

THOUGHT LEADERSHIP

News

FIFTH CIRCUIT UPHOLDS DISTRICT COURT DECISION THAT INSURER'S STOWERS DUTY APPLIED TO POST-JUDGMENT SETTLEMENT OFFER AND THE INSURER VIOLATED THAT DUTY

Newsbrief

05 APR 2021

Recently, the U.S. Appeals Court for the Fifth Circuit upheld a decision by the U.S. District Court for the Southern District of Texas that ACE American Insurance Company ("ACE") violated its *Stowers* duty by not accepting a settlement offer at trial before the jury rendered a verdict and therefore had to contribute to the amount the excess insurer, American Guarantee and Liability Insurance Company ("AGLIC"), paid towards the post-judgment settlement amount. *Am. Guarantee and Liability Ins. Co. v. ACE Am. Ins. Co.*, No. 19-20779 (5th Cir. March 4, 2021) involved a dispute between ACE and AGLIC that arose after a post-judgment settlement was reached in an underlying tort action.

The underlying tort action involved claims made by the surviving family of a man who died after his road bike collided with a stopped commercial truck. The family made a settlement offer purporting to be a *Stowers* offer on the eve of trial, which ACE rejected. The case proceeded to trial.

When the case wrapped up and was submitted to the jury—and after several adverse rulings at trial that severely, negatively affected the insured's defense and bolstered the family's case—the family made a second settlement offer purporting to be a *Stowers* offer, which ACE again rejected. The family made one final offer prior to the jury's verdict for the \$2 million in limits under the ACE policy, which the family also purported to be a *Stowers* offer. ACE again rejected the offer.

The jury returned a \$40 million verdict against the insured, which was reduced to \$28 million after accounting for comparative negligence. Soon thereafter, the parties settled for \$10 million, with ACE paying its \$2 million in limits AGLIC contributing \$8 million in excess. AGLIC then sued ACE, arguing that ACE violated its *Stowers* duty to the insured by rejecting the family's settlement offers.

On appeal, the Fifth Circuit upheld the trial court's ruling as to the third settlement offer but not the second. That is, Court held ACE had a *Stowers* duty under the third offer, that it had violated such duty by rejecting the offer, and that ACE was therefore responsible for paying the AGLIC the \$8 million it had contributed to the post-judgment

FIFTH CIRCUIT UPHOLDS DISTRICT COURT DECISION THAT INSURER'S STOWERS DUTY APPLIED TO POST-JUDGMENT SETTLEMENT OFFER AND THE INSURER VIOLATED THAT DUTY

settlement.

The Fifth Circuit pointed out the second offer was ambiguous because it sought "1.9MM to \$2.0MM *with costs*," and the record showed confusion as to whether "costs" meant litigation expenses and court costs, or just court costs.

With regard to the third offer, however, the Fifth Circuit emphasized that the offer was within the scope of coverage, within policy limits, and included terms that an ordinarily prudent insurer would accept, considering the likelihood and degree of the insured's potential exposure to an excess judgment—in other words, that it triggered a *Stowers* duty. ACE argued that adverse interests between the surviving wife and minor children existed because the wife was asserting claims individually and as next friend of her minor children. As such, ACE argued, the settlement would have required third-party approval by the court or a guardian ad litem, which made the offer inherently conditional.

In response, the Court noted that, if a settlement offer is accepted, the trial court must appoint a guardian ad litem to approve the settlement *if* the court perceives an adverse interest. Next, the Court distinguished the three cases ACE cited in support of its argument, essentially pointing out that the cases cited involved obvious "intrafamilial conflicts" that the record did not support existed in this case. Rather, the record showed that ACE refused the offer because "it was convinced it would win the case." Thus, a *Stowers* duty was triggered by the third settlement offer.

Moreover, the Court held that ACE breached its *Stowers* duty when it rejected the offer because, as the trial court found, when the family made their third demand, ACE had actual knowledge of the adverse rulings and evidence presented at trial that hurt the insured's case and bolstered that of the family, and such knowledge would have led a reasonable insurer to reevaluate its value of the case and accept the third offer.

Finally, because ACE did not make the argument to the lower court—and did not preserve the argument for appeal—the Court rejected ACE's argument that the trial court's adverse rulings should not be considered because a possibility existed that such rulings could be reversed on appeal.