15 Cal.3d 9, 16 (1975); *Badillo v. Mid-Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005); *Southern General v. Holt*, 416 S.E.2d 274 (Ga. 1992). Thus, in the first instance, the duty to settle arises in the perceived conflict of interest between the interests of the insured for whom any settlement within the policy limits is favorable, as it will not be funded by the insured, and the insurer, for whom the value of a settlement depends on the probability of winning or losing the suit. This balancing of interests in the duty to settle ensures that when the insurer gambles with respect to the value of a case, it does so with its own money.

II. ACTIVATION OF THE DUTY TO SETTLE – TIME-LIMITED DEMAND

Some states have codified the requirements for an effective time-limited settlement demand requiring the insurer to respond on behalf of the insured. In Texas, there are four distinct common law requirements to "activate" a duty to settle, *i.e.*, a *Stowers* duty, with a settlement demand:

1. The claim against the insured is within the scope of coverage;

2. The demand is within the policy limits;

3. The terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment; and

4. The demand must offer to release fully the insured in exchange for a sum equal to or less than the policy limits.

Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994); *OneBeacon Ins. Co. v. T. Wade Welch & Associates*, 841 F.3d 669 (5th Cir. 2016).

A. The Demand Is Within the Coverage of the Policy

It is generally accepted that in cases in which both covered and uncovered claims are asserted, the insurer need only evaluate the demand as to the covered claims. *See Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co.*, 27 Cal.App.4th 33, 52 (1994); *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994). In *St. Paul Fire & Marine Ins. Co. v. Convalescent Services, Inc.*, 193 F.3d 340 (5th Cir. 1999), the Fifth Circuit found under Texas law that the insurer need not consider claims that are not covered during settlement negotiations, such as a punitive damages claim subject to a policy exclusion. In *Convalescent Services*, the insurer evaluated the exposure to the insured on the covered negligence claim as less than the demanded amount. While the insured offered to contribute to a settlement based on its perceived exposure to a punitive damages award, St. Paul rejected the demand as unreasonable in light of St. Paul's assessment of the insured's liability and claimant's damages for covered claims.

In the end, while the total award including punitive damages exceeded the policy limit, the judgment for the compensatory claim, while more than the demand, was less than the policy limits and no *Stowers* duty violation existed. *Id.* at 345. The court found that St. Paul was not obligated to consider the potential punitive damage exposure when evaluating the claim. Similarly, other jurisdictions have refused bad faith claims with respect to uncovered punitive damages. *See Zieman Mfg. Co. v. St. Paul Fire & Marine Ins. Co.*, 724 F.2d 1343, 1346 (9th Cir. 1983) (rejecting the claim of bad faith against the insurer who paid, after verdict, the entire compensatory damages costs and defense expenses, leaving the insured exposed to a punitive damages award, because it is "absurd" to suggest the insurer is obligated to settle "at any figure demanded within the policy limits, an action in which punitive damages are sought"); *Lira v. Shelter Ins. Co.*, 913 P.2d 514 (Colo. 1996) (holding that the insurer's duty to settle "did not encompass a duty to protect the petitioner from exposure to punitive damages").

The difficulty arises when the coverage issue is not as straightforward as application of a punitive damages exclusion or state legal prohibition to coverage for such awards. An insurer's duty to settle a claim in which coverage issues exist, but are debatable due to unresolved fact issues in the liability claim or uncertainty in the law, varies based on jurisdiction.

On one end of the spectrum, California has held that insurer cannot consider coverage defenses when considering a policy limits demand. *Johansen v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 538 P.2d 744 (Cal. 1975). Of course, California balances the equities of requiring the insurer to settle potential uncovered claims by allowing the insurer to seek reimbursement from its insured. *See Blue Ridge Ins. Co. v. Jacobsen*, 22 P.3d 313 (Cal. 2001). On the other hand, in

Mowry v. Badger State Mutual Cas. Co., the Wisconsin Supreme Court held that an insurer who rejected two settlement demands based on what was ultimately an unsuccessful coverage defense did not commit bad faith because the question of coverage was "fairly debatable." 385 N.W.2d 171, 181 (Wis. 1986). *See also Hunt v. State Farm Mut. Auto Ins. Co.,* 994 N.E.2d 561, 572 (Ill. App. Ct. 2013) ("It is not bad faith for an insurer to refuse to settle a claim when the question of coverage is fairly debatable and when the grounds for refusal, if determined in the insurer's favor, would wholly excuse the insurer from any indemnity responsibility to the insured.").

In Texas, an insurer's ability to consider unresolved coverage defenses is less certain. The Texas Supreme Court seemingly recognized that without a right of reimbursement to recoup settlements for uncovered claims, an insurer could include its coverage evaluation in its assessment of whether a particular settlement demand is reasonable. *Compare Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 2005 WL 1252321 (Tex. 2005) (withdrawn) with *Frank's Casing Crew & Rental Tools, Inc.,* 246 S.W.3d 42, 51 (Tex. 2008) (removing references to California law requiring the insurance carrier to settle potentially uncovered claims). Since *Frank's Casing*, practitioners assume that filing declaratory judgment actions on coverage issues is one way of either resolving the coverage question or demonstrating the insurer's reasonableness in determining the coverage. However, in many cases, procedural hurdles to early resolution of coverage issues involving fact issues intertwined with the liability claims make resolution of coverage issues unlikely. *See, e.g., D.R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co.*, 300 S.W.3d 740 (Tex. 2009) (an insurer may owe a duty to indemnify even if no duty to defend as the two duties "enjoy a degree of independence from each other.")

Nonetheless, seeking resolution of an identified coverage issue is a reasonable step to establish that a defending insurer with a duty to settle acted in good faith. Certainly, the Fifth Circuit seems to understand that the question of whether an insurer had a reasonable basis to reject a settlement demand includes an evaluation of whether a bona fide controversy as to coverage exists in the first instance. *U.S. Metals, Inc. v. Liberty Ins.*, 2017 WL 830398 *7 (S.D. Tex. Feb. 27, 2017, rehearing on other grounds, 2017 WL 11634913 (Mar. 31, 2017)). In the case of a bona fide controversy as to coverage, which is a sufficient reason to deny or limit coverage, the insurer is not liable for "bad faith" and similarly the *Stowers* claim fails. *Id. See also Ryan Law Firm, LLP v. New York Marine & Gen. Ins. Co.* 2020 WL 5820531 (W.D. Tex. Sept. 30, 2020). *But see OneBeacon Ins. Co. v. T. Wade Welch & Assoc.*, 2014 WL 5335362 (S.D. Tex. Oct. 1, 2014) (refusing to admit evidence that the insurer had a reasonable basis to deny the claim as a basis to reject a *Stowers* demand).

The result is that while establishing coverage is an element of proving a *Stowers* duty, and one in which the insured has the initial burden to establish, the strength and realistic viability of that coverage defense will be judged in hindsight against the insurer. *See Employers Cas. Co. v Block*, 744 S.W.2d 940 (Tex. 1988). If the court finds the reliance on the coverage issues to be "absurd," as the *T. Wade Welch* judge did with the prior knowledge exclusion defense provided by One Beacon, the insurer may not have this evaluative element available to it when presenting its case as an "ordinarily prudent insurer." *OneBeacon Ins. Co. v. T. Wade Welch & Assoc.*, 841 F.3d 669 (5th Cir. 2016). But, if the policy coverage defense is fairly debatable in coverage litigation, reasoned opinions permit this bona fide dispute as a defense to a *Stowers* claim as a matter of law. *See, e.g., Ryan Law Firm, LLP*, 2020 WL 5820531.

B. Within Limits

Despite the obvious fact that a demand must be within the limits of coverage to be actionable, issues arise regarding whether the demand is properly made "within limits." *See First Acceptance Ins. Co. of Georgia, Inc. v. Hughes*, 826 S.E.2d 175 (Ga. Mar. 11, 2019) (deciding as a matter of first impression that a time-limited demand must be made within policy limits to trigger a good faith duty to settle). If the demand exceeds the limits available, whether due to prior claim erosion, defense costs erosion or simple mistake, the demand cannot be the basis for an extracontractual claim for breach of the duty to settle. *See Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994)*; Soriano*, 881 S.W.2d at 315. *Hanson v. Republic Ins. Co.*, 5 S.W.2d 324 (Tex. App.—Houston [1st Dist.] 1999, no writ) (if policy limits are exhausted through payment under a separate section of the policy, no *Stowers* liability can attach because the offer is then in excess of limits); *Am. Physicians Assur. Corp. v. Schmidt*, 187 S.W.3d 313, 318 (Ky. 2006). (an insurer does not act in "bad faith" by refusing to pay a settlement demand that exceeds it policy limits). *But see Allstate Ins. Co. v. Miller*, 212 P.3d 318, 329 (Nev. 2009) (finding an insurer can be liable for bad faith failure to settle a demand that exceeds policy limits if the insured is willing and able to pay the portion of the demand that exceeds policy limits); *Monaghan v. Admiral Ins. Co.*, 21 F.3d 1114, 1994 WL 118021 (9th Cir. 1994) (Alaska) (same).

In Texas, an offer within the aggregate limits of multiple polices (*e.g.*, primary/excess) is generally ineffective as to each insurer because the offer exceeds the individual primary carrier's policy limits. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 776 (Tex. 2007) (if the offer is within the combined primary limits of two pro-rata primary policies, but exceeds the individual limits of any one of the two policies, the demand is ineffective as to either.); *Am. Phys. Ins. Exch. v. Garcia*, 876 S.W.2d at 849 (a demand that would require "stacking" of primary policy limits to accept did not trigger a *Stowers* duty to settle in APIE). Moreover, an offer to a combined excess and primary policy is ineffective until the primary insurer has actually tendered its limits to the excess insurer prior to the end of the time period for the demand. *Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, PA*, 20 S.W.3d 692, 701-02 (Tex. 2000).

This limitation of the *Stowers* duty in cases with potential value inclusive of the policy limits of multiple carriers creates understandable frustration with plaintiffs—leaving them with a choice to make a demand within the limits of just one carrier or losing the *Stowers* threat in their arsenal of litigation tactics. As between insurance carriers, this dynamic can create additional pressure. An excess carrier has the same *Stowers* rights owned by the insured if a lower tier carrier fails to reasonably accept a settlement demand within primary limits. If a demand required acceptance by primary and umbrella carriers, a decision by the umbrella carrier to "accept" the portion of the demand falling within its policy period creates a good faith duty to reasonably evaluate settlement (or *Stowers* duty) that would not have otherwise existed. This "acceptance" might be communicated within days or hours of the expiration of the time limits itself, massively increasing the pressure on the remaining insurers. Frequent communication between insurance layers is crucial in light of exposure/high value costs to avoid unpleasant surprises.

C. Reasonableness of Offer – Assessing the Likelihood of Liability and Amount of Exposure

This factor is one that frequently creates a fact issue and jury question in the hindsight investigation into decisions on the good faith duty to settle. A negligence standard, the insurer need not be perfect in its evaluation. *See Pinto v. Farmers Ins. Exch.*, 61 Cal.App.5th 676, 688 (2021) ("So long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.") (citation omitted). "And the fact that the insurance company refuses an offer of settlement, contrary to the advice of its trial attorney, with a bad result, is not proof of bad faith on its part. It is merely proof that the judgment of the trial attorney was better than its own as to what would be the final outcome of the case." *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill.App. 649, 60 N.E.2d 896, 900 (1945). *See also W. Side Salvage, Inc. v. RSUI Indem. Co.*, 215 F.Supp.3d 728, 740 (S.D. Ill. 2016), *aff'd*, 878 F.3d 219 (7th Cir. 2017). Some cases will be tried to unexpected and unpredictable results. Those cases should not give rise to liability over policy limits to the insurer. But, as noted at the beginning of this article, many courts view the risk of trying cases and correctly assessing damages and liability to be both the insurer's to take and the insurer's to lose.

Determining the reasonableness of a settlement offer is based on the information available to the insurer at the time of the proposed settlement. *See Isaacon v. California Ins. Guarantee Assn.*, 44 Cal.3d 775, 793 (1988); *Kelly v. State Farm Fire & Cas. Co.*, 169 So.3d 328 (La. 2015). Various factors should be considered when evaluating a settlement demand, and such consideration documented, including:

- Strength of plaintiff's liability case
- Seriousness or extent of plaintiff's damages
- Advice of defense counsel
- Responses, if any, of the insured once advised of the settlement demand
- Jurisdictional considerations
- Status of litigation and fact investigation
- Financial risk to which the parties are exposed in the event of an adverse verdict
- The likelihood of an adverse verdict

See O'Neill v. Gallant Ins. Co., 329 Ill.App.3d 1166, 1172 (2002). Similarly, the reasonableness of the time limits and stage of litigation are also factors. *See infra.*

Furthermore, at least according to one Texas court, a carrier has a reasonable basis to reject a settlement demand under this element when coverage is questionable. *See American Western Home Ins. Co. v. Tristar Convenience Stores, Inc.*, 2011 WL 2412678 (S.D. Tex. June 2, 2011) ("the contention that there was questionable coverage would be better addressed to the third

Stowers liability element, which American Western also argues, namely, whether a reasonable insurer would have accepted the settlement at the time it was offered.")

A demand is reasonable in cases where liability is clear and injuries are so serious that a judgment in excess of the policy limits is likely. *Kropilak v. 21st Century Sec. Ins. Co.,* 2014 WL 2884022 (M.D. Fla. June 25, 2014); *Peterson v. St. Paul Fire & Marine Ins. Co.*, 239 P.3d 901 (Mont. 2010). When assessing the reasonableness of a policy limits demand,

> the view of the carrier or its attorney as to liability is one important factor, [but] a good faith evaluation requires more. It includes consideration of the anticipated range of a verdict, should it be adverse; the strengths and weaknesses of all the evidence to be presented on either side so far as known; the history of the particular geographic area in cases of similar nature; and the relative appearance, persuasiveness and likely appeal of the claimant, the insured and the witnesses at trial.

Rova Farms Resorts Ins. v. Investors Ins. Co. of Am., 323 A.2d 495, 503 (N.J. 1974).

A Texas court in *American Guarantee & Liability Ins. Co.* noted that previous evaluations of liability, based on information regarding the anticipated testimony of witnesses and admissibility of evidence, while reasonable at the time of earlier demands, must be flexible. 413 F.Supp.3d 583 (S.D. Tex. 2019) In other words, for demands made during trial, the carrier's knowledge that certain evidence or testimony has not been presented as favorably as anticipated, increasing the possibility of an excess verdict, requires a change in evaluation. If the carrier steadfastly stays with a prior evaluation in the face of new information, that carrier is subject to potential *Stowers* or bad faith liability. *Id. See Critz v. Farmers Ins. Grp.*, 230 Cal.App.2d 788 (1964), *disapproved on other grounds*, *Crisce v. Security Ins. Co.*, 66 Cal.2d 425 (1967) (finding a one week deadline to accept or reject a settlement may not be unreasonable where the insurer has already completed its investigation).

When evaluating the reasonableness of a demand, the timing of the demand is important. If the demand is made pre-suit, frequently courts will find a demand for policy limits unreasonable as the carrier has little opportunity or time to investigate the liability and damage facts. *See, e.g.*, O.C.G.A. §9-11-67.1 (establishing procedures for pre-suit demands to address market uncertainty due to time-limited demands). Conversely, demands made just before or during trial, even with very short time limits, may be assessed as reasonable because it is incumbent on the defending insurer to be constantly and consistently updating its evaluations with new information regarding the evidence and presentation of the insured's liability defenses to the jury. *See, e.g., American Guarantee & Liability Ins. Co v. Ace American Ins. Co.*, 413 F.Supp.3d 583 (S.D. Tex. 2019); *Westport Ins. Corp. v. Penn. Nat'l Mutual Cas. Ins. Co.,* 2018 WL 6313478 (S.D. Tex. 2018) (given defense counsel's investigation prior to mediation, the forty-five minute deadline for the settlement demand was not unreasonable as a matter of law). And underscoring all, each demand is determined on a case-by-case basis assessing not only the underlying case facts and litigation dynamics but the quality of investigation by the insurer. *See Holt*, 416 S.E.2d at 276.

Moreover, clarity in the demand is important. Texas practitioners have debated whether a demand need be in writing to evoke the *Stowers* obligations in a carrier. What is not debatable is that a settlement's terms must be clear:

> [A]t a minimum we believe that the settlement's terms must be *clear and undisputed*. That is because "settlement negotiations are adversarial and … often involve hard bargaining on both sides." *Id.* Given the tactical considerations inherent in settlement negotiations, an insurer should not be held liable for failing to accept an offer when the offer's terms and scope are *unclear or are the subject of dispute.*

Rocor International, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 77 S.W.3d 253 (Tex. 2002).

It is difficult to imagine a scenario in which the terms of an oral offer would be sufficiently clear and undisputed, particularly when evaluated in hindsight after a jury verdict. Illinois courts agree that lack of clarity that a chance exists to resolve *all* claims against the insured within policy limits is fatal to a claim for extracontractual relief over policy limits upon an adverse verdict. *See W. Side Salvage Inc. v. RSUI Indem. Co.*, 215 F.Supp.3d 728, 741 (S.D. Ill. 2016), *aff'd*, 728 F.3d 219 (7th Cir. 2017) (without evidence establishing RSUI ever had a concrete offer from plaintiffs and counterclaimants that would have allowed it to settle all claims against the insured within policy limits, no claim for bad faith will succeed).

In some cases it may be advisable to seek clarification of more information when a demand is vague or lacking information. In Georgia, if the demand falls under O.C.G.A. Section 9-11-67.1, clarification can be sought on several issues specified in the statute, including the terms, liens, subrogation interests, standing, medical bills and records. Regardless of the jurisdiction, however, a request for clarification should be carefully framed so as not to be construed as a counteroffer. *Frickey v. Jones*, 280 Ga. 573, 630 S.E.2d 374 (2006).

A compelling issue may arise when a settlement offer is made to resolve claims by less than all claimants. As discussed, in Illinois an insured must establish that the demand would resolve all plaintiffs' claims against the insured to pursue a bad faith failure to settle claim. *See W. Side Salvage*, 215 F.Supp.3d at 741. *See also DeMarco v. Travelers Ins. Co.*, 26 A.3d 585, 613 (R.I. 2011) ("We hold that, when an insurer is faced with multiple claimants with claims that in the aggregate exceed the policy limits, the insurer has a fiduciary duty to engage in timely and meaningful settlement negotiations in a purposeful attempt to bring about settlement of as many claims as is possible, such that the insurer will thereby relieve its insured of as much of the insured's potential liability as is reasonably possible given the policy limits and the surrounding circumstances.")

In Texas, an insurer is allowed to fulfill its *Stowers* duty to settle by settling with one claimant, even though the result is to leave the insured exposed to another claim. *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994). In *Soriano*, Farmers elected to settle the minor claim, partially exhausting its policy limits, although indications existed (although no express demand made) that the more significant and dangerous claim could have been settled for policy limits. The Texas Supreme Court found the insurer could only be liable for breach of its duty to settle if: (1) it had previously rejected a policy limits demand for the larger claim or (2) the settlement of the minor claim was unreasonable. *Id.* at 316. The test then is whether a reasonably prudent insurer would *not* have settled the claim when considering the merits of the settled claim only. *Id.*.

Similarly, while many jurisdictions hold that in assessing settlement in a case of multiple insureds, the insurer may not prefer one insured over another, Texas has rejected this approach. *Compare Smoral v. Hanover Ins. Co.*, 37 A.D. 23, 322 N.Y.S.2d 12 (1971) *and Travelers Ins. Co. v. Citgo Petroleum Corp.*,166 F.3d 761 (5th Cir. 1999). In *Citgo*, the court extrapolated from *Soriano* to ask whether the carrier was reasonable in settling the claim against the particular insured when considering solely the merits of the claim and potential liability of that insured. *Id.* at 765. *See also Mid-Century Ins. Co v. Childs*, 15 S.W.3d 187 (Tex. App.—Texarkana 2000, no writ); *Pride Transportation v. Continental Cas. Co.*, 511 Fed.Appx. 347 (5th Cir. 2013). Strategic behavior from plaintiffs in cases of insufficient limits and multiple claimants and/or multiple insureds abound. Though Texas law provides that a carrier *may* accept reasonable settlement demand to resolve less than the entire case, it is less settled regarding whether the insurer may choose not to settle when less than all insureds are offered a release. *See Patterson v. Home State County Mut. Ins. Co.*¸ 2014 WL 1676931 (Tex. App.—Houston[1st Dist.] 2014, pet. denied) (holding an insurer does not have a *Stowers* duty to settle if the claimants' demand does not release all insured covered by a policy). *Patterson* involved a demand to the owner but not to the employee driver of the truck. The insured owner communicated that it did not want to settle without its driver, and Home State rejected the demand. *Patterson* suggests that while a carrier is free to settle for less than all plaintiffs or less than all insureds, it need not do so and still fulfill its *Stowers* obligation. Shortly thereafter, however, the Fifth Circuit rejected this argument from OneBeacon, that to be a "true" *Stowers* demand the offer to settle must release all insured, by citing to *Citgo* and *Soriano*. *OneBeacon Ins. Co. v. T. Wade Welch & Associates*, 841 F.3d 669 (5th Cir. 2016). The Fifth Circuit distinguished *Patterson* noting that in that case the insured employer explicitly indicated it did not want to accept any settlement demands that did not release both the employer and driver. *Id.*

In fact, the distinction between the results in *Patterson* and *Wade Welch* goes to the heart of time-limited demands—a review of the reasonableness of the decision not to accept an offer. An insurer's decision not to accept a demand because some insureds are not offered a release may be reasonable and one an ordinarily prudent insurer would make in the same circumstances. In Texas, a carrier is protected when a reasonable demand is accepted, even if it resolves less than all claims. A carrier that rejects a demand faces the negligence standard of whether it prudently balanced its own interests with the interests of the insured for whom the release was offered. This ultimately leads to the next issue, how to best set the stage for that post judgment review of rejected settlement opportunities.

D. Strategies for Responding to the Demand

When an insurer receives a demand, it is important to clearly document the file. In the first instance, the insurer must create a factual record of the communication—meaning putting the written offer in the claim file, or in the case of an oral communication documenting the details of the demand in the claim notes. Likewise, any information regarding the transmittal of the demand and the how the demand was received should be documented in the claim file. The details can matter when evaluating the reasonableness of the demand, particularly with regard to the timing of demands made.

Next, the insurer should communicate the demand, and the details regarding deadlines and conditions to the insured as soon as possible. Likewise, the insurer should evaluate the substance

of the demand. For instance, is the demand made to an insured—which makes a confirmation of insured status and policy limits at the outset crucial to an evaluation. Next, evaluation of the parties making the demand—such as whether it includes all potential claimants, whether those parties have standing to make the demand and confirmation regarding representations. Evaluation of any deadlines and conditions in the demand must also be noted and documented. In Texas, conditional demands are ineffective to create *Stowers* obligations, but in other jurisdictions, conditional demands are acceptable. *See Frickey v. Jones*, 280 Ga. 573, 630 S.E.2d 374 (Ga. 2006). If a policy limits demand contains conditions that require the involvement of the insured (*e.g.*, providing documentation or a declaration of assets or other insurance), the claims professional should contact the insured in writing and explain that the case may not settle unless certain conditions are met. If the insured refuses to meet the condition, the insurer should confirm that position in writing and, again, document the claim file.

The insurer must then investigate the demand—the nuts and bolts of claim handling. The insurer should evaluate whether the information that is necessary to assess liability and damages is available and knowable. If information is knowable, the carrier should request additional information and document its file if needed. Information needed may come from the claimant, the insured or third parties as needed. The ability of the insurer to receive necessary information and the timing of and receipt should be documented in the claim file as it may support the reasonableness of the evaluative process and the timing of that evaluation. If additional time is required to solicit and receive necessary information, such requests should be made to claimant. Courts may reject claims for bad faith failure to settle when reasonable extensions are not provided or the time deadline is not supported. *See Adduci v. Vigilant Ins. Co.*, 424 N.E.2d 645, 649 (Ill. App. Ct. 1981) (rejecting a bad faith claim where the insurer attempted to accept a time-limited demand 40 days after expiration because: "The allegations of the complaint simply do not show why the offer would have been good on May 7, 1976, but was not acceptable on June 18, 1976.").

In Texas, the demand must offer a complete release which includes a promise to release all hospital liens. *See Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998). A settlement demand made without expressly offering a complete release, including hospital liens is ineffective under the *Stowers* doctrine. *Id. Nationwide Mut. Ins. Co. v. Chaney*, 2002 WL 31178068 (N.D. Tex. 2002). Said differently, implying a release will be offered in exchange for money is insufficient to invoke a good faith duty to settle. In *McDonald v. Home State County Ins. Co.*, the court found that simply offering a "full release" was insufficient without express language including that all liens would be released. 2011 WL 1103116 (Tex. App.—Houston [1st Dist.] Mar. 24, 2011). Moreover, whether the lien is valid is irrelevant to whether the demand triggers a *Stowers* duty. *Id.* at * 7. The insurer owes its insured a duty to secure a release in exchange for the payment of policy proceeds, not simply an end to litigation.

When responding to, and rejecting, a demand, the letter should be crafted to show the reasonableness of the insurer at the moment in time in which the demand is made. The response letter should include a statement regarding the investigation of the insurer, what information is outstanding or unresolved that the insurer believes is significant to its evaluation of liability or damages, summarize the details of the demand in the first instance, request additional information to support the demand, explain any request and refusal, seek additional time to evaluate the demand and identify future intentions regarding settlement. In addition, we recommend that the response set out the standard in which the response should be judged. For example, in Texas the response

should ideally include a statement that a demand is evaluated as whether an ordinarily prudent insurer would accept it given the information available at the time it is made. In most instances, claimants or insured will use the initial demand as their primary jury exhibit in its tale of bad faith failure to settle. Creating its own jury exhibit to explain the evaluative process of the insurer is important in setting the stage for future negotiations during the pendency of the litigation against the insured and future proceedings in the event of an adverse judgment against the insured.

Of course, the insured should be advised of all responses to settlement demands. If the insured takes a position regarding the demand, whether to request the claim be settled or demand the offer be rejected should be documented in the file. While in Texas the insured's position regarding settlement is not ultimately determinative of an insurers *Stowers* obligation, it will be a factor presented in a reasonableness determination for a jury. *See American Ins. v. Assicurazioni Generali*, 228 F.3d 409, 2000 WL 1056143 *10 (5th Cir. 2000) (assuming without deciding that the insured's consent to reject a settlement demand is a defense to a *Stowers* claim, it was the insurer's burden of proof to establish such consent); *Patterson*, 2014 WL 1676931.

Notably, if the insured requests the demand be rejected, that *Stowers* claim cannot be turned over or assigned after litigation to the claimant. *See Nationwide Mut. Ins. Co. v. Chaney*, 2002 WL 31178068 *4 n. 5 (N.D. Tex. 2002); *Charles v. Tamez*, 878 S.W.2d 201, 208-09 (Tex. App.—Corpus Christi 1994, writ denied) (court denying a turnover of a *Stowers* claim because the insured refused to assert the claim and denied dissatisfaction with the insurer).

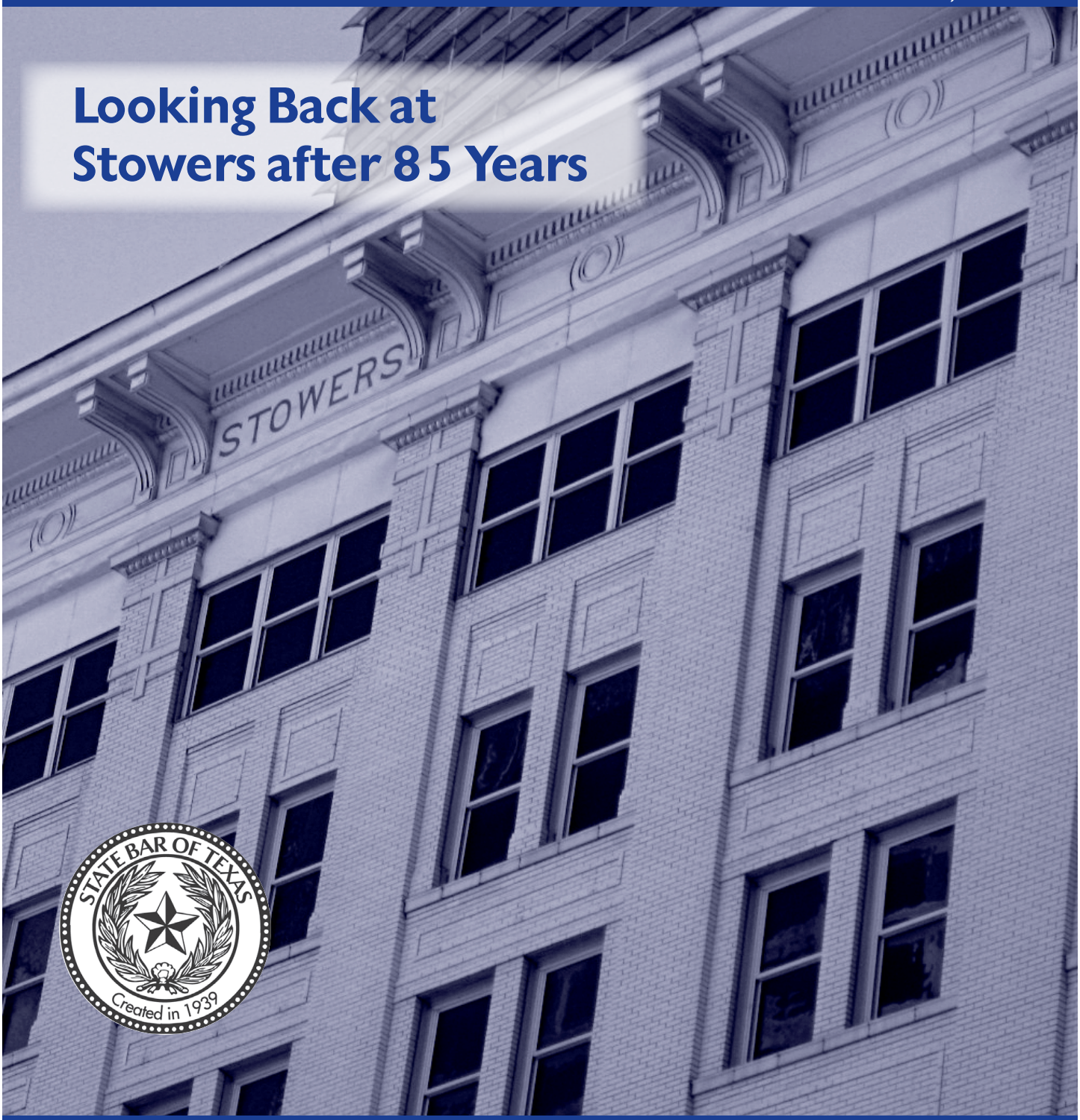
Just as a plaintiff's policy limit demand should include a comprehensive analysis of the insured's potential liability and the alleged damages suffered by claimant, best practices dictate the claim file should have an equally comprehensive documentation in its file of its evaluation and investigation of all demands. The claims professional should document its actions in evaluating the demand, the information available to it at the time of the demand, communications with the insured and defense counsel including assessments of liability and damages, any requests for extension of time and responses by claimant and, of course, the formal response to the demand. Similarly, all efforts to keep the insured informed of the demand, evaluation and responses should be documented.

Finally, consider making a counteroffer or expressly offering to mediate or negotiate further upon receipt of necessary information. Hindsight evaluation of the reasonableness of the insurer's decision to reject a specific demand frequently includes, rightly or wrongly, an assessment of the carrier's overall liability and damages evaluation. If a counter-offer is made and negotiations commence, not only has the insurer established the original demand unreasonable, but the parties move closer to resolution—the ultimate goal in claims handling.

Journal of Texas Insurance Law

Winter 2014 Volume 12, Number 4

Looking Back at Stowers after 85 Years



Official publication of the Insurance Law Section of the State Bar of Texas

Journal of Texas Insurance Law

The Journal of Texas Insurance Law is published by the Insurance Law Section of the State Bar of Texas. The purpose of the ***Journal*** is to provide Section members with current legal articles and analysis regarding recent developments in all aspects of Texas insurance law, as well as convey news of Section activities and other events pertaining to this area of law.

Anyone interested in submitting a manuscript for publication should contact Bill Chriss, Editor In Chief, at 512-420-2378 or by email at wjchriss@gplawfirm.com. Manuscripts for publication must be typed double-spaced with endnotes (PC-compatible disks are appreciated). Replies to articles published in the ***Journal*** are welcome.

Journal of Texas Insurance Law

WINTER 2014, VOLUME 12, NUMBER 4

TABLE OF CONTENTS

Comments

FROM THE EDITOR

By William J. Chriss
Gravely & Pearson, LLP

This being my first issue as editor of the Journal, I have suffered more than a little trepidation at following in the footsteps of my predecessors, Kim Steele, and before her, Chris Martin. Fortunately, I have help from many sources, including two of the Insurance Law Section's best writers, immediate past Chair Vince Morgan and Insurance Legends Award recipient Michael Sean Quinn. Morgan reminded me that this Spring marks the 85th anniversary of the groundbreaking Stowers decision, and he offered the Journal a treasure trove of material on that subject, much of which has never been published before.

So, this issue is dedicated in its entirety to the 85th anniversary of Stowers, a precedent as influential as any in Texas jurisprudence. In this issue you will find an updated version of an article Morgan and Quinn wrote for the Journal ten years ago, on Stowers' 75th anniversary, and there is much more. Included are the following previously unpublished materials uncovered in researching that article: the "lost" dissent in the case that never made it into the West publishing system; an amicus letter predicting dire consequences from the decision ultimately reached; and the jury charge from the trial of Stowers' suit against its liability insurer, American Indemnity Company, for failing to settle the underlying personal injury claim of Mamie Bichon, a passenger in a taxi that struck a stranded G.A. Stowers Furniture Company truck. We also have included pdfs of the original typewritten opinion of the Commission of Appeals and the approval of that opinion by the Supreme Court. All these materials are reproduced from the Texas State Archives.

The Stowers doctrine handed down by the Commission of Appeals and approved by the Texas Supreme Court in 1929 continues to drive the handling of insured liability claims, and it continues to vex courts, litigants, attorneys, and commentators. Allstate v. Kelly further defined it. Ranger County Mut. Ins. Co. v. Guin extended its doctrine to require affirmative negotiations by carriers. APIE v. Garcia effectively overruled Guin and laid down specific requirements for Stowers demands. Farmers Insurance Co. v. Soriano clarified its application where there are competing Stowers demands by multiple claimants, and the Fifth Circuit's recent decision in Pride Transportation v. Continental Casualty Co. clarified its application to multiple defendant/multiple insured scenarios.

The Insurance Law Section of the State Bar of Texas was created because its founders believed that insurance law had become sufficiently nuanced to recognize it as a separate discipline with its own set of practitioners. Perhaps more than any other legal doctrine, Stowers and its ubiquity among trial practitioners proved they were right. But there are other examples and other watershed precedents, each of which would benefit from the same type of exhaustive and historical treatment Morgan and Quinn provide here. Allstate Ins. Co. v. Kelly, Arnold v. National County Mut. Fire Ins. Co., Aranda v. Insurance Co. of N.A., State Farm Fire and Cas. Co. v. Gandy, Vail v. Texas Farm Bureau Ins. Co., Viles v. Security Nat. Ins Co., Universe Life Ins. Co. v. Giles, APIE v. Garcia, and Soriano are but a few examples that instantly spring to mind.

If you are reading this, you know what I mean, and the Journal would welcome your submission of similar work for the benefit of the bench and bar. We would be happy to publish it. Email articles to me at wjchriss@gplawfirm.com. Enjoy.

William J. Chriss
Publications Editor

William J. Chriss, of counsel to Gravely & Pearson, LLP, graduated from Harvard Law School, holds graduate degrees in Theology and Political Science, and is currently a doctoral candidate in legal history at the University of Texas. He has practiced insurance law for over thirty years and currently serves as editor in chief of *The Journal of Texas Insurance Law*.

STATE BAR OF TEXAS
Created in 1939

By: Vincent E. Morgan[1] & Michael Sean Quinn[2]

Pillsbury Winthrop, LLP
The Law Office of Michael Sean Quinn

"DAMN FOOLS" – LOOKING BACK AT STOWERS AFTER 85 YEARS

I. Introduction

It was a dark and rainy night.[3] When this classic story began on the evening of January 23, 1920, Mamie Bichon was a passenger in a taxi that collided with a truck owned by the G.A. Stowers Furniture Company. The legal principle resulting from this chain of events, a defending liability insurer's duty to accept reasonable settlement demands within policy limits, is known to virtually all lawyers, adjusters and other insurance professionals who routinely deal with liability issues in Texas. To think of the rule another way, it has stood as a cornerstone of Texas law for so long[4] that virtually every current practitioner (young and old alike) who knows of its existence learned the *Stowers* doctrine soon after their entry into the field.[5] While they have seen other aspects of Texas insurance law change over the course of time, this particular doctrine remains largely – or at least mostly – unaltered from its original form.[6] Because of its importance, *Stowers* and its progeny have been the subject of countless demand letters and status reports, numerous judicial decisions,[7] CLE speeches and law school classes, a host of scholarly writings,[8] and probably more than a few sleepless nights. Many of these examples have centered around the contours of the *Stowers* doctrine and its application in various scenarios.

Our focus is a bit different. This spring, *Stowers* celebrates its eighty-fifth anniversary as a landmark of Texas law.[9] In light of this occasion, we thought it might be useful to take a step back in time and revisit the original case from a number of different angles. Because *Stowers*-type cases necessarily involve "litigation about litigation," we will begin by examining the facts and people involved in both the underlying personal injury lawsuit as well as the insurance dispute. We will then review the arguments put forth by the parties, and in one instance, by a lawyer who filed an amicus brief. This topic will be followed by an analysis of the resolution of those arguments by the various courts involved. Part of this analysis will include some surprise data – there was a dissent written in the (nearly) controlling court, and we have run across no one who was aware of its existence. Thus, the primary approach will be a historical one. We wish to shed light on the case not only because it is vitally important to the insurance jurisprudence of Texas, but also because it is an interesting story that is worthy of being told. It is our hope that by engaging in this retrospective look at the case, some new insights can be gained into the legal doctrine and that interested readers can get a brief look at the colorful history of this case, not to mention the State of Texas, along the way.[10]

II. The Accident

Today, the intersection of Austin Street and Capitol Avenue[11] in Houston is unremarkable. Three corners are surface parking lots, while a nondescript low rise building of recent vintage occupies the fourth. There are two streetlights, and the intersection is very well lit. About five blocks away at the corner of Walker and Fannin sits the old Stowers building.[12]

In contrast to today, the intersection was likely very different ninety-four years ago. Again, it was raining very heavily that night. Bichon's petition described the events as follows:

> That about the 23rd day of January 1920 and about the hour eight forty five P M (8:45 P M) defendant, G.A. Stowers Furniture Company had . . . left . . . one of its large furniture vans . . . on Austin Street in . . . such a way as to obstruct a portion of said street on which it had placed no lights, that the night was dark and . . . a very heavy rain was falling which made it difficult for anyone driving on said Austin street to see said furniture van . . . .
>
> . . . .

