IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation	§	MDL-1446
MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, VS. KENNETH L. LAY, et al., Defendants.	§	
ROBERT A. BELFER, et al., Third-Party Plaintiffs, VS. ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES, LTD, ENERGY INSURANCE MUTUAL, LTD., Third-Party Defendants, and FEDERAL INSURANCE COMPANY, et al., Third-Party Defendants.	§	
FEDERAL INSURANCE COMPANY, et al., Third-Party Counterclaim Plaintiffs, VS.	§	

ROBERT A. BELFER, et al.,	§
	§
Third-Party Counterclaim Defendants,	§
	§
and	§
	§
JEFFREY ADER, et al.,	§
	§
Additional Third-Party Counterclaim Defendants.	§

ORDER

Pending before the Court are a number of issues regarding the proposed settlements and the remaining insurance proceeds, now placed in the registry of the Court for the interpleader action, of policies issued by Third-Party Counterclaim Plaintiffs Associated Gas & Electric Services, Limited, Energy Insurance Mutual, Limited, Federal Insurance Company, Greenwich Insurance Company, Certain Underwriters at Lloyd's, London subscribing to insurance certificate No. 901/LK9802531, St. Paul Mercury Insurance Company, Royal Indemnity Company as successor in interest to Royal Insurance Company of America, ACE Bermuda Insurance Ltd., and Kemper Indemnity Insurance Company (collectively, the "Excess Insurers").

It is clear that under Texas law, specifically *Stowers* and progeny, an insurer must accept a settlement offer within the limits of the policy when an ordinarily prudent insurer would do so or face liability for any excess judgment against that insured; where there are multiple insureds and inadequate proceeds, as is the case here, the doctrine further allows policy proceeds to be exhausted to fund a reasonable settlement on behalf of one or more

insureds even though the settlement leaves other insureds exposed. *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544, 547-48 (Tex. Comm'n App. 1929, holding approved)(holding that insurers may be liable for negligently failing to settle within policy limits claims against their insureds); *American States Ins. Co. v. Arnold*, 930 S.W.2d 196 (Tex. App.-Dallas 1996, writ denied)(holding that an insurer's duty to nonsettling insureds terminates when the insurance proceeds are exhausted in payment of a reasonable settlement within policy limits)). Nevertheless, for the doctrine to apply and exhaustion of the policy proceeds be permissible without creating liability to the nonsettling insureds, the insurer has a duty to "*Stower*-ize"[1] the settlement demand if the claim against the insured is covered by the policy, the claim is within the policy limits, and if an ordinarily prudent insurer would accept it in view of the likelihood and degree of the insured's potential exposure to an excess judgment. *American Physicians*, 876 S.W.2d 876 S.W.2d 842, 849 (Tex. 1994); *Excess Underwriters*, No. 02-0730, 2005 WL 1252321 at *3 ("The reasonableness of a settlement offer" is judged by "an objective assessment of the insured's potential liability").

The claims against the settling Defendants in this action were asserted during the policy period, and Enron is bankrupt and unable to reimburse them for their defense costs. There is no issue here that the proposed settlement demands of the

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[1] *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, No. 02-0730, 2005 WL 1252321, *3 (Tex. May 27, 2005).

Outside Directors and Harrison are covered by the policy and are within the policy limits, though they will exhaust the proceeds. Thus under *Stowers* the insurance policies' contractual obligations give rise to a "generally recognized, implied duty of liability insurers--the duty to accept reasonable demands within policy limits." *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 846 (Tex. 1994) *citing Stowers*, 15 S.W.2d at 547-48. Such a duty necessarily entails a duty to make a determination whether a settlement demand is reasonable.

Although the Outside Directors argue that the Excess Insurers have impliedly given their consent to the settlements by interpleading the funds, nowhere, in the Excess Insurers' pleadings nor in the hearing transcripts, has the Court found any express statement by them that these settlements are reasonable. Indeed, their First Amended Answer to First Amended Third-Party Complaint for Contract Enforcement and Injunctive Relief Regarding D&O Policy Proceeds, #2483 at ¶ 63, states in relevant part:

> . . . Insurers admit that they have been advised of the settlements and have requested information to evaluate the proposed settlements, but deny that Third-party Plaintiffs have cooperated in those requests. The Insurers aver that Third-Party Plaintiffs have not provided requested information to enable the Insurers to evaluate the reasonableness of the settlements. The Insurers aver that they have received communications from numerous insureds objecting to the reasonableness of the Third-Party Plaintiffs' settlements.[2]

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[2] Whether other insureds object is irrelevant. Where there are "multiple parties and other potential claims in excess of policy limits," the insurer in measuring reasonableness is not required to

Thus the Excess Insurers have not made a determination of reasonableness, essential to avoid breaching their established "implied duty . . . to accept reasonable demands within policy limits," without liability to nonsettling insureds. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d at 846. Instead of satisfying this duty, which appears to this Court to be essential to approval of the exhaustion of the policy proceeds for the proposed settlements as a matter of law, here, by filing an interpleader without a determination by the insurers whether the settlement demand is reasonable, the insurers appear to be attempting to exculpate themselves from any risk of liability for potential claims of an unreasonable settlement under *Stowers*[3] or unfair settlement practices under Tex. Ins. Code Ann. art. 21.21, § 4(10), recodified eff. April 1, 2005 in Tex. Ins. Code Ann. § 541.060, Act of June 21, 2003, 78th Leg., R.S., 2003 Tex. Session Law Service ch. 1274 (Vernon's). This Court cannot make such a determination of reasonableness as a matter of law on summary judgment.

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examine the settlement "in light of all potential claims against all the insured parties," but instead need only look "at the initial demand for settlement in isolation," and "consider[] solely the merits of [that] claim and the potential liability of its insured on the claim," even where another insured might be exposed to greater liability. *Travelers Indemnity Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764-65 (5th Cir. 1999)(discussing *Soriano*).

[3] *See, e.g., Travelers Indemnity Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 765 (5th Cir. 1999)(under Texas law an insurer may be liable if "the settlement they reached was unreasonable 'considering solely the merits of the' settled 'claim and the potential liability of the insured on' that claim")(*quoting Soriano* at 316).

Accordingly, the Court

ORDERS that the Excess Insurers shall within thirty days fulfill their legal duty to determine whether or not the proposed settlements are reasonable, solely on the basis of the claims against the settling Defendants and not with regard to claims against other insureds. Any discovery still needed should not address the claims or objections of nonsettling insureds and should be expedited. If there is lack of cooperation, appropriate motions should be filed.

SIGNED at Houston, Texas, this 2nd day of June, 2005.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE