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Texas Insurance Bulletin - Placing the 5th Circuit's *In Re: OGA Charters* case in context

The Fifth Circuit's recent decision in In Re: OGA Charters, LLC, 2018 WL 4057525 (5th Cir., Aug. 24, 2018) swims against the current of certainty insurers have generally enjoyed in handling settlement demands in injuries-in-excess-of-limits cases.

Periodically, a claim will arise where covered injuries/damages clearly exceed policy limits. In the one claimant (*or one related group of claimants*) and one insured context, G. A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved) provides our black letter law – namely, an insurer that negligently fails to settle a claim within policy limits can be liable for a judgment against the insured in excess of policy limits only if three prerequisites are met:

1. The claim against the insured is within the scope of coverage;
2. There is a settlement demand within the policy limits … that proposes to fully release the insured; and
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.

Texas Farmers Insurance Co. v. Soriano, 881 S.W.2d 312 (Tex. 1994) then addressed the multiple claimant wrinkle on the Stowers issue. The Soriano court established the rule that, when faced with multiple claimants and inadequate limits, an insurer may settle with one or more claimants without risk of Stowers liability, even though the settlement reduces or exhausts the remaining available limits below the amount available to settle the claims of other, perhaps even more seriously injured, claimants – so long as [1] the insurer had not previously unreasonably rejected a settlement within the policy limits from the non-settling claimants, and [2] the settlement it agreed to that reduced or exhausted the limits was itself reasonable. See also Montoya v. State Farm Mut. Auto. Ins. Co., 2018 WL 3236058 (W.D. Tex., June 29, 2018) (applying Soriano's holding to a $25,000 policy limits settlement with a contributorily negligent passenger who had purchased and supplied the alcohol to the negligent driver – reasoning that unless the passenger's comparative negligence exceeded 50%, under Texas law that negligence only went to the value of the claim and not to its viability).

Subsequently, the 5th Circuit held the Soriano rule also worked in the context of a single seriously injured claimant and multiple liable insureds: An insurer could accept a Stowers demand to one or more insureds, even if in doing so it exhausted the insurance available for another culpable insured. E.g., Travelers Indemnity Co. v. Citgo Petroleum Corp., 166 F.3d 761 (5th Cir. 1999). Then the Houston 1st Court of Appeals in Patterson v. Home State County Mutual Insurance Co., 2014 WL 1676931 (Tex. App. – Houston [1st Dist.], Apr. 24, 2014) arguably held that to be a valid Stowers demand in the first place, a settlement demand must offer a full release of *all insureds*, which in that case included a named insured employer and its negligent employee who was a permissive user of the insured vehicle. (Note, the insured employer in that matter,

through counsel, insisted that no settlement demand be accepted unless it proposed to release both it and its employee driver.)

Putting it all together, to this point – or at least prior to the August 24th opinion in the In re: OGA Charters, LLC matter – insurers that handled catastrophic injury/damage claims with reasonable competence and diligence could do their job with considerable certainty and with little reason to be overly concerned about potential extra-contractual liability beyond the policy limits under the Stowers doctrine. And that is still basically true after In re: OGA Charters, LLC; what is now less certain is whether an insurer can successfully pay its limits early on in a multiple claimants, catastrophic injuries and inadequate limits context, when the remaining claims may potentially bankrupt the insured.

In re: OGA Charters, LLC dealt with a bankruptcy issue: Are proceeds of a liability policy property of the bankruptcy estate? Generally, the answer to that question is "no", since the debtor itself has no legal claim to any such liability insurance proceeds. The 5th Circuit in In re: OGA Charters, LLC, however, recognized an exception for when the policy limit was inadequate to cover competing claims to the proceeds. OGA Charters' owned assets were just two buses. One of the buses overturned in the Rio Grande Valley while taking a group to the Kickapoo Lucky Eagle Casino in Eagle Pass. Nine passengers were killed, over 40 others were injured, and the claims against OGA Charters exceeded $400 million. Meanwhile, it had a commercial auto policy with liability limits of only $5 million. Following Soriano's guidance, the insurer entered into settlement agreements with several of the claimants, but before the settlements were funded, the non-settling claimants filed an involuntary bankruptcy petition against OGA Charters, and the bankruptcy court promptly enjoined the insurer from distributing the $5 million. The bankruptcy court then ruled the $5 million of policy proceeds were property of the bankruptcy estate to be equitably distributed by the court amongst all of the claimant creditors. (Besides the claims arising from the bus accident, OGA Charters only had one other creditor with a claim for less than $9,000.)

The 5th Circuit affirmed:

> *[W]here a siege of tort claimants threaten the debtor's estate over and above the policy limits, we classify the proceeds as property of the estate. Here, over $400 million in related claims threaten the debtor's estate over and above the $5 million policy limit, giving rise to an equitable interest of the debtor in having the proceeds applied to satisfy as much of those claims as possible.*

2018 WL 4057525 at *4.

Accordingly, when the claims of multiple claimants outstrip (or, perhaps, far outstrip) policy limits, and the claims that cannot be settled with the policy limits are likely to push the insured into bankruptcy – whether voluntarily or involuntarily – then an insurer ought to recognize the very real possibility it may not be able to successfully settle any of the claims, and will instead ultimately find itself tendering its limits for payment into the registry of the bankruptcy court. It may be wholly unnecessary, but carriers could consider putting in verbiage in their CSAs to walk back their obligation to fund such settlements if a bankruptcy court prohibits them from doing so. But otherwise, at this juncture, In re OGA Charters, LLC does not appear to materially alter an insurer's ongoing responsibilities under its policy and state insurance law to adjust claims with reasonable competence and diligence – they may just have less certainty in actually getting any of the claims settled when faced with a similar fact pattern.

Please don't hesitate to contact us if you have any questions regarding In re OGA Charters, LLC, or if you have any other legal questions and issues with which we can be of assistance. Feel free to contact Schubert & Evans, P.C. at 214-744-4400 or visit our website at www.schubertevans.com.