1. Vince Morgan is with the Houston office of Pillsbury Winthrop. Since graduating from the University of Texas School of Law, his practice has concentrated on litigating insurance coverage disputes, as well as advising clients on insurance and risk management issues. He is immediate past Chair of the Insurance Law Section of the State Bar of Texas.

2. Michael Sean Quinn is the founder of his own boutique law firm in Austin. He both practices law and testifies on various subjects, including insurance coverage and professional malpractice. He is a former Chair of the Insurance Law Section of the State Bar of Texas, and has taught at the University of Texas School of Law, Southern Methodist University Dedman School of Law and the University of Houston Law Center.

> . . . [a] few minutes prior to the hour of 8:45 P M [plaintiff] left her place of business on the corner of Main Street and Congress Avenue . . . and entered [a] rent car [presumably something like a taxi], belonging to defendant, Jamail, for the purpose of going to her home in the southern portion . . . of Houston.
>
> . . . .
>
> Plaintiff would further show that the driver of defendant, Jamail, was going in a southerly direction on Austin Street and that about the 700 block on said street the said driver . . . was going at a tremendous rate of speed, being some twenty or thirty miles an hour,[13] and that while so running at said tremendous rate of speed he drove into and came into collision with the said furniture van . . . hitting the said van with tremendous force, throwing this plaintiff from said rent car . . . under the said furniture van thereby injuring this plaintiff
>
> . . . .

Bichon's Original Petition, at 1-3. Clearly, "tremendousness" was thought of differently in 1920 and was very important to Bichon, or her lawyer.

The liability theory against Stowers had two basic components: (a) the truck's obstruction of the road; and (b) the fact that the truck had no operating warning lights or watchman at the time of the accident, as we shall presently see.

In her Original Petition, Bichon made only brief remarks concerning the truck. In her Amended Petition, she alleged:

> [The truck] had no lights upon it of any character and especially had no red light in the rear thereof and was left without anyone being in charge thereof and without any warning or signal of any character around the same to warn approaching vehicles of the presence of such automobile truck.

Bichon's Amended Petition, at 4. Like many lawsuits, however, the plaintiff's petition told only part of the story. In responsive pleading, Stowers:

> [a]nswered by a general demurrer and general denial, and further specifically pleaded that . . . the driver[14] of its truck, while driving his truck in a careful manner, ran into a wagon that had been left by its owner on the streets without a light on it of any sort; that [the] force of the collision with the wagon damaged the defendant's truck so that the motor was disabled to such an extent that the engine could not run and that the fender was bent down upon the tire so that it was impossible for the driver to move the truck; that the truck in question was a Ford truck, with the lights connected directly to the motor, and that the electricity that furnished the lights to the truck was generated by the motor, and therefore, since the engine or motor was disabled so that it could not run, the lights would not burn;[15] that the driver of the truck, as soon as he discovered the condition, went as quickly as possible to the nearest telephone for help, and, although gone from the truck only a few minutes, the rent car in which plaintiff was riding ran into the truck which was still standing immediately behind and against the wagon in question. The defendant further pleaded that the fact that the truck was on the streets without a light at the time and place in question was not due to any act of this defendant, but to the act of the unknown owner of the wood wagon. [S]towers Furniture Company further pleaded that the rent car in which plaintiff was riding would have struck the wagon in question if the defendant's truck had not previously hit it, and on account of the damages received remained immediately behind the wagon.

Bichon, 254 S.W. at 608. Stowers's answer set up the key factual dispute in the case. Bichon pleaded that Stowers was negligent for abandoning the truck and not leaving a watchman at the scene to warn oncoming traffic of the hazard. As set forth in its answer, however, Stowers maintained that its driver "went as quickly as possible to the nearest telephone for help," and was "gone from the truck only a few minutes."[16] Note that Stowers also pleaded causation, arguing that the taxi would have hit the wagon anyway had the truck not done so beforehand.

III. Bichon's Injuries

As for damages, Bichon pleaded that her back and kidneys were injured, and that she received abrasions to her face and head. More importantly, it was also alleged that she:

> [s]uffered a bad wound which cut and lacerated her throat, injuring the thyroid glands and [that] some sharp instrument cut or penetrated her throat to a depth of nearly an inch, cutting some arteries, which caused her a great loss of blood[17] .
>
> . . .

7.

> She further shows that she is informed by her physician and charges the truth to be that the force with which she was thrown from said automobile was such that it inflicted either a strain or rupture on one of the valves of her heart and said injury is very dangerous as it is liable to prove fatal at nearly any time and she fears the same is incurable.

Bichon's Original Petition, at 3-4. Thus, Bichon alleged cuts, bruises, arterial bleeding of the neck, and heart damage, at least some of which was a consequence of being thrown from the cab.

Her medical expenses, including a one week stay in St. Joseph's hospital along with a surgical procedure and follow-up visits by two doctors, amounted to $174.[18] Additionally, she claimed to suffer swelling, heart palpitations, and chest pains. Lastly, she alleged that the accident resulted in a heart murmur that ultimately led to valvular disease. Bichon's Amended Petition, at 6. In her prayer, she sought $20,000 as damages for the injuries, $174 in medical expenses, and $33 for her clothes that were destroyed. She did not specifically seek lost wages, although they probably occurred. Hence, most of the damages she sought would today be categorized as compensation for pain and suffering.

Unfortunately, while his business may have "changed [San Antonio's] skyline," Mr. Stowers did not live long enough to see his business change the landscape of Texas insurance law…

IV. The Players

A. The Parties

1. Mamie Bichon

Mamie Bichon worked at Cockrell's Drug Store, located on the corner of Main Street and Congress Avenue in Houston. In her First Amended Original Petition, she was referred to as a "feme sole."[19] She was repeatedly described in the pleadings and testimony as a pleasant woman and a "respectable white business lady."[20] There is no question that she sustained injuries in the accident, although just how severe they actually were remains unclear.

2. The G.A. Stowers Furniture Company

George Arthur Stowers founded the G.A. Stowers Furniture Company. Mr. Stowers died in 1917 at the age of 50, about three years before Ms. Bichon's accident. Born in Georgia just after the close of the Civil War, he was a remarkably successful businessman. The Handbook of Texas Online, published by the Texas State Historical Association, has this biography:

> Out of his savings from a two-dollar-a-week job in a candy company he was able at seventeen to start his own furniture store in Birmingham, Alabama, with $500 capital. By the time he was twenty-three he was operating ten stores in Alabama, Tennessee, and Texas; San Antonio, Dallas, Waco, and Fort Worth were the Texas outlets. Stowers moved his business from Birmingham to Dallas in 1889, but soon thereafter he located in San Antonio, where his business succeeded to the extent that it eventually changed the city's skyline. His first furniture stores were on West Commerce Street; by 1910 he had one of the largest retail businesses in San Antonio and had built a ten-story building (a "skyscraper" at that time) at the corner of Main and Houston streets. He also opened furniture stores in Houston and Laredo. Stowers's ranch holdings outside San Antonio were extensive.[21]

Unfortunately, while his business may have "changed [San Antonio's] skyline," Mr. Stowers did not live long enough to see his business change the landscape of Texas insurance law.[22]

3. American Indemnity Company

Based in Galveston, the American Indemnity Company was incorporated in 1913 by Joseph F. Seinsheimer. His son, Joseph F. Seinsheimer, Jr. took over the company in 1951.[23] During the 1990's, Joseph F. Seinsheimer III ran the company until its acquisition by the United Fire & Casualty Company in 1999.[24] Thus, it lasted seventy-six years as an independent entity.

B. The Lawyers

There were many lawyers involved, but a handful in particular played key roles.

1. Norman Atkinson

Mr. Atkinson, along with his father (who later became a Harris County judge), represented Ms. Bichon in the personal injury lawsuit. Subsequently, he served as co-counsel with John Freeman in the lawsuit against American Indemnity following the final resolution of Bichon's case.

2. John H. Freeman

Freeman was a partner in Campbell, Myer & Freeman, and was regular counsel to the Stowers Furniture Company. In 1924, he became the third partner in the law firm of Fulbright, Crooker & Freeman, which is still well-known in Houston and now elsewhere.[25] He later served as city attorney for Houston in 1928-1929 and also prepared the legal documents setting up the M.D. Anderson Foundation, which funded the beginnings of the Texas Medical Center.[26]

3. Ben Campbell

Born in 1858, Ben Campbell was mayor of Houston from 1913-1917. Given the seriousness of the case, Freeman turned over the lead role of defending Stowers to Campbell, who was the senior litigator in their firm. Campbell tried Bichon's case alongside Mr. Patterson, who was engaged by the insurer. During his tenure as mayor, Houston's first parks were established and Campbell's administration was credited with paving the way for the development of the Port of Houston.[27] In fact, his daughter christened the port during its opening ceremony on November 10, 1914.[28] Campbell died in 1942, survived by his wife and six children.

4. R.C. Patterson

Robert Clendening Patterson was appointed by American Indemnity to defend the underlying case for Stowers. Once Stowers brought suit against American Indemnity, he was again engaged by American Indemnity to defend the carrier in the insurance lawsuit. Prior to forming the firm of Fouts & Patterson, he was an attorney with Baker Botts (then known as Baker, Botts, Parker & Garwood). Educated at Vanderbilt, Patterson was a distinguished lawyer. After practicing with Elwood Fouts for about fifteen years, he finished his career as a solo practitioner from 1935 until his retirement in 1951. Patterson died in 1952.[29]

C. The Jurists

1. Judge Monteith

Walter E. Monteith, who presided over the trial of the *Stowers* case as judge of the 61st Judicial District Court of Harris County, was quite an extraordinary fellow. Born in 1877, he served in the Boer War and ran rubber and banana plantations in Nicaragua.[30] Attending both college and law school at The University of Texas, he played football on the first undefeated Longhorn team. Monteith even took a leave of absence from the bench to serve as a private in field artillery in World War I. *Id.*[31] He went on to become mayor of Houston from 1929-1933.[32] Later, he served on the First District Court of Civil Appeals from 1939 until his death in 1953.[33]

2. Justice Critz

Richard Critz, the author of the key opinion, spent much of his legal career in public service. Born in Mississippi, he worked as a farmhand and teacher before becoming a lawyer. He held various positions such as city attorney in Granger and judge in Williamson County, where he was instrumental in the construction of a new courthouse.[34] Critz also assisted Georgetown district attorney Daniel Moody in prosecuting members of the Ku Klux Klan in the 1920's.[35] In 1927, Moody became governor and appointed him to the Commission of Appeals.

Critz served in that capacity until 1935 when Justice William Pierson was brutally murdered by his son.[36] Governor Allred appointed him to succeed Pierson on the Texas Supreme Court.[37] During his tenure, Critz wrote hundreds of opinions and was considered both industrious and influential.[38] He left that bench in 1944 and returned to private practice in Austin with Lloyd Mann, Emmett L. Bauknight, F.L. Kuykendall, and Pierce Stevenson.[39] Dying on April 1, 1959 at the age eighty-one, Critz was survived by his wife of fifty-three years and three of his four children.[40]

3. Judge Nickels

Born in 1882,[41] Nickels went to law school at The University of Texas. He served as a member of the Texas House of Representatives and Assistant Attorney General. Before and after his service on the Commission of Appeals from 1925 until 1929, Nickels was in private practice in Dallas with former U.S. Senator Joseph W. Bailey and his son, U.S. Congressman Joseph W. Bailey, Jr., at Bailey, Nickels & Bailey. Nickels died relatively young in 1933 at the age of 51, but like Justice Critz, he also passed away on April 1. *Id.*

He served on the Commission of Appeals with Richard Critz and J.D. Harvey.[42] Collectively, these three judges comprised Section "A" of the Commission of Appeals in the year that *Stowers* was decided. Judge Nickels wrote the dissenting opinion in the *Stowers* case that, for reasons unknown to us, never made it into the *South Western Reporter*. The reporter contains no dissenting opinion; neither do the online versions available from Westlaw and Lexis. The majority opinion gives no hint of a dissent. It was only through reviewing the files of the Texas State Archives that this opinion was discovered, and it will be discussed below.

V. The Outcome of the Underlying Lawsuit

Bichon sought a total of $20,207 in her lawsuit. Her lawyers extended two settlement offers. The first was for $5,000, and the second was for $4,000. Neither offer was accepted. Settlement negotiations having failed, the case went to trial. On appeal, the court held that the evidence was sufficient for the jury to conclude:

> This truck, the motor of which had been so damaged by a collision with a broken-down wagon, which had been left in the street by some unknown person, that the truck could not be moved and its lighting system could not be operated, was left in this condition by its driver for more than an hour before the car in which appellee was riding collided therewith.[43]

Therefore, the Court upheld the jury's factual findings and apparently their decision to disregard the driver's testimony concerning the length of time he was gone. The jury awarded Bichon $12,207.[44] With costs of suit and interest, the judgment came to $14,103.15.[45] Following an unsuccessful appeal and denial of review by the Supreme Court, Stowers paid Bichon and then brought suit against American Indemnity for the full amount of the judgment.

VI. The *Stowers* Case[46]

A. The Policy

Interestingly, this was a "lost policy" case, as the original was "misplaced."[47] Using the following year's policy, Stowers proved up the contents of the missing one. In exchange for a premium of $607, Stowers obtained an "Automobile Public Liability and Property Damage Policy."[48] Although there are some differences from modern policies, the basic structure is largely the same. It began with the insuring agreements, followed by certain conditions (including the exclusions), and then concluded with a number of schedules and endorsements. The relevant defense obligation stated:

> AMERICAN INDEMNITY COMPANY
>
> * * * *
>
> DOES HEREBY AGREE
>
> * * * *
>
> Defense.(A) TO DEFEND in the name and on behalf of the Assured any suits even if groundless, brought against the Assured to recover damages on account of such happenings as are provided for by the terms of the preceding paragraphs.[49]

The policy also spoke to the rights and obligations of the parties concerning settlements:

> [T]he Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiation for settlement or legal proceeding without the consent of the Company previously given in writing. The Company reserves the right to settle any such claim or suit brought against the Assured.[50]

It was against this backdrop that the insurance case unfolded.

B. The Pleadings

Worth remembering is the fact that this case arose prior to the onset of "notice pleading." Consequently, the pleadings on both sides were fairly elaborate.[51] One interesting point is that Stowers said its truck hit the wagon "at about the hour of seven o'clock p.m." Stowers's Second Amended Petition, at 3. It also stated that Jamail's car hit the truck "at about 8:30 or 8:40 p.m. . . ." *Id.* at 4. Stowers got to the heart of the case with the following allegation:

> [D]efendant[,] who was conducting plaintiff's defense in said underlying cause, had to rely for this defense upon the naked statement of this plaintiff's said servant who was a *Negro boy*[52] and interested in clearing or showing himself guilty of no wrong, whereas the said Mamie Bichon had *two reputable white witnesses* who were in nowise interested in the suit who testified in their behalf that they saw the truck standing where it had collided with the wagon at about seven o'clock that night . . . and the undisputed evidence showed that the accident did not occur until more than an hour later — all of which facts were well known to defendant long prior to said trial, or could have been known by it by the exercise of ordinary care and diligence.

Stowers's Second Amended Petition, at 8 (emphasis added).[53] By way of legal allegations, Stowers stated:

> [I]t became the duty of the defendant . . . on taking charge of plaintiff's defense in the aforesaid suit to conduct same in good faith and for this plaintiff's interest as well as for the defendant's own interest and without negligence on the part of said defendant; and that it further became the duty and obligation of said defendant to conduct said suit and to make such settlement with . . . Miss Bichon or her attorneys as the reasonably prudent person would have made under the same or similar circumstances for the protection of this plaintiff's interest . . . .

Id. at 9.[54] This position, modified and narrowed somewhat, became the *Stowers* doctrine.

American Indemnity responded with its own lengthy and elaborate pleading. As to the legal duty, it argued that the petition failed to state a claim. With respect to the relative worth of the testimony of the driver versus the two disinterested witnesses, American Indemnity pleaded:

> Defendant specially excepts to that part . . . for the reason that this court will not consider that white witnesses are more truthful than black or that a negro boy was interested, as he was not a party to the suit, or that a negro boy may not be as reputable as a white witness, and that said allegations are prejudicial and inflammatory and improper . . . .

American Indemnity's Second Amended Original Answer, at 2. Thus, the insurer "accused" Stowers's lawyers of racism. In addition to failure to state a claim, American Indemnity also pleaded that the case did not justify a settlement of $4,000. Further, American Indemnity claimed that even if it did breach a duty, it was a contractual one, and hence, Stowers was put to the election of either kicking the insurer out of the defense and suing it or continuing to allow performance through trial and appeal. Since Stowers allowed American Indemnity to continue to defend the case through trial and the appellate process, American Indemnity contended that Stowers had therefore waived, or was estopped from asserting, what in American Indemnity's view was at most a breach of contract claim. At its core, American Indemnity's position was that it did all that it was required to do by faithfully and reasonably defending its insured until the Supreme Court's denial of review and then offering to pay the full limits of its policy. Freeman testified that he argued with Patterson on this issue, pointing out the unfairness of this position to the insured. Unfortunately, the testimony makes no other reference to this point.[55]

C. The Trial

Six witnesses testified at the trial. Stowers called Norman Atkinson, I.P. Walker (the manager of its Houston store), and John Freeman. American Indemnity called Ben Campbell, R.C. Patterson, and W.L. Hartung, the last of whom was the head of American Indemnity's claims department. Seven witnesses were excluded, including Bichon, her employer, the two witnesses who first saw the truck at the accident site, the doctor who examined her for life insurance before and after the accident, and her treating physicians at the hospital. These witnesses were the "Irrelevant Seven." Although the trial court and the Court of Civil Appeals held their testimony was irrelevant, the Commission of Appeals later reversed this ruling.[56]

Mr. Atkinson was the first witness. While testifying, he recalled discussing the case with Patterson and Freeman many times prior to the trial of Bichon's suit:

> Mr. Patterson's contention was that the Stowers Furniture Company's truck had been disabled, . . . a few minutes before the accident by running into a wagon that had been left there, and that the negro driver had gone to secure assistance by telephone; and that the truck at the time of the accident had only been there just a few minutes, some ten, fifteen or possibly twenty minutes, the accident having taken place at about eight or eight twenty. I told Mr. Patterson we had two reputable white men who would testify they had seen that truck there at around or just before seven o'clock, about an hour and a half before the accident.

SOF at 15-16. Thus, the length of time the truck sat unattended was a key factual dispute in the underlying case. The defense contended it was only a short time, just long enough to go and summon help via telephone. Bichon, on the other hand, contended that the truck was there for more than an hour, giving the driver ample time to summon help and return to the truck to warn oncoming traffic. Not only was this an important factual dispute, but the racial backdrop was a constant issue in both the underlying case and the subsequent insurance case.

Atkinson also testified about Bichon's injuries, stating that Dr. Alvis E. Greer conducted an independent medical evaluation of Bichon. Dr. Greer's report, which was introduced into evidence,[57] indicated that she told him she was rendered unconscious for about forty-five minutes after the accident. Ultimately, he concluded that she had pre-existing valvular disease, but that the accident may have aggravated the condition. *Id.* at 18-19. Bichon had her own doctor, though, who examined her for a life insurance policy before the accident and re-examined her after the accident. It was expected that this doctor would have testified that he detected a heart murmur in the subsequent examination that was not present prior to the accident. *Id.* at 19-20. Thus, there was a conflict in the medical opinions.

As noted before, Bichon's lawyers made two offers of settlement. The first, of $5,000, was summarily rejected. Subsequently, a $4,000 offer was made and rejected. Atkinson testified:

> It is true that the American Indemnity Company was not willing to pay as much as we demanded in settlement, leaving a difference between what it was willing to pay and what we were willing to accept.

> Mr. Patterson's attitude was that he was going to put it up to Stowers, and if Stowers wanted to pay the balance they would be able to put the settlement over, otherwise not.[58]

Mr. Walker, the manager of Stowers's Houston store, testified next. He explained that, the morning after the accident, Stowers gave notice of the matter to its insurance agent, and Patterson was engaged "the next day or two after the accident." *Id.* at 48-49. After suit was filed, the insurance company gave Stowers the opportunity to have its counsel assist with the defense, and at that point, Freeman and Campbell became involved.[59] SOF at 50. Walker testified that "the first communication I had with Mr. Patterson was when he wrote me a letter, telling me that he was representing the American Indemnity Company." *Id.* at 54. As for the $4,000 settlement offer, Walker stated:

> Mr. Patterson . . . came by the store one morning and discussed with me a proposition of settlement, claiming that Atkinson & Atkinson had come to him and offered to settle for $4,000.00, and asked if we would be willing to put up fifteen hundred dollars of that amount, stating that the American Indemnity Company was willing to pay twenty-five hundred dollars,[60] but would not go any further than that. I discussed it with Mr. Patterson quite a bit, and he impressed on me that this was going to be a pretty serious case . . . .

SOF 26-27. Walker then testified as follows:

> I told Mr. Patterson that I thought we had insured with a pretty good company, and that they should take care of us without bringing us into court, in as much as it could be settled for less than the amount of the policy, and that we would not put up any part of it in settlement. Mr. Patterson said if the case was not settled it would go to trial, and they were only liable for five thousand dollars and that it was so near the amount of their policy they were willing to take a chance on it.

SOF at 27. On redirect, he testified about the following exchange:

> I told Mr. Patterson I thought his company should go ahead and settle this claim without bringing us in to any kind of litigation; that it was a crime for us to carry insurance and pay for it, and then they would not pay what little claims we might have. He told me he thought that was a fair settlement, a good settlement, and the thing should be settled, but they would not put up over twenty-five hundred dollars.

SOF at 64. He also testified that Patterson said "the case was dangerous, and he thought [the insurer] ought to settle . . ." *Id.* at 28.[61] Interestingly, in a letter to Jamail's attorneys, Walker had previously stated a somewhat different view of the matter:

> The night of this accident the police were called to the scene and they immediately exonerated our driver, stating that he was not to blame under the circumstances, and if there is really anybody who is to blame . . . it should be the man who left his wagon in the street without a light of any kind . . . .

SOF at 52. If the police did indeed exonerate Stowers, it is curious to us why the defense did not make this a central point of their case. Nevertheless, it is also interesting that Stowers's manager found fault with the wagon on the same basis that Bichon found fault with Stowers.[62]

Finally, Walker testified that after the conclusion of Bichon's case:

> [The insurance company] offered to pay the five thousand dollars with interest on it up to that time, providing we would give them a release. I refused to give them a release and they would not pay me. I would not give them a full release of their liability under this policy in connection with this accident because we were figuring on suing them; immediately after the case was affirmed we figured on doing that.[63]

Freeman was the next witness. As to the conflict in the testimony, he stated:

> [T]he facts as contended by our negro driver and the plaintiff's facts supported by their two witnesses; we were conscious there was going to be a conflict there. In discussion [of the matter] we took into consideration the fact that the plaintiff's witnesses were reputable white men.

Id. at 76. Continuing, Freeman also noted that if the plaintiff's witnesses were correct, "then our defense simply was not a defense." *Id.* at 79. After discovering what the testimony of these witnesses was expected to be, "[Mr. Patterson and I] went to work a little more seriously trying

to get a settlement of the case." *Id.* at 80.

Ultimately, he characterized the case as one:

> [I]n which there probably would be no recovery, or else a recovery very considerably in excess of the five thousand dollars that had been discussed as the limit of this insurance policy, dependent upon how the jury viewed this conflicting testimony, and based further upon how the jury considered the injuries that this young lady had received.

Id. at 81. Freeman and Patterson each went back to their respective counterparts to inquire about the prospect of putting together a settlement fund for the plaintiff. Stowers's position was that it should not pay any amount of a settlement less than five thousand dollars, and they were of the "impression that it was the duty of the insurance company to make settlement of that case if it could be settled for less than five thousand dollars, and relieve them of any liability of loss over five thousand dollars." *Id.* at 83. Freeman then stated:

> To be perfectly frank, Mr. Patterson and I told each other that both of our clients were damn fools . . . [T]hat his insurance company was foolish in not coming up a little above twenty-five hundred dollars, and that [Stowers] was foolish if it could get rid of a law suit with the potentialities this one had by putting up some amount not to do it. Just as a broad proposition, that a suit of this kind had potentialities and I think our language was that they were damn fools not to do it.[64]

American Indemnity's first witness was Stowers's lead trial lawyer, Ben Campbell. He thought Stowers had a good case below. He believed Perry's story, and he doubted that Bichon was as injured as she had claimed. Nevertheless, he was cognizant of the disadvantage a corporation had when defending itself against the claims of an injured woman who was faultless. Remember that Bichon was merely a passenger in what was essentially a taxi-cab. In fact, Campbell went on to state that he "knew that [the underlying action] was a dangerous case." SOF at 100. He knew this before it went to trial.

Perhaps the most telling indicator of Campbell's view of the case was given at the close of his cross-examination. Here is what he said:

> Assuming that a suit was brought by a young lady against a corporation, and that the principal defense of the corporation was based on the testimony of a colored boy in their employ; and assuming that the evidence of the colored boy was that it was only fifteen minutes from the time of the collision between the truck and the wagon, and the accident, and that the testimony of two reputable white men was that they saw that truck in the position where it was at the time of the accident from an hour to an hour and a half before the accident could have occurred, they saw it there at about seven o'clock at that place and the accident didn't occur until about eight twenty, *I would say under those circumstances there would be* [*a*] *very serious danger of losing the case, because it was a negro, and the circumstances detailed.*

SOF at 101-02 (emphasis added). Race thus played a significant role in this lawyer's thinking. How else might it have been relevant?

The head of American Indemnity's claims department, W.L. Hartung, testified as the last witness in the case. On cross-examination, the Stowers attorneys[65] pressed him to identify cases in which the company paid more than fifty-percent of the limit of a given policy. In response to this line of questioning, he testified:

> It is pretty hard for me to recall the particular instances and the style of a case where the company paid the full limit of their policy without anybody contributing anything, because in handling claims for the company for a period of ten years I could not recall that . . . .
>
> . . . .
>
> I don't know that I can name you a single case where my company paid the full limit of their liability under the policy without trial and without somebody else contributing something to that settlement. I said there was such a case but I could not give you the name of it. I will state here under my oath that to the best of my recollection there have been such instances but I cannot recall a specific case now.
>
> . . . .
>
> I cannot give you the name of any specific case where the company paid more than half, I could not tell you in what town it happened or when it happened. I could not tell you the name of the assured nor the agent who handled it. All I can tell you about that matter is that such a case

> happened. I don't know the place where it occurred, what court it was in, the name of the fellow that got the money nor the company to whom the policy was issued in any single instance. Instead of my having a recollection about such an instance it may be an impression.

SOF at 168-69.[66] This, from the head of the insurance company's claims department. Today, most lawyers would find such testimony shocking. Viewed under current standards, Hartung is probably admitting that American Indemnity violated Tex. Ins. Code Ann,. Section 541.060(a)(2)(A), and perhaps in every case in the company's history until that point.

Following the closing of the evidence, Judge Monteith withdrew the case from the jury and rendered judgment in favor of American Indemnity. Thus, the insurer won the trial handily, as a matter of law. Stowers appealed.

VII. The Appeals

A. The Court of Civil Appeals

As we shall see, an intermediate appellate court ruled twice on this case. We turn now to the first ruling.

1. Stowers's Arguments

Stowers put forth two propositions in the beginning of its opening appellate brief. When taken together, these propositions form the basis of the *Stowers* doctrine. They were:

> FIRST PROPOSITION
>
> Where an insurance company for a valuable consideration to it in hand paid undertakes to insure one against loss and stipulates that it is to have the sole settlement of any cases, if any settlement is made, and also stipulates that it has the sole right to appear and defend on the behalf of the assured, then such insurance company is held to that reasonable degree of care and diligence which a prudent man would exercise in the management of his own business.
>
> SECOND PROPOSITION
>
> Where it is manifest to the insurance company during the progress of the litigation that a trial of the cause is practically certain to result in a verdict and judgment against the assured in excess of the liability of the policy, it is the duty of the insurance company to make a settlement of said cause, if the same can be done within the limits of the amount of its liability as fixed in its policy.

Stowers's Brief, at 7-8. The first proposition focuses upon the key element of control of the defense and settlement, and it speaks in terms of negligence. The second proposition addresses the potential for excess judgments that may be avoided where settlement can be had for an amount within the limits of the policy. It does not, however, formulate the standard by which that duty should be judged. Thus, only when these two propositions are taken together can the full contours of the *Stowers* doctrine be seen.

After setting out its view of the case, Stowers went through a lengthy summary of the testimony from the trial to paint a picture of Bichon's case as well as the events surrounding the defense and failure to settle. It began its arguments with this:

> To hold that one, who, for a valuable consideration, enters into a contract with another by which he has exclusive control of all litigation that may arise and which litigation he agrees to defend on behalf of the person with whom he has contracted, has a right to disregard the interest of the one with whom he has made a contract and consult his own interest only, seems to us to be utterly abhorrent to the plainest principles of justice.[67]
>
> For the present, we confine this discussion to the question of whether the acts of the Indemnity Company in this litigation fulfilled its obligation to the Stowers Furniture Company or constituted a fraud upon said company.

Id. at 44. Both sides took liberties with the facts, as litigants occasionally do. Stowers argued:

> The evidence of Mr. Hartung also authorizes the conclusion that it was the fixed policy of defendant company not to pay more in any case than one-half of the amount of liability on its policy.

Id. at 46. This was a fair inference from Hartung's testimony, but it was only an inference. Stowers varied between arguing that the evidence supported this conclusion and that it established it as a fact, which was central to its pleading of fraud. In other words, Stowers argued that American Indemnity had an unwritten settlement sublimit of half of the policy limits.

Stowers then cited a handful of cases from around the country (since none existed in Texas at the time) with similar facts and in which the insurers were held liable for failing to make reasonable settlements within the limits of their respective policies, as well as an A.L.R. annotation. It then concluded with a brief argument:

> The meaning of the policy in controversy may be a little obscure where in effect it provides that the insurance company shall pay where lawfully liable. We think a fair interpretation of the meaning of this provision of this policy is that if under all the circumstances, it is the duty of the insurance company to settle the loss, it is certainly lawfully liable to do so.

Stowers's Brief, at 51. Note the insured's use of the word "fair." Its final paragraph stated:

> In this cause, the defendant insurance company has, by its conduct, inflicted on the Stowers Furniture Company, a loss of thousands of dollars. It did this rather than pay Fifteen Hundred Dollars for which it was legally liable or at least the evidence of its legal liability was certainly sufficient to go to a jury to be heard and determined by them.

the defendant insurance company has, by its conduct, inflicted on the Stowers Furniture Company, a loss of thousands of dollars. It did this rather than pay Fifteen Hundred Dollars for which it was legally liable…

Id.

2. American Indemnity's Response

American Indemnity began with a number of counter arguments. The first three in particular are noteworthy:

FIRST COUNTER PROPOSITION

> In a policy of indemnity insurance against loss resulting from liability imposed by law, such as is involved in this suit, the undertaking of the insurance company in the contract is to defend and pay a judgment, and, in the absence of fraud, there can be no liability on the part of the insurance company for refusing to settle a case, the company never having agreed . . . to settle the same in the contract.

SECOND COUNTER PROPOSITION

> The provision for settlement involved in this case is a mere option to be exercised by the insurer, should it elect to do so for its own benefit, as distinct from that of the assured and the insurance company is under no obligation to exercise it otherwise than for its own benefit.

THIRD COUNTER PROPOSITION

> As long as there is even a remote chance of recovering a verdict or securing a judgment for less than the amount of the policy, there can be no duty upon the insurance company to settle upon the policy.

American Indemnity's Brief, at 4.[68] In contrast to Stowers's negligence approach, American Indemnity took the position that this was a contractual issue. Its argument began:

> Every case must be tried upon some legal theory that will support a recovery. The relation of the parties is wholly governed by the contract. If plaintiff has a case and if there has been any breach of any duty, it must be of an express or implied contractual duty resulting from the relations of the parties, as evidenced by the contract or read into the contract by operation of law because of the relation of the parties resulting therefrom. In other words, the duty must be a contractual one, or what is legally termed a quasi-contractual one.

Id. at 16. Noting that it agreed to defend any suit but did not agree to settle every suit, it stated:

> Naturally, having undertaken the defense in the contract and having contracted to defend, there are duties in connection with the defense of a law suit to use care,[69] but there is no such duty in connection with the settlement under the policy, there having been no agreement, either express or implied, to settle.

Id. at 17. American Indemnity then argued:

> If an insurance company has such duties as appellants claim, they would necessarily settle all cases, for they would have no hope of convincing a jury after judgment that they had acted with reasonable care.[70]

By characterizing it as a contractual issue,[71] American Indemnity set up the defenses of waiver and estoppel. It correctly noted that, by virtue of Stowers having its own

lawyers in the case, the insured knew all the facts surrounding Bichon's lawsuit. It also correctly noted that Stowers did not sue at the time of the failure to settle, but instead allowed American Indemnity to continue performing under the contract by paying Patterson to defend the case through trial and even through the appellate process. Of course, the insurer pleaded these defenses below.

As a result of these facts, American Indemnity argued:

> [T]he G.A. Stowers Furniture Company is attempting, and, if successful in this case, will have done two things. First: It will have reaped the benefit of the representation in the defense of the case by the insurance company and its lawyers and the other services in the way of investigation, payment of costs, and all other matters. Secondly: In addition to securing the full performance of the contract, it will secure damages for a breach thereof. In other words, if their position is good law, the G.A. Stowers Furniture Company can sit idly by and await final outcome of their lawsuit. If the Insurance Company is successful in its defense, or does not have to pay more than $5,000.00, it gets off scot free.[72] If, on the other hand, the suit is ultimately lost, although the contract of defense has been carried to completion, yet the insurance company must pay a sum of money far in excess of the amount it agreed to pay, and the Stowers Furniture Company in addition to having secured the performance of the agreements of the company recovers in addition for a supposed breach of the contract.

American Indemnity's Brief, at 54-55. Continuing, it made the following analogy:

> [I]f an insurance company undertakes the defense of a policy it would waive the fact that the accident was not covered by the policy or that there had been some prior breach of it by the insured. Why is it not equally true that when the insured goes ahead with the performance of the contract and permits the insurance company to do so and by its actions permits it to defend said insured has not waived any breach that existed and is it not also estopped from asserting it?

American Indemnity's Brief at 56-57. In sum, American Indemnity's position was that no duty was owed, no duty was breached, and even if a duty was owed and breached, then Stowers had waived the right to complain about it.

3. The Court's Opinion

In the Court of Civil Appeals, American Indemnity again won outright. After thoroughly stating Stowers's position, the court held:

> We do not think the Indemnity Company was, by the terms of the policy, under any obligation to do more than faithfully defend the suit. [I]t had not agreed to settle the suit, but had reserved the right to do so.

Stowers I, at 261. Continuing, the court went on to state:

> Under the facts shown, the Indemnity Company had the right to refuse the proffered settlement and to defend the suit against a larger recovery or any recovery whatever, no matter how slender its chances of success. It was not under obligation to abandon what it believed to be a defense to the suit because there was a strong probability that a refusal of a settlement would result in the rendition of a judgment in excess of its liability under its policy, and settle the suit for $4,000 so as to assure the Furniture Company against loss.

Id.[73] Thus, the judgment of the trial court was affirmed. *Id.* at 261-62.

B. The Commission of Appeals

Before continuing, a short discussion of the history of the Commission of Appeals is worthwhile. It was first created by the Legislature in the late 1870's to assist the Supreme Court.[74] As the Supreme Court had only three members at the time, the Commission was designed to help relieve an ever-increasing caseload. After being revived in 1918, the Commission took the form it was in when *Stowers* was decided, having two sections with three judges each.[75] All decisions by the Commission required approval or adoption by the Supreme Court. The court was effectively disbanded in 1945, when an amendment to the Texas Constitution increased the number of Supreme Court justices from three to nine, and the Commissioners then in office were automatically elevated to fill the new places on the Supreme Court. *Id.*

1. Stowers's Brief

Stowers first filed a petition for writ of error, with a thirty-

odd page brief in the Supreme Court. Later, it filed a comparatively short brief in the Commission of Appeals, at less than ten pages. It repeated most of its original points, but it also expressed its arguments in new ways. For instance, Stowers summarized its position as follows:

> [The insurance company] was bound to do two things by its contract: one was to defend on behalf of the Company and the other was its implied obligation to make a settlement if that seemed to be the wise and prudent thing to do. When the Indemnity Company bound itself by its contract to defend against any suit or claim on behalf of the insured, it certainly obligated itself to do something more than to permit the insured to be dragged into a hopeless lawsuit or one in which there was great danger of losing.

Stowers's Brief, at 3. Continuing, Stowers argued:

> Of course, if the agreement to defend in behalf of the insured does not mean anything and is merely a delusion and a snare, then the decisions of the trial court and of the Court of Civil Appeals are right, but if that agreement means that good faith should be exercised by the Indemnity Company in protecting the insured and that the Indemnity Company will not knowingly pursue a course by which it will lose the insured many thousands of dollars in order to save itself a few hundred dollars, then the decisions of the lower courts are wrong.

Id. at 5.

2. American Indemnity's Response

Unfortunately, we were unable to locate a copy of American Indemnity's response to Stowers's principal brief. One can guess what it probably said, given the success of the insurer's brief in the Court of Civil Appeals.

3. The Majority Opinion

Justice Critz's majority opinion began by noting:

> This case involves issues that are questions of first impression in this court, and are so important to the jurisprudence of this state that we deem it advisable to make a very full and complete statement of the issues involved.[76]

Stowers, at 544. After reciting the facts, the court held:

> We are of the opinion that the plaintiff's petition states a cause of action against the defendant for the amount sued for, and that the evidence in the case raised an issue of fact to be submitted to the jury by the trial court under proper instructions.

Id. at 546. Continuing, it adopted Stowers's position, stating:

> Certainly, where an insurance company makes such a contract; it, by the very terms of the contract, assumed the responsibility to act as the exclusive and absolute agent of the assured in all matters pertaining to the questions in litigation, and, as such agent, it ought to be held to that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business; and if an ordinarily prudent person, in the exercise of ordinary care, as viewed from the standpoint of the assured, would have settled the case, and failed or refused to do so, then the agent, which in this case is the indemnity company, should respond in damages.
>
> . . . .
>
> The provisions of the policy giving the indemnity company absolute and complete control of the litigation, as a matter of law, carried with it a corresponding duty and obligation, on the part of the indemnity company, to exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances, and a failure to exercise such care and prudence would be negligence on the part of the indemnity company.

Id. at 547. After discussing various cases from other jurisdictions, the court concluded:

> In our opinion the other authorities . . . sustain the rule announced by us, and, while there are authorities holding the contrary rule, we are constrained to believe that the correct rule under the provisions of this policy is that the indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business.

Id. at 548. The court agreed with Stowers on the evidentiary

points as well, noting that "all the facts and circumstances surrounding [Bichon's] injury, are material as bearing on the question of negligence on the part of the indemnity company in failing and refusing to make the settlement." *Id.* Lastly, the court held that the testimony concerning American Indemnity's "rule" of never making a settlement for more than half the amount of the policy should have been admitted as bearing on the issue of negligence on the part of the insurer. *Id.* All of these holdings were in turn approved by the Supreme Court.[77]

4. The Lost Dissent

Countless lawyers, scholars, adjusters and other insurance professionals have read Justice Critz's opinion and thought this was all there was to the case. As previously noted, however, Judge Nickels wrote a dissenting opinion. Beginning as many opinions do by stating the case and the relevant facts, Judge Nickels did so succinctly:

> Accident transpired; suit followed; defense was conducted by the Company and the assured; "trial of the issue" was had; final judgment declaring liability in excess of "indemnity" stipulated resulted. The Company's obligation to pay $5,000, plus interest from "entry of judgment" and costs, matured and payment thereof is required in the judgment before us.

