

**ARGUMENT  
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NO. 35763

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

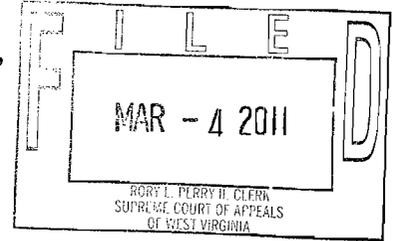
THOMAS D. LOUDIN AND ALICE M. LOUDIN,

Appellants,

v.

NATIONAL LIABILITY & FIRE INSURANCE COMPANY, JACK SERGENT, D.L.  
THOMPSON and CONSOLIDATED CLAIM SERVICE, INC.,

Appellees.



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From the Circuit Court of Upshur County, West Virginia  
Civil Action No. 08-C-100

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**BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE*  
IN SUPPORT OF BRIEF OF APPELLEES  
NATIONAL LIABILITY INSURANCE COMPANY, JACK SERGENT,  
D.L. THOMPSON AND CONSOLIDATED CLAIM SERVICE, INC.**

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## **I. INTRODUCTION**

The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of the Appellees’ brief because this case has significant implications for insurance law in West Virginia and the ability of a person to bring a private third-party “bad faith” cause of action in this state. Specifically, this case poses the question as to who is a first-party claimant and who is a third-party claimant under West Virginia law.

West Virginia regulations already clearly define these terms, demanding that when a named insured under a liability insurance policy brings a liability claim against another insured under that same policy, he is a third-party, not a first party claimant. West Virginia law is also clear that a first-party claimant may sue his own insurance company for the way it handled his claim; however, a third-party claimant cannot. This Court has not directly addressed this issue, so it is important that it adopt established and logical principles of insurance law and affirm the Circuit Court’s Order granting summary judgment to Appellees on this basis.

For the reasons detailed below, therefore, the Federation respectfully urges this Court to affirm the decision of the Circuit Court of Upshur County.

## **II. BACKGROUND**

Although the Federation incorporates by reference the factual background as outlined by the Appellees in their brief in this matter, the Federation provides the following inasmuch as it relates to the Federation’s interest in the issue before this Court.

On September 4, 2006, Appellant Thomas Loudin was repairing his 1993 International truck with assistance from his brother, William Loudin. As some point, the truck moved, injuring Thomas Loudin. (Complaint ¶ 6; Order of Circuit Court of Upshur County (“Order”), p. 2.)

Thomas Loudin maintained an insurance policy with Appellee National Liability & Fire Insurance Company (“National Liability”) on his International truck (the “Policy”). Following his accident, Thomas Loudin made two claims under the Policy. One was an Auto Medical Claim, which settled in 2006 for the policy limits of \$5,000. (Complaint; Memorandum in Support of Motion for Summary Judgment By Defendants (“Defendants’ Memorandum”), p. 2.) That claim is not at issue here. (Complaint ¶ 6; Order, p. 3.)

The other claim, however, is a liability claim against William Loudin. Because the Policy defines an “insured” to include “[a]nyone else while using with your permission a covered ‘auto’ you own[,]” and because William Loudin was using Thomas Loudin’s truck with his permission, William Loudin constitutes an “insured” under the Policy. As such, the liability claim asserted by Thomas Loudin against William Loudin implicated the Policy, which contained a form of coverage described as “Liability Coverage”:

[National Liability] will pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies, caused by an “accident” and resulting from the ownership, maintenance or use of a covered “auto”.  
(Defendants’ Memorandum, Exh. 1.)

Here, this Liability Coverage would pay all sums that an insured (William Loudin) is legally obligated to pay as damages to another person (Thomas Loudin) resulting from bodily injury to that other person caused by an accident that is the result of the insured’s (William Loudin) use of the truck.

Thomas Loudin’s liability claim against William Loudin, which included claims against National Liability and the remaining defendants for the way they handled the liability claim, did not immediately settle. Once it did, though, Thomas and Alice Loudin pursued their previously-bifurcated case against National Liability, Jack Sergent, D.L. Thompson, and

Consolidated Claim Service, Inc. (collectively the “Insurance Defendants”) for common law bad faith, violations of the West Virginia Unfair Trade Practices Act (“UTPA”), breach of the insurance contract, breach of the implied covenant of good faith and fair dealing, and the tort of outrage. (Complaint, Amended Complaint.)

On March 16, 2010, the Insurance Defendants filed a motion for summary judgment, arguing that Thomas and Alice Loudin were third-party claimants, not first-party claimants, when they asserted a liability insurance claim against William Loudin; thus, as third party claimants, they “had no legal right to sue the Insurance Defendants for any alleged misconduct in the handling of that claim” as third party causes of action are not permitted in West Virginia. (Defendants’ Memorandum, pp. 1-2.)

The Circuit Court of Upshur County agreed and entered an Order, which held:

8. While the West Virginia Supreme Court of Appeals has never addressed the question of whether a named insured under a liability insurance policy bringing a liability claim against another insured under that same liability insurance policy is a first party claimant or a third party claimant, this Court finds the analysis and conclusions regarding that question contained in the six opinions cited above from other courts to be consistent with West Virginia jurisprudence and the definitions contained in Sections 114-14-2.3 and 114.14-2.8 of the West Virginia Code of State Rules.
9. According to West Virginia law, Thomas and Alice Loudin were third party claimants when they made their liability claim against William Loudin under the liability portion of the National Policy.
10. Because they were third party claimants when they made their liability claim against William Loudin under the liability portion of the National Policy, Thomas and Alice Loudin have no legal right under West Virginia law to sue the Insurance Defendants for common law bad faith, breach of the insurance contract, or breach of the implied duty of good faith, fair dealing, for the manner in which the Insurance Defendants

handled their liability claim against William Loudin. *See Elmore v. State Farm*, 504 S.E.2d 893 (W. Va. 1998).

