Excess vs. Primary *Stowers* Doctrine Bench Trial Reveals Inciteful Findings of Facts and Conclusions of Law

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The Texas *Stowers* doctrine, which has been shaped in large part by ACCC Texas Fellows, gives rise to some of the more exciting insurance bad faith litigation in Texas. The prospect of opening up the policy limits for an insurer's failure to accept a within limits settlement demand of a covered claim that an ordinarily prudent insurer would accept, considering the likelihood and degree of the insured's potential exposure to an excess judgment, in many situations is the ultimate hammer in settlement negotiations.

The *Stowers* doctrine is particularly effective when dealing with one injury and one insured for a covered claim. Another recurring aspect of *Stowers* litigation is that it often arises in the context of an excess insurer suing a primary insurer. Both of these factors were involved in *American Guarantee & Liability Ins. Co. v. Ace American Ins. Co.,* 2019 WL 4316531 (S.D. Tex. 2019).

The underlying tort litigation was a wrongful case brought by the mother, wife and two minor children of a man killed in a bike accident involving a truck owned by a large landscaping company. The Plaintiffs were represented by a highly regarded and very successful Joe Jamail mentee; although defense counsel was very bullish about the insured's lack of liability. The primary limits were $2 million. The excess insurer monitored the underlying tort litigation.

After a $39 million verdict against the insured, which was subsequently settled for $9.975 million with the excess carrier funding the amount over the $2 million primary limits, an excess vs primary insurer *Stowers* lawsuit was litigated in a Houston federal court.

What is very different than normal about *American Guarantee v. Ace American,* is that Houston Federal Judge Keith P. Ellison, after presiding over a week-long bench trial, issued 68 Paragraphs of Findings of Fact and 17 Paragraphs of Conclusions of Law in the attached Memorandum Order issued last month. He discussed the evidence involving whether the primary insurer was negligent in not accepting one of three settlement demands within the $2 million policy limits.

Significant to insurers facing demands under the *Stowers* doctrine is that Judge Ellison ruled that, even in the face of a hammer letter by the excess insurer, the primary insurer did not violate the *Stowers* doctrine for failing to accept the first policy limits demand made after a second failed mediation eleven days before the start of trial. Judge Ellison ruled that in light of the perceived liability defenses, an ordinarily prudent insurer could believe that the settlement value of the case was less than the $2 million policy limits, relying on what he found to be a reasonable report assessing a reasonable settlement range between $1.25 and $2 million.

However, there were adverse evidentiary rulings against the insured landscape company during trial, which changed Judge Ellison's mind about two within policy limits demands made during trial, the last one expiring when the jury returned its verdict. As it relates to those demands, Judge Ellison ruled that the primary insurer violated the Stowers doctrine by not accepting either one of those demands, which will leave it responsible for the settlement payment made by the excess insurer.

In many cases, the *Stowers* issue is decided by as few as one jury question. In *American Guarantee & Liability Ins. Co. v. Ace American Ins. Co.,* however, *Stowers* liability was established by a very thorough analysis of the facts and then a highly detailed application of the law. Accordingly, unless it gets reversed or altered on appeal, this uncommon Memorandum Opinion will be helpful for those evaluating *Stowers* claims in the future.