Dissenting Opinion, at 3.

Continuing, the opinion addressed the heart of the case by noting that the insurance company's "obligation . . . is sought to be extended . . ." because of the facts involved in the handling of the underlying lawsuit.[78] After reciting these facts, Judge Nickels responded:

> But the very gamble which was made by the Company and by the assured in declining the offer was by them left open when their contract was made. The possibility that a judgment in any suit for damages for personal injuries (especially internal ones) may be for a sum either more or less than the amount of indemnity named affords a probable reason for lack of contractual terms specifically requiring a settlement by either party.

Id. The dissent argued that, "for aught that appears," the contract was negotiated at arm's length, and "its terms cannot be re-cast so as to impose that liability sought to be established in this case." *Id.* Next, the dissent went through each case Stowers cited as authority for its position, painstakingly distinguishing them from the instant case. Following this analysis, Judge Nickels seized on a distinction between a duty to pay "upon ascertainment of liability" and a duty to pay after liability is established at trial. He felt that the *Stowers* case was more like the latter type rather than the former, and for this reason he recommended that the Court of Civil Appeals be affirmed. We will not dwell on it further, but as it was left out of the published reporter and lost to history, this dissenting opinion is at least worth a passing discussion.

5. Subsequent Developments

Following the decision, American Indemnity filed a Motion for Rehearing in the Commission of Appeals, and then filed a motion directly with the Supreme Court asking it to withdraw the motion from the Commission of Appeals and decide the matter itself.

In support of this Motion for Rehearing, J.W. Gormley filed an amicus brief. A lawyer at the Dallas firm of Touchstone, Wight, Gormley & Price,[79] he was very interested in the outcome of the *Stowers* case, and asked the Clerk of the Texas Supreme Court to:

> [P]lease remind [the Chief Justice] for me that if the Court adheres to the opinion as written by Judge Critz, it will put us insurance lawyers out of business.

Gormley letter, at 1. Continuing, he stated:

> In this case the Commission [of Appeals] simply elected to follow a line of minority decisions without carefully examining their *rationes decidendi*. This is a pardonable error, but if it is not corrected, a new and intolerable burden will be placed upon us Texas lawyers, – a burden that will take all the fight out of us; and a lawyer without courage, yea, without even daring, is of little help, either to clients or to courts.

Id. He concluded:

> [W]e are really fighting for our bread and butter as lawyers in this matter, as well as for the interests of several clients, who will be very much embarrassed if the original opinion in this case is suffered to stand.

Id. In contrast to Gormely's prediction that the decision would "put us insurance lawyers out of business," American Indemnity's motion for direct review by the Supreme Court

argued it was:

> A matter of so much importance to the people of this State and involves untold sums of money and will cast upon the Courts of this State great volumes of litigation hitherto not tried . . .

Motion to Withdraw, at 2. Where Gormley saw a drought, American Indemnity saw a flood.[80]

As for his amicus brief, Gormley wrote it on behalf of Standard Accident Insurance Company, which was subsequently merged into Reliance Insurance Company in 1963.[81] Like his letter, Gormley's brief is filled with sensational prose. It is an entertaining read, filled with quotations from Cardozo and Lord Westbury.[82] In it, Gormley advances two main points. First, the duty is based in terms of the "reasonable person," when, according to Gormley, it should be couched in terms of the "reasonable lawyer."[83] His second point is that a case with uninsured exposure is really two lawsuits – one below the limit and one above it. Thus, Gormley suggests that a contribution scheme like the one American Indemnity proposed to Stowers is proper in such cases. Gormley's first point is incorrect because the duty really should be measured from the standpoint of a reasonable person, as lawyers can only recommend to clients that settlements be accepted or rejected, but ultimately the decision is the client's to make (or the insurer's, in the case of most liability policies). Either way, it is not a lawyer's decision. Gormley's second point is unworkable, as even back then parties knew that the vast majority of all lawsuits settled for amounts less than their true potential.[84] Furthermore, after seventy-five years of *Stowers*, parties have come to rely on it.[85] By way of example, insureds rely on it when determining the amount of liability limits they should purchase, how closely they should monitor cases with excess exposure, and sometimes how a corporation should report such lawsuits in public filings. Even excess carriers have come to rely on it when dealing with cases that should be settled by underlying carriers.[86] Gormley's arguments were untenable back then, and this is even more true eighty-five years later.

After the case was remanded to the trial court following the decision in *Stowers II*, and now that it was deemed a negligence action by the Commission of Appeals, American Indemnity filed another Second Amended Answer. In its second Second Amended Original Answer, American Indemnity changed its contract defenses of waiver and estoppel into a negligence defense of contributory fault. It alleged that Stowers, having had its lawyers working side by side with the insurance company's lawyers, knew all the facts of Bichon's lawsuit as well, and if the underlying case were as bad as Stowers later made it out to be (*i.e.* one that should have been settled), then Stowers was itself guilty of negligence for not capping the exposure by settling within policy limits. Thus, it set up a contributory fault/failure to mitigate defense.[87]

VIII. The Final Chapter

More than ten years after Bichon's accident, Stowers finally got the chance to take its case to a jury. Here is what happened.

A. "Gentlemen of the Jury"[88]

Following retrial in the 11th Judicial District Court of Harris County, the judgment recited the sole special issue and the jury's answer, which were:

> "Special Issue No. 1.
>
> Would a person in the exercise of ordinary care in the management of his own business under the facts and circumstances known to the American Indemnity Company or its counsel in charge of the case, prior to the trial of the suit of *Mamie Bichon v. Stowers Furniture Company*, have settled said suit for Four Thousand Dollars? Answer Yes or No as you may find."
>
> To which Special Issue the jury answered: "Yes."

Judgment, at 1.[89] The jury submission raises at least three interesting questions.

First, it refers to "facts and circumstances known . . . ." In Bichon's case, the facts were very well known. What about cases in which certain key facts are unknown? Should the carrier treat unknowns as if they would be adverse to the insured in the underlying lawsuit? Can the carrier disregard unknowns altogether? Can it guess as to what it thinks the truth really is?

Second, it refers to facts "known to the American Indemnity Company or its counsel." What if counsel knew of certain problems but failed to inform the carrier? Under this formulation, the carrier would be responsible in any event because "its counsel" was aware.[90]

Third it speaks only in terms of "prior to the trial . . . ." Suppose a case looks defensible prior to trial, and then a surprise witness comes forward in the middle of trial who brings new evidence to light that completely negates the defense's theory. Does the duty to settle apply then? Or can the carrier rest comfortably, knowing that it did not need to

settle it "prior to the trial"?

Some of these questions are obvious and have already been answered, but some remain open to this day. In any event, Stowers prevailed at the retrial, and it ultimately obtained a judgment for $19,309.85.[91]

B. One Last Appeal

American Indemnity appealed when it lost this time, re-urging its arguments from before. This time, the Court of Civil Appeals rejected American Indemnity's position, noting that the jury verdict in the second trial "finally settled this controversy." *Stowers III*, at 956. As they have been amply discussed, we do not repeat these arguments here. We note only one item worth mentioning from Stowers's Reply Brief – its response to American Indemnity's "have your cake and eat it too" argument:

> The appellant attempts . . . to set up some kind of waiver by appellee . . . on the ground that the appellant did certain things after the breach complained of, from which the appellee received benefits. We have sought earnestly to see what benefits appellee has received from the so-called performance of appellant in the trial of the Bichon case, and the only thing that we find is that the case was so managed by the appellant, (American Indemnity Company) that appellee had to pay out some $14,000.00. A few more performances like that and appellee would cease to exist. It is a new proposition for a party to a lawsuit to so conduct it as to cause its clients to be mulcted in a sum in excess of $14,000.00, and then claim it has acquired merit . . . .[92]

the case was finally at an end, more than a decade after Bichon's accident…

Following its unsuccessful appeal, American Indemnity's writ of error was refused.[93] Thus, the case was finally at an end, more than a decade after Bichon's accident.

IX. Vistas in Research[94]

In the course of our work on this project, a number of issues appeared worthy of further exploration. While there are many, we identify only a handful of possibilities:

1. A thorough treatment of the racial issues involved in this case and others of this type. Our space limitations did not permit us to examine the topic beyond this article's scope, but these issues clearly warrant careful study.

2. An investigation of the evolution of the *Stowers* doctrine from the "ordinarily prudent *person*" standard set forth in the original opinion, to more recent formulations that occasionally speak in terms of an "ordinarily prudent *insurer* . . . ."[95] Was this evolution purposeful, or simply accidental?

3. A discussion of the various perspectives from which the duty can be measured. An ordinarily prudent person? An ordinarily prudent attorney? An ordinarily prudent insurer? Although we touched on this point, a more thorough analysis of each position would be worthwhile in our view.

4. An analysis of the roles of the lawyers in this case. From all we have seen, they were lawyers of eminent skill, reputation and integrity. Nevertheless, they switched clients and testified at trials where their firms were acting as counsel. On top of these points, there is always the thorny issue of the tripartite relationship, a problem that continues to vex lawyers, litigants and courts even to this day.[96] Exploring this in connection with the evolution of modern professional responsibility rules would be interesting.

5. An analysis of Patterson's role in particular is enough for a short paper. Walker testified that at ". . . the trial of the case . . . Mr. Patterson [was] representing the insurance company and working with Mr. Campbell who represented us, and the[y] cooperated with each other in the trial of the case." SOF at 62. Freeman testified that "Mr. Patterson was representing the insurance company . . . ." *Id.* at 78. Campbell remarked that he "took part in the defense of that Bichon case, Mr. Patterson and I together; I represented the Stowers Furniture Company and Mr. Patterson represented the insurance company." *Id.* at 98. Patterson even thought he represented the insurer, stating that "I do not remember how many letters I wrote to my client, the American Indemnity Company . . . ." *Id.* at 146. Later, however, Patterson went on to blur the line, stating that "the insurance company undertook to and did furnish the lawyers, my firm, to contest the case and represent the Stowers Furniture Company, in conjunction with their

lawyers." *Id*. at 150.

6. An empirical analysis of the accuracy of American Indemnity's prediction that if the *Stowers* duty exists, then insurance companies "would necessarily settle all cases, for they would have no hope of convincing a jury after judgment that they had acted with reasonable care."[97]

7. Similar studies of other landmark insurance cases. Our own insights into the *Stowers* doctrine have deepened because of this process, and we hope it will encourage like ventures with other important cases. *Tilley*[98] may be an appropriate candidate for the next such project.

X. Conclusion

As eighty-five years have passed since the *Stowers* doctrine was first laid down, now seemed like a good time to step back and review this historic case. In light of what we learned, we wondered who among the parties involved in the case are left standing today. Of course, Fulbright & Jaworski has merged into Norton Rose Fulbright, a multi-national law firm, [99] and American Indemnity, though it has since been sold, is still licensed to sell insurance in Texas. The Stowers Furniture Company remains in business today, noting on its website that it has been "creating beautiful homes in San Antonio since 1890."[100] We found nothing current on Fouts & Patterson. No word on Gormley's firm, either.

We have seen how the case came about by examining the facts surrounding both the personal injury lawsuit and the subsequent insurance litigation. We also discussed the arguments put forth by the parties and the resolution of the competing positions by the courts involved. While those who deal with *Stowers* know its doctrine well, hopefully the readers of this article will come away with a deeper appreciation of the case itself.

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2 Michael Sean Quinn is the founder of his own boutique law firm in Austin. He both practices law and testifies on various subjects, including insurance coverage and professional malpractice. He is a former Chair of the Insurance Law Section of the State Bar of Texas, and has taught at the University of Texas School of Law, Southern Methodist University Dedman School of Law and the University of Houston Law Center.

3 It literally was. *G.A. Stowers Furniture Co. v. Bichon*, 254 S.W. 606, 609 (Tex. Civ. App.—Galveston 1923, writ dism'd w.o.j.) ("That appellee was injured . . . on a dark, rainy night . . . is shown by the undisputed evidence."). In fact, it was the heaviest rainfall in Houston's recorded history for a 24 hour period in January at the time. *Expect Cold Wave to Follow Heavy Downpour of Rain,* Houston Chronicle, Jan. 24, 1920 at 1. As an aside, the newspaper had another article reporting the accidents that resulted from the storm. Notably, Ms. Bichon's accident was not among them. *Slippery Streets Cause Accidents*, Houston Chronicle, Jan. 24, 1920 at 8.

4 The first judicial reference to the "*Stowers* doctrine" that we found was in 1960. *F.M. Chancey v. New Amsterdam Cas. Co.*, 336 S.W.2d 763, 766 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.). It was referred to as a "landmark case in this state" as early as 1963. *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222, 224 (N.D. Tex. 1963).

5 Sometimes it is learned sooner than that. The case is regularly studied in courses on insurance law, and it is even discussed in some first-year tort classes.

6 So-called "*Stowers* demands" may now have to be slightly more explicit than they did in the past.

7 A search performed using Westlaw's Keycite program on October 6, 2004, showed that *Stowers* has been cited in 216 cases, with 445 references in total. Candidly, we expected this figure to be higher. One possible explanation could be that courts now cite to more recent expositions of the *Stowers* doctrine, such as *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 847 (Tex. 1994). There is some breadth to the citations, though, with decisions from more than two dozen jurisdictions, including courts in Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Kentucky, Massachusetts, Mississippi, Missouri, Montana, New York, Ohio, Oklahoma, Oregon, Rhode Island, Utah, Washington, Wisconsin, Vermont, the Virgin Islands, and the U.S. Courts of Appeals for the 5th, 7th, 8th, and 10th Circuits. *Id.*

8 The Journal of Texas Insurance Law routinely publishes significant articles on this important subject. *See*, *e.g.* Brent Cooper, *Essential Requirements to Trigger a Duty under the Stowers Doctrine and Unfair Claims Settlement Practices Act*, 4:2 J. Tex. Ins. L. 7 (June 2003); Randall L. Smith & Fred A. Simpson, *The Liability Insurer's Dilemma: Should a Good Faith But Mistaken Belief There is No Coverage Absolve an Insurer of "Stowers" Liability?*, 4:3 J. Tex. Ins. L. 2 (November 2003).

9 To be precise, the decision was handed down on March 27, 1929, making its seventy-fifth anniversary March 27, 2004. As an aside, March 27 is a particularly significant date in Texas history generally. On that day in 1836, the Mexican army executed hundreds of Texas revolutionaries at Goliad, *available at* http://www.historychannel.com/tdih/tdih.jsp? month=10272955&day=10272992&cat=10272948 (last visited Apr. 21, 2004).

10 A brief note about the conventions we will use is in order. This article discusses four key decisions (which comprise a total of five opinions with the "lost" dissent included), including the appeal of the underlying lawsuit and the three appeals in the insurance action. We refer to the appeal of the underlying lawsuit, reported in *G.A. Stowers Furniture Co. v. Bichon*, 254 S.W. 606, 609 (Tex. Civ. App.—Galveston 1923, writ dism'd w.o.j.), simply as *Bichon*. We refer to the first appeal of the insurance suit, reported in *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 295 S.W. 257, 261 (Tex. Civ. App.—Galveston 1927), as *Stowers I*. The second appeal of

the insurance suit, which is the opinion cited for the *Stowers* doctrine and reported in *G.A. Stowers Furniture Co. v. Am. Indem. Co*., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved), is referred to as either *Stowers* or *Stowers II*. Finally, there was a third appeal after the re-trial of the insurance lawsuit, reported in *Am. Indem. Co. v. G.A. Stowers Furniture Co*., 39 S.W.2d 956 (Tex. Civ. App.—Galveston 1931, writ ref'd), and this decision is referred to as *Stowers III*. Also, we will draw heavily from the testimony at the trial of the *Stowers* case, and our citations to the Statement of Facts will be prefaced with the abbreviation "SOF." Pleadings, briefs or other papers from the cases are identified as appropriate. As these pleadings were prepared on typewriters for the most part, we have taken the liberty of editing typographical errors in the passages we quoted. Thus, while some excerpts were not reproduced quite verbatim, they are substantively the same and any changes are purely cosmetic.

11 When we began this project, we thought the accident occurred at the corner of Austin and Leeland, some nine blocks southwest of Austin and Capitol. In preparation for the 2003 Annual State Bar Meeting, *Texas Lawyer* provided a map of noteworthy points of interest for attendees who might be so inclined. Among these was the "*Stowers* Case Accident Scene," listed as being at the corner of Austin and Leeland. Kelly Pedone, *Get Ready for Hot Hip History: Houston State Bar's Annual Meeting Offers Sightseer's Plenty to Do*, Texas Lawyer, June 9, 2003 at 20. However, after reading the trial transcript and other materials we obtained in researching this article, we later became convinced that the accident actually took place at the corner of Austin and Capitol. The amended petition in the underlying lawsuit lists the accident scene as happening at the 700 block of Austin, which is the corner of Austin and Capitol. Bichon's Amended Petition, at 4. Further, the bill of exceptions filed by Stowers in response to the exclusion of Bichon's testimony states that she would have testified the accident happened "near the corner of Austin Street and Capitol Avenue." Transcript, at 29.

12 This ten-story building, located at 820 Fannin, still has the word "Stowers" emblazoned on it. Long vacant, it is currently undergoing renovation and seeking occupants, *available at* http://www.stowersbuilding.com (last visited Nov. 30, 2004). Perhaps an enterprising mediator with a flair for irony will move in and use history as an extra incentive to encourage reluctant parties into settling.

13 At the time of the accident, the applicable speed limit was 10 miles per hour. Bichon's Original Petition, at 2.

14 The truck driver's name was Otis Perry. SOF at 64. Mr. Perry was about twenty years old at the time. *Id*. at 101. We have discovered nothing else about his life.

15 Consequently, the issue was not that the truck was missing the required lights, but that the lights were disabled because the engine was rendered inoperable as a result of the collision with the wagon. The tongue on the back of the lumber wagon went through the truck's radiator and disabled the motor. SOF at 77. Though attempts were made to determine the identity of the wagon's owner, they were unsuccessful. *Id*. at 88, 104. An interesting question is whether, at any time in Texas legal history, Bichon might have had a cause of action against Ford for say, strict liability? The rule laid down in *MacPherson v. Buick Motor Co*., 111 N.E. 1050 (N.Y. 1916), was in existence at the time of Bichon's accident. However, it was not cited by a Texas court until 1922. *Tex. Drug Co. v. Caldwell*, 237 S.W. 968, 976 (Tex. Civ. App.—Dallas 1922, writ ref'd).

16 At the trial of Bichon's lawsuit, the driver testified that he went two to three blocks to the nearest telephone, and that he was gone for only 10 to 15 minutes. *Bichon*, 254 S.W. at 609. There was even a possibility that the driver was within earshot of the accident, and that he may have actually heard Bichon's crash. Finally, there was at least some speculation that the driver lived near the accident scene, and that he might have gone home or gone to visit a lady friend while he went to seek help. SOF at 139. These alternative theories are possible explanations for the time discrepancy.

17 She later alleged that because of this cut, she "came very nearly bleeding to death . . . ." Bichon's Original Petition, at 4.

18 Among these expenses, we note that the doctor charged $3 for a weekday visit, and $5 for a Sunday visit. *Id*.

19 Bichon's First Amended Original Petition, at 1. Interestingly, the archives of the Harris County courts also contained a file in an action for divorce filed by Leon Bichon against "Mammie J. Bichon" in 1918, two years before the *Stowers* accident. The defendant's answer spells the name as "Mamie," which is consistent with the spelling of the first name of the plaintiff in *Bichon*. Whether this is the same person is speculation, but interesting nonetheless. In any event, the marriage apparently was an unsuccessful one, as the plaintiff-husband alleged that she was "a woman of a high and ungovernable temper and disposition . . .," that she "made most indecent remarks about the plaintiff's dead mother . . .," and that she "almost constantly nagged and found fault with every thing that the plaintiff did . . . ." Ultimately, the plaintiff alleged that the "constant ill treatment and abuse of the defendant . . . keeps [the plaintiff] . . . in such [an] unsettled state of mind that his life [is] a Hell on Earth . . . ." *Bichon v. Bichon*, Original Petition, at 1. (Perhaps Stowers felt the same way about the plaintiff suing it.).

20 *Stowers I*, 295 S.W. at 261. But consider the immediately preceding note.

21 Handbook of Texas Online (Ron Tyler et al. eds., 1996), *available at* http://www.tsha.utexas.edu/handbook/online/articles/view/SS/fst69.html (last visited Feb. 6, 2004). As for his ranch holdings, they remain in the hands of his grandchildren and great-grandchildren to this day. The ranch is about 25 miles west of Kerrville, in Hunt, Texas. It is open to guests for recreational usage such as hunting, hiking, and wildlife observation, *available at* http://www.stowersranch.com (last visited Apr. 26, 2004).

22 Ironically, it turned out that Stowers left a more permanent mark on Texas insurance law than he did on the San Antonio skyline. The "skyscraper" he built in San Antonio was apparently dynamited in 1981. San Antonio Conservation Society's "Milestones," *available at* http://www.saconservation.org/about/milestones_4.htm (last visited Oct. 22, 2004). Perhaps it is more fitting that only the Houston building now remains.

23 Handbook of Texas Online (Ron Tyler et al. eds., 1996),

available at http://www.tsha.utexas.edu/handbook/online/articles/view/AA/djatk.html (last visited Apr. 22, 2004). The middle Seinsheimer graduated from Tulane University in 1936 with a bachelor of business administration degree. He later became a generous supporter of Tulane's business school and endowed a professorship, *available at* http://www.tulane.edu/~akc/seins.html (last visited Oct. 18, 2004). Continuing the family tradition, the youngest Seinsheimer graduated from Tulane in 1962, *available at* http://www.freeman.tulane.edu/freemanmag/summer04/gwded.pdf (last visited Oct. 23, 2004).

24 United Fire Group, *available at* http://www.unitedfiregroup.com/investorrelations/news/19990304.asp (last visited Apr. 22, 2004).

25 Of course, this firm ultimately became what became known as Fulbright & Jaworski and is now Norton Rose Fulbright.

26 Handbook of Texas Online (Ron Tyler et al. eds., 1996), *available at* http://www.tsha.utexas.edu/handbook/online/articles/print/FF/ffr29.html (last visited Feb. 23, 2004).

27 *Memorials*, 5 Tex. B.J. 134 (1942).

28 *The Port's Past*, *available at* http://www.portofhouston.com/geninfo/overview2.html (last visited Oct. 23, 2004).

29 *Memorials*, 16 Tex. B.J. 609 (1953).

30 *Id*.

31 *Id*. That he would leave his job on the bench in order to volunteer for combat duty speaks volumes about his patriotism, or perhaps the job satisfaction of the judiciary during that era, or possibly both.

32 L. Patrick Hughes, *Beyond Denial: Glimpses of Depression-era San Antonio*, *available at* http:// www.austin.cc.tx.us/lpatrick/denial.htm (last visited Feb. 23, 2004).

33 Justice Robert W. Calvert, *Judicial System of Texas*: *The Appellate Courts of Texas – History*, *in* 361-362 S.W.2d 1-18 (1963).

34 These facts were drawn from a biography prepared by Critz's surviving daughter, Genevieve. Genevieve Critz Atkin & Brenda A. Rice, A Biographical Sketch of Richard Critz, Texas Judge (Dec. 1959) (unpublished manuscript, on file with the Austin History Center).

35 Ken Anderson, *How Dan Moody, '14 Destroyed the Klan in Texas*, The Alcalde (July/August 2000), *available at* http://www.texasexes.org/alcalde/issue-2000.07.html#feature (last visited May 4, 2004).

36 Justice Pierson and his wife were beaten and shot to death by their son Howard just outside of Austin. Howard even shot himself in the arm in an effort to cover up his crime, although he later confessed and offered a number of conflicting reasons behind the gruesome killings. Declared insane, he did not stand trial initially and was instead sent to the Austin State Hospital, from which he twice escaped. Twenty eight years after the slayings, he was pronounced medically sane and the case was later reopened for trial. Jerry Pillard, *Motive Still Obscure in Pierson's Slayings*, Houston Post, Sept. 8, 1963 at 10. Prior to the confession, a young Walter Cronkite reported Howard's original story in the student newspaper for the University of Texas. Walter Cronkite, The Daily Texan, April 25, 1935 at 1.

37 At the time, the Court had only three members. It was physically located in the Capitol building, and the justices wore suits rather than robes. As a young attorney, Joe Greenhill clerked for the Supreme Court during Critz's tenure. Justice Greenhill later quipped:

> To say we served under Justice Critz is a slight exaggeration. He would have nothing to do with a law clerk. He didn't want any "boy" telling him what the law was. (laughter) He could have used the help. (laughter)

Salute to the Honorable Clarence A. Guittard, February 27, 1987, *in* 741-742 S.W.2d at XLVI, LII.

38 The memorial services held in his honor at the Supreme Court were chronicled in the Texas Bar Journal. 22 Tex. B.J. 557-58, 586 (1959).

39 *Memorials*, 22 Tex. B.J. 545 (1959).

40 Handbook of Texas Online (Ron Tyler et al. eds., 1996), *available at* http://www.tsha.utexas.edu/handbook/online/articles/view/CC/fcr22.html (last visited Feb. 6, 2004). His fourth child, Ella Nora (known as "Sugar"), married J.J. "Jake" Pickle before dying of cancer in 1952. He and Critz remained friends after her death, and a touching biographical piece can be found in Congressman Pickle's book, "Jake." Jake Pickle & Peggy Pickle, Jake 197-200 (1997).

41 *Struck Down by Heart Attack*, *Luther Nickels Dies Suddenly*, Dallas Morning News, Apr. 2, 1933 at 1.

42 Judge Harvey was the presiding judge of Section "A." Born in Austin County in 1873, Harvey served on the Commission of Appeals from 1925 until 1943. As an aside, Leon Bichon's 1918 divorce petition mentioned in note 19, *supra*, was filed in the 80th J.D. of Harris County, Texas and was addressed to "the Hon. J.D. Harvey, Judge of said Court." *Bichon v. Bichon*, Original Petition at 1. Harvey is listed as having served as "District Judge, 80th Judicial District, 1915-1925" in the 1937 edition of the Bench and Bar of Texas. Bench and Bar of Texas, Vol. 1 (Horace Evans 1937). While we can only speculate, it appears that Judge Harvey may have had the opportunity to be associated with two cases involving Ms. Bichon.

43 *Bichon*, 254 S.W. at 609.

44 The judgment was against all defendants jointly and severally. Unfortunately, Jamail and his surety company were insolvent. Interestingly, at some point during this case, the name of Patterson's firm changed from Fouts & Patterson to Fouts, Amerman, Patterson & Moore. Patterson's partner, Mr. A.E. Amerman, served as mayor of Houston from 1918 until 1921. In that capacity, he approved the very bond that later turned out to be worthless. *See* Exhibit "A" to Bichon's Original Petition.

45 *Stowers I*, 295 S.W. at 258. In 2004 dollars, this figure would be worth $147,570.95. *See* Federal Reserve Bank of Minneapolis, *available at* http://woodrow.mpls.frb.fed.us/research/data/us/calc

(last visited Apr. 22, 2004).

46 Adjusters, lawyers and judges instantly recognize the issues involved in a *Stowers*-type case, including whether an underlying lawsuit should be settled instead of tried. However, juries tend to view things through a different prism. Accordingly, it is important to keep in mind the difficulty insureds sometimes face in winning over the jury in this type of case. An excellent trial lawyer once observed that the trouble with trying to recover under a liability policy is that the insured has to prove its wrongdoing was bad enough to warrant settlement with the plaintiff(s) but not so bad that it should not be covered. There is a distinction, of course, between conduct that is *very injurious* as opposed to that which is *quite intentional*.

47 SOF at 29. To recover on a lost or missing policy, the Fifth Circuit has held:

> Where the actual policy is not available, the terms of the contract can also be shown by secondary evidence. This alternative requires evidence of the policy terms, not just evidence of the existence of the policy.

Bituminous Cas. Corp. v. Vacuum Tanks, *Inc*., 975 F.2d 1130, 1132 (5th Cir. 1992). Notably, the opinion from the Commission of Appeals mentions but does not discuss this issue. *Stowers*, 15 S.W.2d at 545-46.

48 SOF at 47, 30.

49 *Id*. at 31.

50 *Id*. at 38.

51 In addition to the pleadings, the lawyers spoke with a certain eloquence as well. For example, when asked about his experience as a trial lawyer, Campbell responded:

> My experience has been largely that of a trial lawyer in all kinds of litigation. [I] couldn't tell you how many such cases I have tried, but I suppose about the average number that a lawyer tries who has been in the practice as long as I have.

SOF at 98.

52 Regrettably, the racial composition of the people involved in this case was an issue during this litigation. As a result, the briefs, opinions and other materials we reviewed in researching this article contain racial epithets of this type. While we do so with much reluctance, we repeat these terms only in the quotations in order to maintain historical accuracy.

53 The petition thus laid bare the more sinister aspect of the case lurking in the background. The Court of Civil Appeals also categorized the individuals by race. *Stowers I*, 295 S.W. at 261 (referring to Perry, Bichon, and her liability witnesses by their respective races). The other courts, though, did not. *See*, *e.g. Stowers*, 15 S.W.2d at 545 (referring to Perry simply as one of the ". . . furniture company's servants . . . .").

54 Stowers mixed bad faith and negligence together in its pleadings. For example, it stated that it was compelled to pay Bichon's excess judgment "by reason of said defendant's lack of good faith and negligence in refusing to make settlement of said suit for $4,000 . . ." Stowers's Second Amended Original Petition, at 11. Although both are torts, one is pure negligence, the other is bad faith. In part because of *Stowers*, the Texas Supreme Court has held that there is no common-law duty of good faith duty and fair dealing in the third party context. *Maryland Ins. Co. v. Head Indus. Coatings & Servs*., *Inc*., 938 S.W.2d 27, 28-29 (Tex. 1996) (per curiam).

55 SOF at 85.

56 This was one of the points of dispute on appeal, but it was not a central part of Stowers's initial brief. American Indemnity's brief argued that the exclusion of these witnesses was proper because the only relevant testimony was what the lawyers and parties knew at the time the settlement was refused, which of course was prior to trial. However, since the *Stowers* doctrine is designed to avoid excess judgments, it should not be limited only to pre-trial settlement offers. Thus, if settlement at a certain sum appeared unwise before trial, but became reasonable as the trial progressed, there is no reason to think that the *Stowers* doctrine should not apply. Consequently, any evidence up to the entry of an excess judgment should be relevant. Ultimately, this position prevailed. *Stowers*, 15 S.W.2d at 548 ("[W]e are of the opinion that the serious nature of Miss Bichon's injuries and all the facts and circumstances surrounding her injury, are material as bearing on the question of negligence on the part of the indemnity company in failing and refusing to make the settlement.").

57 It is curious to us why the report was admitted if the witnesses were excluded. Perhaps no objection was made.

58 SOF at 21.

59 Freeman testified that Patterson "said . . . that there was sufficient question in the case that there might possibly be a judgment over and above the five thousand dollars, and that it would be wise for Stowers Furniture Company to be in the case with attorneys of their own selection in addition to the attorneys representing the insurance company." SOF at 71.

60 The limit was $5,000. Thus, American Indemnity was willing to pay no more than half of the limit in settlement.

61 Patterson denied that this conversation ever took place. SOF at 116.

62 Apparently, the distinction between "no lights" and "non-working lights" worked for Walker, but not the jury.

63 SOF at 63.

64 SOF at 83. At trial, Patterson testified first that "I don't remember who said it." *Id.* at 127. Later, he testified that he had "no recollection of making that statement." *Id.* at 144.

65 Although it is not expressly clear, it appears that Freeman's partner, John H. Crooker, tried the case on behalf of the Stowers Furniture Company. Crooker was the co-founder of the Fulbright firm.

66 There was some discussion about one other case in particular where the company paid 75% of its limits to settle, but it was reinsured for half of the limit of the policy, so American Indemnity's

net out of pocket was no more than half of the policy's limit. Hartung also testified concerning other cases about which he could not identify the particulars, but was certain that they had paid more than half of the limits of the policy.

67 At one point, Stowers argued that, when it issued the policy, American Indemnity Company "created the relation of attorney and client . . . ." Stowers's Brief, at 44.

68 This last point makes little sense as virtually any case can draw an adverse jury verdict, a directed verdict, or other similar outcome that results in no recovery. Thus, if this were the standard, then the duty would likely never be triggered. It occurs to us that a duty which is almost never triggered is worth very little.

69 Curiously, American Indemnity acknowledged that it would be liable for botching the defense, stating:

> We do not contend for a second that in proper cases negligence in the defense of a suit, the failure to plead proper defense, etc., will not make the [insurer] liable under a policy of this nature.

American Indemnity's Brief, at 18. Contrast this view with *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998) (prohibiting recovery against the insurer for the conduct of an independent attorney it selects to defend the insured.).

70 *Id.* at 19. Obviously, this prediction is not absolutely true. Nevertheless, as the jury verdict in Stowers's favor shows, there is probably at least some merit to this contention. This could partially explain why there has been a large amount of litigation as to whether the duty was properly triggered. *See*, *e.g. Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 853-55 (Tex. 1994) (whether demand was within policy limits); *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998) (whether demand offered to fully release insured). Nevertheless, there are many cases where the insured has difficulty in convincing a jury that it should be indemnified for its own culpable conduct. An interesting empirical study would be to analyze the reported cases involving the *Stowers* duty to determine what percentage of jury verdicts is won by insurers and what percentage is won by policyholders. This would only be a rough estimate at best given the small fraction of cases that actually reach the appellate process, and this limitation is particularly relevant here since the very purpose of *Stowers* is to encourage settlement.

71 Why did it ultimately evolve as an action in tort instead of one in contract? It might be that because Stowers pleaded it that way, and since it ultimately prevailed, perhaps the court naturally adopted Stowers's approach. It might also be that since the standard is couched in terms of "ordinary care," the logical response is to call it a negligence claim. Interestingly, if the duty sounds in contract, then a breach would subject the insurer to liability for attorneys' fees. But, since the duty ultimately was couched as a tort, then there is no exposure to attorneys' fees under Tex. Civ. Prac. & Rem. Code Ann. § 38.001 as a result of a breach of the duty to settle. However, since it is a tort, it theoretically opens an insurer up to the possibility of exemplary damages. Accordingly, the nature of the evolution of this doctrine both narrowed and broadened the available remedies in this context. Fortunately (or unfortunately), this issue has now been resolved by the Texas Supreme Court's decision in *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 255 (Tex. 2002) (allowing recovery under Tex. Ins. Code Ann. art. 21.21 for breach of the *Stowers* duty). Thus, in a proper case, an insured would be allowed to recover attorneys' fees *and* exemplary damages under art. 21.21.

72 Of course in this situation, the insured would not "get off scot free" as American Indemnity claimed. Instead, it would receive exactly what it paid for – indemnity up to the policy limits, if necessary.

73 Curiously, it seems that the court found significance in the fact that Stowers itself refused to put up $1,500 to settle the suit. Apparently, the court felt that this was evidence of Stowers's belief in the strength of the defense. Stowers took issue with this point in its Motion for Rehearing, noting that the testimony revealed that Stowers simply believed it was not obligated to contribute anything to a settlement below the limits of its insurance. In effect, Stowers was unwilling to insert a deductible or self-insured retention into the policy after it was issued, as American Indemnity was trying to force it to do.

74 Catherine K. Harris, *A Chronology of Appellate Courts in Texas*, 67 Tex. B.J. 668, 671 (2004).

75 Justice Robert W. Calvert, *Judicial System of Texas*: *The Appellate Courts of Texas – History*, *in* 361-362 S.W.2d 2-3 (1963).

76 At the time, there were only a handful of other states that had considered the matter. Thus, this was not only an issue of first impression in Texas, it was one in which there was very little guidance from other jurisdictions as well. In its briefing, Stowers reported the decisions to be more or less evenly split as to whether the insured should be allowed to recover in claims of this type.

77 Chief Justice Cureton signed the order approving of the holding of the Commission of Appeals. Aside from Chief Justice of the Supreme Court of Texas, Cureton held other public posts, including state legislator and attorney general. He was appointed to the Court in 1921 by Governor Pat M. Neff, and served continuously until his death in 1940, *available at* http://www.tsha.utexas.edu/handbook/online/articles/print/CC/fcu26.html (last visited Nov. 14, 2004).

78 Interestingly, Judge Nickels referred to these as "facts." Among the facts identified were that a reasonable offer within the policy limits was extended, an excess judgment was possible if not probable, and the insurer refused to contribute more than $2,500.

79 Gormley's firm provided the founding partners of what is today known as Strasburger & Price, *available at* http://www.strasburger.com/nav/directory.htm (last visited May 5, 2004). Gormley's prediction may have turned out correct after all, at least with respect to his own firm going out of business. With the defection of the lawyers who formed Strasburger & Price in 1939, the firm dissolved. Gormley then became a partner in the new firm of Touchstone, Wight, Gormley & Touchstone, where he practiced until his retirement in 1945. Gormley passed away in 1949, at the age of 74. *Memorials*, 12 Tex. B.J. 482 (1949).

80 Contrast American Indemnity's position here with its earlier

prediction that if the *Stowers* duty remained, insurance companies "would necessarily settle all cases . . . ." American Indemnity argued both extremes, despite the inconsistency. In a motion for additional time to file an extra brief, American Indemnity suggested that the effect of the case "will be so drastic and cause such losses as to put out of business many companies, and to make it unprofitable to write this character of policy for many companies . . ." Motion for Additional Time, at 1. Of course, American Indemnity still has a current license to sell insurance in Texas to this day, and thankfully, liability insurance remains widely available as well.

81 Texas Department of Insurance, *available at* https://wwwapps.tdi.state.tx.us/pcci/pcci_how_profile.jsp? tdiNum=3808&companyName=Standard+Accident+Insurance+Company&sysTypeCode=CL&optCaller=Caller+Info&optExplanation=Explanation (last visited May 4, 2004). The struggles of Reliance are well known. A simple summary of this complex case is *available at* http://www.relianceinsurance.com (last visited May 4, 2004).

82 Apparently Gormley was known for being widely read in literary classics and history, and for quoting such works in his arguments. He was very proud of his membership in the Texas Philosophical Society. *Memorials*, 12 Tex. B.J. 482 (1949).

83 Whether the term "reasonable lawyer" is an oxymoron is a question best left for another day.

84 In its Motion for Rehearing in the Court of Civil Appeals, Stowers argued that "[i]n our modern time . . . the statistics show that more than ninety per cent of all disputes are . . . settled." Motion for Rehearing, at 8.

85 *See*, *e.g. Bawcom v. State*, 78 S.W.3d 360, 363 (Tex. Crim. App. 2002) (noting that *stare decisis* fosters reliance on judicial decisions, and that under the doctrine, it is often "better to be consistent than right.").

86 *See Am. Centennial Ins. Co. v. Canal Ins. Co*., 843 S.W.2d 480, 482-83 (Tex. 1992) (referring to the *Stowers* doctrine as a "clear right" of the insured, and extending this right to allow excess carriers to pursue equitable subrogation claims against primary carriers for mishandling a claim).

87 The pleading made clear that the mitigation defense was directed only to that portion of the judgment in excess of the limits, so it would not apply to the difference between the $4,000 demand and the $5,000 limit, but it would apply to every dollar in excess of the $5,000 policy limit. While Stowers had the financial resources to make such a settlement (it did pay the judgment in full), this creative argument fails when one considers insureds without such resources. Certainly an insurance company should not obtain a windfall for its own negligence simply because its insured has sufficient resources to pay where the insurance company refuses. Perhaps this was merely a throw-away claim back in the days when contributory negligence was still a complete bar to recovery. S*ee Signal Oil & Gas Co. v. Universal Oil Prods*., 572 S.W.2d 320, 327 n.12. (Tex. 1978) ("Contributory negligence no longer bars recovery in a negligence cause of action in Texas since Texas enacted Article 2212a, Texas Revised Civil Statutes Annotated, which became effective on September 1, 1973.").

88 The jury charge begins with this salutation. It appears, therefore, that the jury was all-male. We do not know if it was also all-white, although we suspect it may have been.

89 It is important to note that, on the second appeal, the Court of Civil Appeals expressly approved of this submission. *Stowers III*, at 936-37.

90 Again, there is an interesting question as to the impact, if any, of *Traver* on this point.

91 This was the $14,103.15 paid to Bichon, plus interest during the pendency of the suit against American Indemnity.

92 Stowers's Reply Brief, at 6.

93 That the writ was refused means the opinion in *Stowers III* has precedential value equal to a decision from the Texas Supreme Court. *See* Appendix "A" to the *Texas Rules of Form* (10th ed. 2003).

94 The title for this section of the paper comes from Judge Posner's excellent biography of Justice Cardozo, wherein he suggests alternative areas for further study on one of the towering figures in American law. Richard A. Posner, Cardozo: A Study in Reputation 144 (1990). Posner's treatment of Cardozo's life and work is scholarly, engaging and insightful. In short, it is worth the reader's time.

95 *See*, *e.g. Rocor*, 77 S.W.3d 253, 264-65 ("To establish liability, the insured must show that . . . (4) the demand's terms are such that an ordinarily prudent insurer would accept it."). In truth, recent cases can be found on both sides. To compound the problem further, *Garcia* uses both formulations, and even in the very same paragraph. There are other cases using both as well, including *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314 (Tex. 1994), and *St. Paul Fire & Marine Ins. Co. v. Convalescent Servs*., *Inc*., 193 F.3d 340, 342 (5th Cir. 1999). In *Garcia*, the court first stated that the carrier "was required to exercise 'that degree of care and diligence which an ordinarily prudent *person* would exercise . . . .'" *Garcia*, 876 S.W.2d at 848 (emphasis added). In the same paragraph, it then stated that the *Stowers* duty "is not activated . . . unless . . . the terms of the demand are such that an ordinarily prudent *insurer* would accept it . . . ." *Id*. at 849 (emphasis added). Adding to the mystery, its second formulation cites a law review article written by Judge Keeton in 1954. This issue was raised in both *Rocor* opinions from the San Antonio Court of Appeals and, after determining that that the Texas Supreme Court had not addressed which formulation was more appropriate and that *Stowers* remained good law, the court found no error with the use of "person" instead of "insurer" in the jury charge. In the first opinion, the court also relied on the use of "person" by the Corpus Christi Court of Appeals in *Trinity Universal Ins. Co. v. Bleeker*, 944 S.W.2d 672, 680 (Tex. App.—Corpus Christi 1997). *See Rocor*, 1998 WL 9505 (Tex. App.—San Antonio Jan. 14, 1998). Curiously, the *Bleeker* citation is absent from the substituted opinion following rehearing *en banc*. *Rocor*, 995 S.W.2d at 814-15.

96 S*ee*, *e.g. State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d

625, 627 (Tex. 1998); *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973); *American Home Assurance Co., Inc. v. Unauthorized Practice of Law Committee*, 121 S.W.3d 831 (Tex. App.—Eastland 2003, pet. filed); *Safeway Managing Gen. Agency v. Clark & Gamble*, 985 S.W.2d 166, 168 (Tex. App.—San Antonio 1998, no pet.); *Bradt v. West*, 892 S.W.2d 56, 77 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

97 As we noted previously, American Indemnity's dire prediction is not literally true. Regardless, it reminds us of the words of Justice Holmes:

> [F]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics . . . .

Oliver Wendell Holmes, Jr., Collected Legal Papers 187 (Harcourt, Brace & Co. 1921). Here, we have analyzed the black-letter law (as well as the facts of the case that led to its creation). We leave it to others to analyze the statistics in order to evaluate the true accuracy of American Indemnity's prediction.

98 *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

99 We would like to express our sincere thanks to the many individuals who assisted us in preparing this article. In particular, however, we are grateful to U.S. District Judge Gray Miller, formerly of Fulbright & Jaworski (now Norton Rose Fulbright) for searching that firm's archives several years ago and locating several briefs that served as the inspiration for this paper. Interestingly, the firm's former website identified a number of engagements involving the *Stowers* doctrine in describing its insurance expertise, but the *Stowers* case itself was not among them. See http://www.fulbright.com/index.cfm?fuseaction=local.detail site_id= 334&link_name=Experience (last visited Apr. 27, 2004).

100 Stowers Furniture Company, http://www.stowersfurniture.com/index.php (last visited Apr. 27, 2004).

COMMISSION OF APPEALS
OF TEXAS
AUSTIN

No.1021-4915.
COMMISSION OF APPEALS.
SECTION A.

G.A.STOWERS FURNITURE COMPANY,	)	
PLAINTIFF IN ERROR,	)	FROM HARRIS COUNTY,
vs.	)	FIRST DISTRICT.
AMERICAN INDEMNITY COMPANY,	)	
DEFENDANT IN ERROR.	)	

This case involves issues that are questions of first impression in this court, and are so important to the jurisprudence of this state that we deem it advisable to make a very full and complete statement of the issues involved.

This suit was originally filed by the G.A. Stowers Furniture Company, plaintiff in error, hereinafter styled plaintiff, against American Indemnity Company, defendant in error, hereinafter styled defendant, for $14,103.15, together with interest, and for cause of action the petition states in substance:

That defendant was a private corporation in the city of Galveston and was engaged during the years 1919 and 1920 in the business of writing and issuing insurance policies and bonds to indemnify the assured against loss by reason of liability imposed by law upon the assured for injuries on account of bodily injuries, etc., and that the said Indemnity Company issued to said Stowers Furniture Company a policy of insurance for the sum of Five Thousand Dollars which proposed to indemnify the said Furniture Company against loss by reason of injuries accidentally suffered by any person or persons if such loss or damage so sustained was by reason of the said Furniture Company's ownership of the automobiles described in said policy.

It was further charged that defendant, Indemnity Company, agreed in said policy and had reserved the right to defend any suit in the name and behalf of said named assured for such damage or loss sustained if same was by reason of said plaintiff's ownership.

It was further provided that the Furniture Company should immediately, in the case of an accident, give notice to defendant, Indemnity Company, at Galveston and should forward to said Indemnity Company any summons or other process served upon them and when requested by said Company, the assured should aid in effecting settlement, etc.

It was further stipulated in said policy that the assured, meaning said Furniture Company, should not voluntarily assume any liability, settle any claim or expense except at its own cost and should not engage in any negotiations of such settlement or legal proceedings without the consent of said Insurance Company and the said Insurance Company reserved the right to settle any and all claims or suits brought against the plaintiff.

It was further alleged that the premiums were all paid on said policy and the same was valid and subsisting and in full force and effect, that said policy had been mislaid and that proof would be offered of its contents.

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It was further charged in said petition that on the 23rd day of January, 1920, a truck belonging to said Furniture Company and covered by said policy of insurance, which was hauling and delivering furniture and being operated by one of the said Furniture Company's servants and was being driven on Austin Street in the City of Houston, Texas, at about the hour of 7:00 p.m., came in contact with a wagon standing on the side of Austin Street and was thereby disabled and so crippled that said servant could not longer operate it and that it was left by the servant of said Furniture Company, without a light and without any one to watch it, and that shortly thereafter Miss Mamie Bichon, who was an employee in a drug store, left for her home at about 8:30 p.m. and was driven by Jamail in a Ford Coupe very rapidly along said street and came in collision with said truck; that the coupe was turned over and that she was very seriously injured; and that about the 3rd day of March, 1920, the said Miss Bichon brought suit for damages against said Stowers Furniture Company for Twenty Thousand Dollars.

It was further charged that defendant herein took charge of the defense of said suit for this plaintiff in accordance with the terms of said policy.

It was further charged that defendant herein employed counsel and proceeded to trial in said cause of Miss Bichon against the plaintiff, Furniture Company, and that after hearing the evidence and the charge of the court, the jury returned a verdict for Miss Bichon for the sum of Twelve Thousand Two Hundred Seven and No-100 ($12,207.00) Dollars besides cost; that there was an appeal by the defendant herein from said judgment; that the same was affirmed and that this plaintiff paid to Miss Bichon the sum of Fourteen Thousand One Hundred Seven and 15-1000 ($14,107.15) Dollars, including interest and costs of court.

It was further charged that during the pendency of this suit, and before the trial, Miss Bichon offered to accept Four Thousand Dollars in full settlement for the damages due her; that defendant herein refused to pay more than Twenty-five Hundred Dollars, although its policy bound it to pay Five Thousand Dollars; that the defendant herein knew that the case which Miss Bichon had against this plaintiff was a very dangerous one and that she was likely to get a judgment for far more than Five Thousand Dollars and that a person of ordinary prudence would have settled said cause for said sum of Four Thousand Dollars; that defendant admitted that said offer of settlement was a good one and should be accepted; that it wilfully and negligently refused to make such settlement knowing at the time it did so that it was jeopardizing the interests of this plaintiff in a very large amount; that in refusing to make such settlement it did not act in good faith; and it did not act like a prudent person would have done under like circumstances and that by reason of such conduct of said Indemnity Company the Furniture Company had been compelled to pay the said sum of more than Fourteen Thousand Dollars.

The material portion of the defendant's answer as shown in the opinion of the Court of Civil Appeals is as follows:

"That after the happening of the said accident made the basis of this suit the defendant investigated it, and after suit was filed and after citation was forwarded to it by plaintiff herein, it made defense of said suit and defended it through all the courts. That under the terms and provisions of said contract it was to have control of the defense of said suit and no settlement was to be made without its consent, it having the option of settling or defending the suit as it might deem best, and it was under no duty to settle said suit, and it elected to and did defend the said suit. That after making investigation in reference to said accident and the extent of the injuries suffered by Mamie Bichon, this defendant reached the conclusion that the facts of the accident were of such nature that it could and did reasonably suppose that judgment would ultimately result in a verdict for the defendant, and that the injuries suffered by Mamie Bichon as

a result of the accident were not of a permanent nature or of such seriousness as to justify a settlement of this case for $4,000.* * *

"For further and special answer herein, defendant says that by the terms of said contract of indemnity its liability was limited, as hereinbefore alleged, to $5,000, with interest thereon at 6 per cent. from the date of the judgment to the affirmance thereof. This defendant says that it has already carried out the terms and provisions of said contract except the payment of $5,000 and interest thereon, which immediately upon the affirmance of this case by the Supreme Court was tendered to the plaintiff herein and plaintiff was notified that defendant was ready and willing to pay the same, but was notified by the plaintiff that plaintiff would not release this defendant from liability, which it was entitled to be released from if it complied with its contract, and stated it was useless to tender the actual money because plaintiff would not accept it; that this defendant has always been ready and willing to pay the limit of its liability, to wit, $5,000, with interest at 6 per cent. until plaintiff's notice it would not be accepted, and is now ready and willing to pay the same, which amount next above mentioned represents principal of $5,000, interest thereon to the date of the notification that tender would not be effective, together with court costs, which are also tendered, which notification to the plaintiff and the understanding that a complete release from liability would not be effected was within ten days of the affirmance of said case by the Supreme Court."

The policy mentioned in the petition contains, among others, the following provision:

"AMERICAN INDEMNITY COMPANY
"Home Office: Galveston, Texas.

"In consideration of the premium of this Policy, as expressed in Statement 5, and of the other statements which are set forth in the Schedule of Statements herein made, and which the Assured warrants to be true by the acceptance of this Policy, and also subject to the conditions of this Policy as hereinafter set forth:

DOES HEREBY AGREE

"TO INDEMNIFY the Assured named and described in Statement 1 of the Schedule of Statements forming part hereof:

"AGAINST LOSS BY REASON OF THE LIABILITY imposed by law upon the Assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered while this Policy is in force by any person or persons except employes of the Assured while engaged in operating, riding in or on, or caring for automobiles covered hereby."

****

"AND IN ADDITION THE COMPANY AGREES:

"(A)TO DEFEND in the name and on behalf of the Assured any suits even if groundless, brought against the Assured to recover damages on account of such happenings as are provided for by the terms of the preceding paragraphs.

"(B) TO PAY irrespective of the limits of liability expressed in Condition 8 (Limits) hereof, all costs taxed against the Assured in any legal proceeding defended by the Company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of said liability and the expense incurred by the Assured for such immediate medical or surgical relief as is imperative at the time of the accident, together with all the expense incurred by the Company growing out of the investigation of such an accident, the adjustment of any claim or the defense of any suit resulting therefrom."

The policy further provides:

"This policy does not cover Injuries and / or Death, or Loss, Damage and / or Expense:"

* * * * * * * * * * *

"Assumed by the Assured under any Contract or

The policy further provides:

"The Company's Liability is Limited:
"Under Clause One (Liability) regardless of the number of Assured involved, the Company's liability for the loss from an accident resulting in bodily injuries to or in/death of one person is limited to FIVE THOUSAND DOLLARS ($5,000.00), and, subject to the same limit for each person, the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to TEN THOUSAND DOLLARS ($10,000.00). "

The policy further provides:

"No action shall lie against the Company to recover for any loss, Damage and or Expense, under this Policy, unless it shall be brought by the Assured for Loss, Damage and / or Expense actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement of the Company herein contained unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety days after the right of action accrues, as herein provided.
"The Assured shall upon the occurrence of an accident give immediate written notice thereof to the Company's Home Office, at Galveston, Texas, or its Agent duly authorized by law to receive the same, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If, thereafter, any suit is brought against the Assured he shall immediately forward to the Company every summons or other process served upon him. The Assured, when requested by the Company, shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals. The Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at his own cost, or interfere in any negotiation for settlement or legal proceeding without the consent of the Company previously given in writing. The Company reserves the right to settle any such claim or suit brought against the Assured."

At the close of the testimony in the district court the trial court withdrew the case from the jury, and entered judgment for the defendant. This judgment was, on appeal, affirmed by the Court of Civil Appeals. 295 S.W. 257.

The case is now before this court on writ of error granted on application of the plaintiff.

We are of the opinion that the plaintiff's petition states a cause of action against the defendant for the amount sued for, and that the evidence in the case raised an issue of fact to be submitted to the jury by the trial court under proper instructions.

The Court of Civil Appeals in passing on the issues of this case holds:

"We do not think the indemnity company was, by the terms of the policy, under any obligation to do more than to faithfully defend the suit. As before stated, it had not agreed to settle the suit, but had reserved the right to do so. It had the unquestioned right to defend the suit to the

28

end that it might not be called upon to pay a judgment which might be rendered in favor of Miss Bichon."

As stated in the beginning, the matters involved in this litigation are of first impression in this state, and the holding of the Court of Civil Appeals is in the main supported by the authorities cited by that court.

We, however, are of the opinion that the Court of Civil Appeals was in error in the above holding, and that the better and sounder authorities, and those more in harmony with the spirit of our laws, support a contrary rule. Douglass vs. United States Fidelity & Guaranty Co. (Sup.Ct.N.H.) 127 Atl, 708; Mendota Electric Co.vs.New York Indemnity Co., (Sup.Ct. Minn.) 211 N.W. 317; Cavanaugh vs.General Accident, etc., Assurance Corporation, 106 Atl., 604; Attleboro Mfg. Co.vs. Frankford, etc., Ins.Co. 240 Fed. 573; Brown vs.Guaranty Co., 232 Fed. 298.

As shown by the above quoted provisions of the policy, the Indemnity Company had the right to take complete and exclusive control of the suit against the assured, and the assured was absolutely prohibited from making any settlement, except at his own expense, or to interfere in any negotiations for settlement, or legal proceeding without the consent of the company, the company reserved the right to settle any such claim or suit brought against the assured. Certainly where an insurance company makes such a contract, it, by the very terms of the contract, assumed the responsibility to act as the exclusive and absolute agent of the assured, in all matters pertaining to the questions in litigation, and as such agent, it ought to be held to that degree of care, and diligence, which an ordinarily prudent person would exercise in the management of his own business; and, if an ordinarily prudent person, in the exercise of ordinary care, as viewed from the standpoint of the assured, would have settled the case, and failed or refused to do so, then the agent, which in this case is the Indemnity Company, should respond in damages.

It is true that the policy is for $5000.00, so far as this accident is concerned, but when the liability arose

against plaintiff, the Indemnity Company was in duty bound to exercise ordinary care to protect the interest of the assured up to the amount of the policy, for the reason that it had contracted to act as his agent, and assumed full and absolute control over the litigation arising out of the accident covered by the policy. The provisions of the policy giving the Indemnity Company absolute and complete control of the litigation, as a matter of law, carried with it a corresponding duty and obligation, on the part of the Indemnity Company, to exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances, and a failure to exercise such care and prudence would be negligence on the part of the Indemnity Company.

It is the duty of the court to give effect to all the provisions of the policy, and it would certainly be a very harsh rule to say that the Indemnity Company, in a case such as this, owed no duty whatever to the insured further than the face of the policy, regardless of whether it was negligent in discharging its duties as the sole and exclusive agent of the assured, in full and complete control. Such exclusive authority to act in a case of this kind does not necessarily carry with it the right to act arbitrarily. Douglas vs.United States, etc.Guaranty Co., supra.

In the Douglas case, supra, the Supreme Court of New Hampshire lays down the law, which we think applies to the issues of the case at bar, as follows:

"The fundamental question is, Does or does not the insurer owe to the insured a duty in the matter of a settlement? If it does not owe such a duty, it is not liable either for a failure to act or for the manner of action. It may refrain from completing a settlement for any reason, however essentially dishonest, and still there would be no liability. If, as the cases roundly state, it has an exclusive and absolute option, no one can question its motives for the exercise or nonexercise of the privilege. No case has gone that far. All acknowledge a liability for fraudulent conduct, or lack of good faith, in refusing to settle. But they are silent as to any reasoning which would sustain such liability and at the same time deny responsibility for negligent conduct.

"The whole question of insurance against loss may be laid out of the case, and still the defendant would be accountable for negligence. It had contracted to take charge of the defense of this claim. That contract created a relation out of which grew the duty to use care when action was taken. The insurer entered upon the conduct of the affair in question.

It had and exercised authority over the matter in every respect, even to negotiating for a settlement. It is difficult to see upon what ground it could escape responsibility when its negligence resulted in damage to the party in had contracted to serve. Attleboro Manufacturing Company v.Company, 240 F. 573, 153 C.C.A. 377.

"Denial of agency upon the part of the insurer is put upon the ground that, if there were such a relation the insurer would be bound to consider the interests of the insured, when in conflict with its own. It is then said that, when there is such conflict, the insurer may consult its own interests solely. Therefore, it is concluded there can be no agency.

