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Insurers Agree to Stowers Settlement of Patent Lawsuit

Good Sportsman Marketing LLC v. Non Typical, Inc., No. 6:07-cv-177 (Patent Case) (E.D. Tex. May 25, 2010) See [Decision](#) (settlement amounts redacted at request of the parties)

For insurance practitioners, this decision is truly a rare bird: a patent case that was settled in response to a *Stowers* demand. The decision itself has little to do with the insurance issues. The parties disagreed over the scope of the settlement and asked the judge to don his Solomonic robes and, well, do justice. More on that later.

I have commented before on the reasons that patent infringement rarely triggers advertising-injury coverage under a standard CGL policy (see [Court Finds Patent Infringement a Covered Advertising Injury](#)). Usually, the patent-infringement claim is not covered, but the insurer's duty to defend is triggered by some other violation, such as trade dress, copyright, or (as in this case) false advertising. Frequently, therefore, the most significant claims are not covered, but the insurer must defend the entire action anyway, which is why it is next to impossible to force the insurer to put in all of its chips in response to a *Stowers* demand to settle a patent lawsuit.

Stowers is the name given under Texas law to the doctrine that an insurer that unreasonably fails to accept a settlement demand within policy limits must pay the entire judgment, even in excess of the policy limits, but only (in most cases) to the extent the claims are covered. Because patent infringement (usually the lion's share of any judgment) is almost never covered, the insurer typically yawns at the *Stowers* demand.

In this case, the plaintiffs alleged that their competitor, Non Typical, Inc. and its owner, infringed two patents for high speed camera technology and violated Lanham Act proscriptions against false advertising. In this case, the false-advertising claims apparently had teeth. One of two applicable CGL insurers agreed to defend from the first. The second insurer balked, and a coverage lawsuit ensued.

Upon learning that two successive policies might be skewered, the plaintiffs served a *Stowers* demand for the limits of both policies (plus a sweetener that the defendants had already agreed to pay for the patent-infringement claims). For whatever reason, the second CGL insurer had a change of heart and agreed to tender its limits along with the first insurer. I suppose it realized that its *Stowers* exposure and the cost of the continuing defense were financially problematic. At any rate, counsel for the recalcitrant insurer wrote a short note accepting the *Stowers* demand.

Usually that is the end of the litigation. One of the parties writes up a settlement agreement, and the money changes hands. Here, however, an argument erupted over the scope of the release with respect to the patent claims. Did the settlement pertain only to past commercial activity, requiring the alleged infringement to be discontinued, negotiated, or litigated in this or a follow-up case? Or did the settlement allow the defendants to continue selling the accused products, but now free of threats from the plaintiffs' patent rights? The plaintiffs' letter was like most *Stowers* demands, saying:

Plaintiffs hereby offer to settle and fully release all of their claims against Non Typical and [Owner] unconditionally for [stated \$\$ amount] . . . [This release includes] any and all claims that have or could have been asserted against them by Plaintiffs in connection with the subject matter of the Litigation, including the patent infringement claims.

Shortly before the *Stowers* demand, Defendants had retained new counsel to lead the defense, including the patent defense. After the *Stowers* demand was accepted, plaintiffs' counsel demanded substantial additional money for

a "paid-up" license or a commitment that the accused commercial activity stop or be further litigated, contending that the settlement didn't include future violations. Defendants' counsel denied that defendants had agreed to anything like that, implicitly or otherwise. So both sides filed motions for entry of judgment, asserting their respective understanding of the terms of the settlement.

The defendants argued that "any and all claims that have or could have been asserted" included plaintiffs' claim for a permanent injunction, which necessarily refers to future conduct. Plaintiff argued both that an "injunction" is not a claim, but rather a type of relief, and that, under Texas law, the release language must explicitly "mention" the claim being released. Future infringement was not mentioned in the release, said the plaintiffs.

Unfortunately for the plaintiffs, the case law and the equities weighed in favor of the defendants. The cases plaintiffs relied on concerned releases that explicitly identified the temporal scope of the conduct being released. Defendants found a Third Circuit case on all fours, *Main Line Theaters Inc. v. Paramount Distrib. Corp.*, 298 F. 2d 801 (3rd Cir. 1962), holding that a release of injunctive claims necessarily released future infringement. Also, the court noted that the plaintiffs had represented in pleadings that its motion was meant to "fully resolve this final matter so that the case may be dismissed." Yet under plaintiffs' interpretation, only past conduct was resolved, leaving open the possibility of continued or new litigation.

It is worth noting that the case was brought in Texas' Eastern District, home of the so-called rocket docket for patent lawsuits. The judge, Leonard Davis, is an experienced patent judge, and these settlements end either with the defendant obtaining a paid-up license or explicitly abandoning sale or use of the product. In my experience, judges, faced with parties who can't agree over what they settled, will throw them both out to return to square one. Judge Davis probably rightly caught the plaintiffs overreaching.

Returning to *Stowers*. My theory is that any uncertainty over the the scope of the release resulted from the *Stowers* demand, which has become somewhat formulaic by virtue of a few Texas Supreme Court cases, such as *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998) that arguably force claimants to use the "any and all claims" language stated above. Also, the *Stowers* demand was directed toward the insurance companies to force acceptance of a policy-limits demand within a short time. The insurers could care less about the uncovered patent claims, so the plaintiffs had no reason go into detail about future infringement. Otherwise, the parties (or their lawyers) would probably have been clearer about their intentions for ongoing conduct.

Plaintiffs' counsel: Eric Buether of Buether Joe & Carpenter LLC

Defendants' counsel: Peter Jansson and Molly McKinley, of Jansson Shupe & Munger Ltd.

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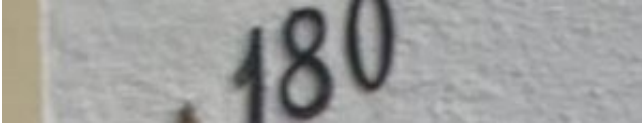
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