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TEXAS LAW★ALERT

Texas Supreme Court Creates a New Theory to Impose Liability on Carriers

In *In re Farmers Tex. County Mut. Ins. Co.*, 2021 WL 1583878 (Tex. 2021), the Texas Supreme Court reaffirmed that there can be no *Stowers* claim absent an excess judgment. However, the court went on to find that there may be a breach of contract action against the carrier when it does not pay the entire settlement (which is within policy limits) and obligates the insured to pay for part of the settlement. In this case, the insured was sued for damages resulting from an auto accident. The plaintiff sought \$1 million in damages, which exceeded the insured's \$500,000 policy limits. The mediator proposed a \$350,000 settlement which the plaintiff agreed to. However, Farmers would only agree to pay \$250,000 and suggested or demanded that the insured contribute the remaining \$100,000. The plaintiff rejected the \$250,000 offer from Farmers. Before trial, the insured's personal counsel was able to get the plaintiff to again agree to a \$350,000 settlement offer. Farmers again refused to contribute more than \$250,000. The insured offered to pay the remaining money to get the case settled. The plaintiff agreed and the case was resolved.

The insured then sued Farmers for negligent failure to settle (*Stowers*) and for breach of contract alleging that Farmers breached the policy by making her contribute her own money to resolve the case. Farmers filed a motion to dismiss which was denied by the trial court. Farmers sought mandamus relief from the San Antonio Court of Appeals. The court agreed on the breach of contract claims, but found that the trial court properly denied the motion to dismiss on the negligent failure to settle because the law was not clear that an excess judgment was necessary for a *Stowers* claim. Both sides then sought mandamus relief from the Texas Supreme Court.

The Texas Supreme Court had no problem finding that the insured had no *Stowers* claim given that the law was clear that without an excess judgment, there could be no claim for negligent failure to settle. The Court specifically declined to extend *Stowers* to cases in which there is no liability in excess of policy limits. Unfortunately, the Court was not done with its analysis.

The Court then turned to the insured's breach of contract claim regarding the carrier's indemnity obligation. The Court noted that the insured's allegations that Farmers failed to use the full extent of coverage under the policy to secure a release, withheld \$100,000 in coverage, and demanded that the insured contribute her own funds implicated Farmer's

indemnity obligation and were sufficient to avoid a motion to dismiss for breach of the duty to indemnify. The Court did note that its determination that there were sufficient allegations to avoid a motion to dismiss did not mean that the insured would ultimately succeed in proving that the carrier breached its duty to indemnify. The Court also noted that it was not holding that insureds who settle third-party claims unilaterally, without the consent or participation of the carrier, are entitled to reimbursement under the policy.

In discussing the breach of contract claim, the court noted that *Stowers* does not eliminate the duty to indemnify, noting that when there is no *Stowers* obligation, permitting a breach of contract claim for failure to indemnify is not inconsistent with *Stowers*.

Ultimately, the Court noted that it was not determining what the policy as a whole required, whether Farmers breached the policy by consenting to settle within policy limits but making the release contingent upon the insured's contribution, or whether the insured could prove damages. Rather, the Court concluded that its holding was limited to the scope of the Rule 91a motion to dismiss and clarified a narrow issue: *Stowers* and the other principles of Texas insurance law do not foreclose as a matter of law a claim for breach of contract against an insurer regarding its indemnity obligation.

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