"This reasoning seems to imply that one party cannot be the agent of the other party. But the law is plainly otherwise. The parties may make that sort of an agreement if they see fit. The result of such a compact is not to leave the promissor free to act as though he had made no promise. On the contrary, his conduct will be subject to closer scrutiny than that of the ordinary agent, because of his adverse interest. The fact that here the insurer stood to lose but a part of the claim, and that as to the balance the chances of loss growing out of mismanagement of the defense were upon the insured, is an added reason for holding the defendant to the use of reasonable care in the exercise of its exclusive control over the negotiations. Where one acts as agent under such circumstances, he is bound to give the rights of his principal at least as great consideration as he does his own. Colby v. Copp. 35 N.H., 434, and cases cited; Richards v.Insurance Company, 43 N.H.263. The insurer cannot betray the trust it has undertaken nor be relieved from the usual rule that in such a case an agent must serve as he has promised to serve."

In the Cavanaugh case, supra, the same court announces the same rule as is announced in the Douglas case.

In our opinion the other authorities above cited sustain the rule announced by us, and while there are authorities holding the contrary rule, we are constrained to believe that the correct rule under the provisions of this policy, is that the Indemnity Company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business.

The Court of Civil Appeals holds that the trial court did not err in refusing to permit Miss Bichon, and others, all witnesses for plaintiff, to testify as to the serious nature of her injuries. We think this holding is error. Further, we are of the opinion that the serious nature of Miss Bichon's injuries and all the facts and circumstances surrounding her injury, are material as bearing on the question of negligence on the part of the Indemnity Company in failing and refusing to make the settlement.

Of course knowledge on the part of the Indemnity Company is also an issue. The facts and circumstances surrounding

the original injury, and the extent of same, would not raise the issue of negligence on the part of the Indemnity Company unless it had knowledge thereof, or by the exercise of ordinary care could have had such knowledge.

We think further that the testimony offered by plaintiff to the effect that it was a rule of the Indemnity Company never to make a settlement for more than one-half the amount of the policy should have been admitted as bearing on the issue of negligence on the part of the Indemnity Company.

What we have said disposes of all the assignments.

We recommend that the judgments of the Court of Civil Appeals, and of the District Court, be both reversed, and the cause remanded to the District Court for a new trial.

Richard Critz
Judge.

C/p

SUPREME COURT
AUSTIN

No. 4915.

G. A. Stowers Furniture Co., Plaintiff in Error,

vs.

American Indemnity Co., Defendant in Error.

Judgments of the District Court and Court of Civil Appeals reversed, and cause remanded to the District Court.

We approve the holdings of the Commission of Appeals on the questions discussed in its opinion.

O. M. Cureton

Chief Justice.

March 27, 1929.

Dissenting Opinion
by
Luther Nickels

NO. 1021-4915,
COMMISSION OF APPEALS,
SECTION A.

G. A. STOWERS FURNITURE CO.,		
PLAINTIFF IN ERROR,		FROM HARRIS COUNTY,
-Vs.-		
AMERICAN INDEMNITY CO.,		FIRST DISTRICT.
DEFENDANT IN ERROR.		

The case is generally stated in the opinion of the Court of Civil Appeals, 295 S. W. 257.

In terms, the insurer agreed "to indemnify" the "assured" to the extent of $5,000

> "AGAINST LOSS BY REASON OF THE LIABILITY imposed by law upon the Assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered while this policy is in force by any person or persons except employes of the Assured while engaged in operating, riding in or on, or caring for automobiles covered hereby."

But, it was stipulated,

> "No action shall lie against the Company to recover for any Loss, Damage and/or Expense, under this Policy, unless it shall be brought by the Assured for Loss, Damage and/or Expense actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement of the Company herein contained unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety days after the right of action accrues, as herein provided."

In the provision last quoted, it will be marked, there is definition of "liability imposed by law" mentioned in the provision first quoted. "Liability imposed by law", as stipulated, is that declared in final judgment "after trial of the issue".

Indemnity thus declared is conditioned, amongst other things, upon notice by "assured" of "accident" and of "claim on account of such accident", transmission by "assured" of "every summons or other process served" in a suit, "aid" by assured (when requested) "in effecting settlements, securing evidence * * * attendance of witnesses and in prosecuting appeals". In the paragraph embodying those conditions are two others:(a) "The Company reserves the right to settle any such claim or suit brought against the assured"; (b) "The assured shall not voluntarily assume any liability, settle any claim, or incur any expense, except at his own cost, or interfere in any negotiation for a settlement or legal proceeding without the consent of the Company previously given in writing".

The "Company" agreed further:

> "(A) TO DEFEND in the name and on behalf of the Assured any suits even if groundless brought against the Assured to recover damages on account of such happenings as are provided for by the terms of the preceding paragraphs.
> "(B) TO PAY irrespective of the limits of liability expressed in Condition 8 (Limits) hereof, all costs taxed against the Assured in any legal proceeding defended by the Company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of said liability and the expense incurred by the Assured for such immediate medical or surgical relief as is imperative at the time of the accident, together with all the expense incurred by the Company growing out of the investigation of such an accident, the adjustment of any claim or the defense of any suit resulting therefrom";

The basic elements of the praesenti agreement may be thus re-stated: (a) Indemnity "against loss by reason of liability imposed by law" as pronounced in a final "judgment after trial of the issue". That definition of "liability imposed by law", as noted, is to be found in the excerpt secondly given above; and it is given some effect in the provision against 'voluntary assumption' of liability and in the stipulation for "interest accruing after judgment". (b) Right of the Company to "settle any * * * claim or suit", and its duty to "defend" if it do not use the right to

"settle". (c) Right of the assured to "settle" at its own expense.

What was left to futuro agreement, in virtue of the liberty of contract inhering in those of able-minds and by way of prophetic stipulation, was this: (d) Settlement by the assured at expense, in whole or part, of the Company; (e) "Settlement" by the Company for an amount in excess of "indemnity" named in the policy; (f) conduct of the "defense" in whole or part by the assured, - 'settlement' absent.

Accident transpired; suit followed; defense was conducted by the Company and the assured; "trial of the issue" was had; final judgment declaring liability in excess of "indemnity" stipulated resulted. The Company's obligation to pay $5,000, plus interest from "entry of judgment" and costs, matured and payment thereof is required in the judgment before us.

The obligation, however, is sought to be extended in virtue of these facts: (a) Prior to judgment the injured party offered to settle for $4,000; (b) result of the trial demonstrates that was a good offer for acceptance by the Company; (c) the nature of the case, as developed in previous investigations and in communications about the offer to settle, was such as to make it plain that judgment for more than $5,000 was possible, if not probable; (d) the offer was for a sum less than the "indemnity" named; (e) the Company refused to contribute more than $2500 or to "settle" unless the assured would contribute $1500. But the very gamble which was made by the Company and by the assured in declining the offer was by them left open when their contract was made. The possibility that a judgment in any suit for damages for personal injuries (especially internal ones) may be for a sum either more or less than the amount of indemnity named affords a probable reason for lack of contractual terms specifically requiring a settlement by either party. And the conduct of the Company and of the assured in declining the offer made

demonstrates the value which each of them originally put upon that reservation of liberty. For aught that appears, the insurer and the insured dealt at arm's length in making the contract, and its terms cannot be re-cast so as to impose that liability sought to be established in this case. For adjudications more or less in point, see: Wisconsin Zinc Co. vs. Fidelity & Deposit Co., 155 N. W. 1081; Auerbach vs. Maryland Casualty Co., 140 N. E. 577; Rumford Falls Paper Co. vs. Fidelity & Casualty Co., 43 Atl. 503, C. Schmidt & Sons Bruen vs. Travelers Ins. Co., 90 Atl. 653.

Plaintiff in error has cited Attleboro Mfg. Co. vs. Frankfort, etc., Ins. Co., (C.C.A.), 240 Fed. 573, Brown vs. Guaranty Co., (Dist.Ct.), 232 Fed. 298, Mendota El. Co. vs. N. Y. Ind. Co., (Minn.), 211 N.W. 317, Cavanaugh vs. Corporation, 79 N.H. 186, 106 Atl. 604, and Douglas vs. United States Fid. & G. Co., (N.H.), 127 Atl. 708.

Amongst the "counts" in Attleboro Mfg. Co. vs. Frankfort, etc., Ins. Co. were these: (a) The insurer, by the contract, was required to take charge of the defense in the former case; it had done so, but was negligent in the manner of performance of that duty because of inadequate preparation for trial, improper conduct of trial, etc. (b) The insurer, for a consideration, had agreed to, and had, undertaken "the task of settling" without judgment. In the trial (of the case brought by the insured against the insurer) it was ruled: (a) The insurer was confined to the right of action pleaded in the first "count". (b) Since the insurer (in the former case) had employed an attorney and to him committed the defense, it was not liable for negligence occurring after that employment. (c) Evidence proffered by the insured tending to establish that subsequent negligence was improper. The insured had judgment, but less in amount than that to which it might have been entitled and which it might have received but for the rulings mentioned. The case

was taken to the Circuit Court of Appeals by each party; that court found error against the insured in the rulings mentioned and remanded the cause. In the course of the opinion a contention by the insurer that cause of action was not stated in either of the "counts" was overruled; in respect to each it was held that the insurer would be responsible for negligent performance of the duty for which it had contracted and which it had, in fact, undertaken to perform.

Brown vs. Guaranty Company arose on demurrer to allegations, inter alia, that the insurance company "investigated the claim, ascertained that there was a liability and that the injured party would settle for $3,000.00 ($2,000.00 less than the face of the policy)" and thereupon: (a) Notified the insured of the offer of settlement; (b) demanded that the insured pay $1500.00; (c) stated that unless the insured did contribute that much to the settlement "it would permit the pending action to proceed to trial and it would necessarily result in a judgment in excess of the face of the policy so that the assured would ultimately be compelled to pay more than the $1500.00". The insured refused to accede, it was averred, the case proceeded to trial and judgment for $12,000.00. The policy stipulations are not disclosed, except that the insurer was bound to defend any "suit or action * * * or settle same as it might deem advisable" and except that the assured might settle at its own expense or at the insurer's expense with its consent.

A demurrer was sustained in the trial court (in Mendota El. Co. vs. N. Y. Ind. Co.) in respect to a complaint which included averments: (a) That the insurance company "undertook the defense of the action" (brought by an injured employe) in behalf of the insured and "agreed * * * that if it were possible to satisfy" the insured's liability "it would pay the amount required * * * to effect a settlement provided it did not exceed $5,000.00" (the amount of the policy); (b) "while the trial was in progress" the injured employe agreed to accept

$18,000.00; (c) in the opinion of the attorneys for the insured and the insurer "the proposed settlement was advisable"; (d) that suit was against the insured and two other defendants, and those three paid the $18,000.00 in consummation of settlement, of which amount the insured paid $4750.00; (e) the insurer "repudiated its previous agreement" with the insured "and refused to contribute more than $3625.00". Suit was brought by insured against insurer for $1125.00, the difference between what it had 'previously agreed' to pay and the amount paid. When all proper inferences were drawn in favor of the complaint, it was held on appeal, a cause of action was stated.

"The action" in Cavanaugh vs. Corporation was "brought to recover from the defendant the sum of $3,000.00, which the plaintiffs claim(ed) they paid because of the negligence of the defendant in the preparation and manner of conducting the defense" in a former suit brought on injury within the indemnity contract. Terms of the policy, etc., are not disclosed except as in this statement: "The defendant insured the plaintiffs against liability for accidents, and, when one of their horses kicked one Blais, it assumed the defense of his claim". After suit brought, the claim was settled for $6000.00, but the circumstances under which the settlement was made are not definitely shown. There was evidence that the claim might have been settled before suit was filed and within the amount of the policy. So far as we can judge, the basic question on appeal was 'whether the insurer owed the insured the duty of settling with Blais before suit, if that was the reasonable thing to do', and as to that "duty", it was decided, 'there could be no question', for "when the defendant assumed control of the Blais claim it then and there became its duty to do what the average man would do in a similar situation". It will be noted that the insurer "assumed control" of the claim originally and before suit and that (according to the opinion) it made no "serious attempt to settle with Blais until matters were in

such shape there was nothing else to do".

Amongst the obligations definitely assumed by the insurer, in the policy before the court in Douglas vs. United States Fid. & Guar. Co., was that of "service" to the assured "by investigation" upon notice of "injury" "and by settlement of any resulting claims in accordance with the law" and by defense of suits. The insurer received notice of injury within the contract; the injury (according to evidence) was a "serious" one for "which a common law recovery would probably exceed the $5,000.00 insurance"; the injured person offered to settle for $1,500.00, and the insurer "failed to accept the offer"; suit was brought by the injured party and a final judgment against the insured for $13,500.00 resulted. Suit was then brought by the insured to recover the excess of judgment and because of negligence in "failing to settle" the claim. The insurer made no defense upon the ground that the contract did not impose a duty to settle, nor (in view of the stipulation noted) could it well have done so. The defense, pre-supposing a contract duty to settle in a proper case, rested upon the ground, first, "that it had no reason to believe" the insured was liable when settlement was proffered and, second, that a "binding settlement" could not have been made with the injured party because of his lack of mental capacity. In respect to the first ground of defense it was held there was "a clear and plain issue for the jury" about the insurer's "knowledge of such facts as would at once inform any one" that the insured "was probably liable", and a like ruling was made about the evidence bearing on mental condition. The decision in the appellate court was that motion for involuntary non-suit was properly overruled in the trial court, and what was said in the opinion on subjects other than those already disclosed would appear to have an obiter character; it is the latter discussion to which plaintiff in error here refers.

That part of the opinion (of the New Hampshire court)

must be read, however, with the existence of the stipulation for "service" "by settlement of any resulting claims in accordance with the law" in mind. In respect to that stipulation (as the basis of duty) the court said:

> "The whole control of negotiations is taken from the insured and given to the insurer. * * The argument that the latter clause refers to the payment of judgments, and not to adjustments, is plainly untenable. The promise of indemnity is contained in another and independent paragraph."

In resume, it may be said: (a) Negligent defense per se is not presented in the instant case, as it was in Attleboro Mfg. Co. vs. Frankfort Ins. Co.; (b) contractual duty of 'defending or settling' "as it might deem advisable", with the implied duty of making good faith selection as between ordinary defense and settlement and with what amounts to admission of bad faith in the election, present in Brown vs. Guaranty Co., is absent here; (c) entrance upon the "task of settling", pursuant to agreement to do so (as in Attleboro Mfg. Co. vs. Frankfort Ins. Co.), special 'agreement to settle within the amount of the policy' and repudiation of that agreement (as in Mendota El. Co. vs. N. Y. Ind. Co.), actual settlement after suit brought "when matters were in such shape there was nothing else to do" and lack of "serious attempt to settle" before suit brought on the part of an insurer undertaking defense of the "claim" and of the suit, (as in Cavanaugh vs. Corporation) and expressed agreement to perform "service" by "investigation" and by "settlement of any resulting claim" (as in Douglas vs. United States Fid. & Guar. Co.) are elements foreign to this record. It may be noted, further, that the form of indemnity stipulation in the policy considered in Mendota El. Co. vs. N.Y. Ind.Co. apparently exerted force toward the decision made, for (unlike that here) there was no contractual definition of "liability imposed by law", for which indemnity was provided, and it was held that "liability" arose co-incidently with the "accident"; and in this respect the policy involved in Douglas vs. United States Fid. & Guar. Co. was like that in

Mendota El. Co. vs. N. Y. Ind. Co. This, we think, has some importance, for where liability arises, under a contract, and with a general stipulation for defense, there is more reason in saying that right performance of the duty includes settlement, if that appears proper, than there is for saying that one who has contracted to pay only after judgment resulting from "trial of the issue" and who has contracted for defense must "settle", and therefore pay before the time stipulated, if facts appear which might signify danger to the insured if settlement be not made. In the one case, the contract is for payment upon ascertainment of the amount due, which includes ascertainment in any proper method (St.Louis, etc. Co. vs. Maryland Cas. Co., 201 U.S. 173, 26 Sup.Ct. 400, 50 L. Ed. 712; Mendota El. Co. vs. N. Y. Ind. Co., supra); in the other case, the stipulation is for payment after fixing of the liability and amount thereof in a way specified, i.e. by judgment, unless an additional method be provided, in futuro, by exercise of the reserved right to settle.

We recommend that the judgment of the Court of Civil Appeals be affirmed.

Nichols
Judge.

NO. 1021-4915,
COMMISSION OF APPEALS,
SECTION A.

G. A. STOWERS FURNITURE CO.,

PLAINTIFF IN ERROR,

-Vs.-

AMERICAN INDEMNITY CO.,

DEFENDANT IN ERROR.

Dissenting
OPINION

By:- Luther Nickels
Judge

TOUCHSTONE, WIGHT, GORMLEY & PRICE
ATTORNEYS AND COUNSELORS
MAGNOLIA BUILDING
DALLAS, TEXAS

O. O. TOUCHSTONE
JOHN N. TOUCHSTONE
ALLEN WIGHT
J. W. GORMLEY
HOBERT PRICE
HENRY W. STRASBURGER
THOMAS F. NASH
PHILIP L. KELTON
ROBERT B. HOLLAND

APRIL 29, 1929

Hon. F. T. Connerly,
Clerk Supreme Court of Texas,
Austin, Texas.

Dear Mr. Connerly:

Re: No. 1021-4915
G.A.Stowers Furniture Co.
vs. American Ind. Co.

Herewith I hand you three copies of a so-called amicus curiae argument, in support of Motion for Rehearing in the above styled and numbered cause. Prayer for permission to file it appears in the proem of the argument.

I do not know what the proper procedure is in these extraordinary matters. In any event I presume you will have to call the attention of the Chief Justice to the prayer that the argument be filed and abide by his judicial action in the matter. If he hesitates to grant the prayer, will you please remind him for me that if the Court adheres to the opinion as written by Judge Critz, it will put us insurance lawyers out of business. In this case the Commission simply elected to follow a line of minority decisions without carefully examining their rationes decidendi. This is a pardonable error, but if it is not corrected, a new and intolerable burden will be placed upon us Texas lawyers, - a burden that will take all the fight out of us; and a lawyer without courage, yea, without even daring, is of little help, either to clients or to courts.

Kindly advise me whether the enclosed will be filed, and if not what further procedure is necessary to prevail upon the Court to consider it, because we are really fighting for our bread and butter as lawyers in this matter, as well as for the interests of several clients, who will be very much embarrassed if the original opinion in this case is suffered to stand.

Very truly yours,

Gormley

JWG:D

Stowers Furniture Company,	*	In the District Court of
	*	
vs	*	Harris County, Texas.
	*	
American Indemnity Company.	*	11th Judicial District.

Gentlemen of the Jury:

This case will be submitted to you upon a special issue which you will answer as you find the fact to be, from a preponderance of the evidence, that is to say, the greater weight of credible testimony.

"Ordinary care", as used in this charge, means such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

You are the exclusive judges of the facts proved, the credibility of the witnesses and the weight to be given their testimony, but the law you receive from the charge of the court as herein given and be governed thereby.

Chas E. Kuhl

Judge.

Special Issue No. 1.

Would a person in the exercise of ordinary care in the management of his own business, under the facts and circumstances known to the American Indemnity Company, or its counsel in charge of the case, prior to the trial of the suit of Mamie Bichon vs Stowers Furniture Co. have settled said suit for four thousand dollars?

Answer Yes or No, as you may find.

No. 110139

Stowers Furniture Co.,
versus
American Indemnity Co.

In the District Court
Of Harris County, Texas,
11th Judicial District,

January Term, A. D., 192___

We, the jury, answer the special issues submitted to us by the court, as follows:

No. 1: yes

No.

No.

No.

No.

No.

No.

No.

No.

No.

F. L. McGinnis
Foreman.

110139

Charge

Filed 2/20 1930

O. M. DUCLOS
Clerk District Court
HARRIS COUNTY, TEXAS

By J. S. Burkhalter
Deputy

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