Fifth Circuit Revises Stowers Opinion; but the Result Stays the Same

March 5, 2021

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On December 21, 2020, the Fifth Circuit issued its long-awaited opinion in *American Guarantee & Liability Co. v ACE American Ins. Co.* in which it analyzed whether three separate settlement demands, made shortly before and during a trial, satisfied the Texas *Stowers* doctrine. Ruling that one of the settlement demands made during the trial satisfied the *Stowers* doctrine, the Fifth Circuit rendered judgment against a primary insurer and in favor of the excess carrier who funded a settlement over the primary policy's limits and then sued the primary insurer in an equitable subrogation *Stowers* action. In response to the initial opinion, the primary insurer filed a motion for rehearing. On March 4, 2021, the Fifth Circuit withdrew its initial December 21, 2020 opinion and issued a new opinion, which reached the same result, but clarified its reasoning in connection with one of the arguments made by the primary insurer.

In this regard, the primary insurer argued that the during-trial settlement demand was impermissibly conditional because it included minor children; so that the consummation of the settlement required a separate settlement prove-up hearing with the appointment of a Guardian *ad litem* to represent the interests of the minor children. Since that proceeding was potentially adversarial and the result of that proceeding was unknown, the primary insurer contended that the settlement demand was conditional and thus, the settlement demand did not invoke the *Stowers* doctrine.

While reaching the same conclusion that the primary insurer breached its duty under *Stowers* for failing to accept the during-trial settlement demand, the Fifth Circuit altered its reasoning on the issue of whether the settlement demand was impermissibly conditional. The new Fifth Circuit opinion deletes certain dicta and replaces the better part of a paragraph in the initial opinion. On this point, the new opinion affirmatively states: "we perceive no inherent ex ante [i.e., based on forecast and not on facts] conflict, and thus no 'conditionality' precluding the *Stowers* duty, where a lump sum settlement offer is accepted on behalf of parents and children." In support, the new Fifth Circuit opinion notes that any issue between parent and child could only arise "after the settlement is agreed upon."

Everything else in the new opinion is identical to the initial opinion. Accordingly, the take-a-ways remain the same in both opinions, to wit:

- First, it is extremely difficult, perhaps impossible, for an oral settlement demand to invoke the *Stowers* doctrine;
- Second, settlement offers are not conditional because a subsequent proceeding is required to approve the settlement;
- Third, while every within limits demand will not necessarily invoke the *Stowers* doctrine, insurers must be conscientious of changes in circumstances;
- Finally, the Texas *Stowers* doctrine is the ultimate "hammer" in forcing insurers to decide whether to accept a settlement demand.

Next up for the Texas *Stowers* doctrine will be the upcoming Texas Supreme Court decision in *In Re Farmers Texas.* The issue in *In Re Farmers Texas* is whether the *Stowers* Doctrine is invoked in the context of an over-the-limits settlement, partially funded by the insured, which was required due to the insurer's alleged negligent failure to accept an earlier demand within the policy limits. *In Re Farmers Texas* was argued to the Texas Supreme Court on September 17, 2020; so a decision is imminent.