11. Because they were third party claimants when they made their liability claim against William Loudin under the liability portion of the National Policy, Thomas and Alice Loudin have no legal right under West Virginia law to sue the Insurance Defendants for alleged violations of the UTPA for the manner in which the Insurance Defendants handled their liability claim against William Loudin. *See* W. Va. Code § 33-11-4a(a). (Order, p. 3.)

Thomas and Alice Loudin appealed this decision, and it is the risk that this Order could be overturned, resulting in the creation of an entirely new type of plaintiff in West Virginia who would be permitted to bring third-party bad faith lawsuits ripe for abuse; that leads the Federation to file this brief as *amicus curiae*.

### **III. STATEMENT OF INTEREST**

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately eight of every ten automobiles and homes in West Virginia. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has served the property and casualty insurance industry for nearly thirty years. The Federation has a strong interest in promoting a healthy and competitive insurance market in this State to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief in support of the Appellees' brief to underscore the importance of the issue before it. Specifically, this issue is one of first impression before this Court. Six jurisdictions in the United States, however, have interpreted their respective laws, all of which are similar to West Virginia's law, and found that where an insured asserts a liability claim against a tortfeasor because of the negligence of that tortfeasor, who also happens to be an

“insured” under the insured’s policy, that insured is seeking benefits based upon the tortfeasor’s coverage, not his own. As such, in that scenario, the insured is a third-party claimant, not a first-party claimant.

Importantly, the Federation’s members seek a competitive insurance climate in West Virginia that offers access to affordable insurance to West Virginia consumers. If this Court adopts the position advocated by Appellants Thomas and Alice Loudin, the Federation fears that it will unleash a flurry of meritless bad faith claims by an entirely new class of plaintiffs, which will ultimately cost West Virginia insurance consumers money.

Every insurance company doing business in West Virginia – and their policyholders – will be affected by the Court’s ruling in this case. Indeed, this is an issue of such significance that, if overturned, it will dramatically and adversely affect insurance consumers in West Virginia by changing the complexion of the claims environment for all companies doing business in our State. As such, the Federation respectfully urges that this Court follow the logic of every other court that has addressed this issue and affirm the Order of the Circuit Court of Upshur County.

#### **IV. ARGUMENT**

##### **A. WILLIAM LOUDIN IS A “THIRD-PARTY CLAIMANT” UNDER THE PLAIN LANGUAGE OF WEST VIRGINIA INSURANCE REGULATIONS.**

As noted in the Order entered by the Circuit Court of Upshur County, the central issue raised in this appeal is as follows:

When a named insured under a liability insurance policy brings a liability claim against another insured under that same liability insurance policy, is the claimant a first party claimant or is the claimant a third party claimant? (Order, p. 4.)

West Virginia regulations answer this clearly and unambiguously: the insured in these circumstances is a third-party claimant. The terms “first-party claimant” and “third-party claimant” have clear, specific and unambiguous meanings under 114 CSR 14-2, which is part of the state regulations governing unfair trade practices in West Virginia. Under 114 CSR 14-2.3, a “first-party claimant” is defined as “an individual . . . asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract.” Importantly, a first-party claimant’s “right to payment” arises out of the insurance contract itself, which is a contract that the first-party claimant bargained for with the insurer and which contains certain insurance coverages that the insurer is contractually obligated to pay to the first-party claimant. Examples of these types of coverages are underinsured motorist coverage, uninsured motorist coverage, and certain medical payment coverages, all of which represent coverages under which a first-party claimant is entitled to receive benefits as a result of the insurance contract.

Conversely, a “third-party claimant” under 114-14-2.8 is defined as “any individual . . . asserting a claim against any individual . . . insured under an insurance policy or insurance contract of an insurer.” Under this definition, a third-party claimant does *not* have a “right” to payment that arises out of the insurance contract. Rather, a third-party claimant has a “claim against an individual,” which is a claim that arises out of the operation of the law – not the insurance contract.

In this case, Thomas Loudin brought a liability claim against the tortfeasor, William Loudin. Thomas Loudin does not have a “right to payment” that is governed by the Liability Coverage of the Policy that is any different from a “claim” for benefits under the Liability Coverage asserted by any other person who brings a liability claim against a tortfeasor

who is an “insured” under the insurance contract. In other words, Thomas Loudin has a “claim” against William Loudin, an “insured” under the Policy, which claim is governed by West Virginia common law. Under the facts presented by this appeal, therefore, Thomas Loudin fits squarely within the plain and unambiguous definition of a “third-party claimant” under West Virginia law.

**B. HOCUS POCUS – OR WHY THE APPELLANTS ARE TRYING TO TURN LIABILITY COVERAGE INTO SOMETHING ELSE.**

By simply calling himself an “insured” in reference to the National Liability Policy, Thomas Loudin attempts to fool this Court into believing that all the insurance coverages provided under the Policy are the same and that, in reference to those coverages, he cannot possibly be a “third-party claimant.” In doing so, however, Thomas Loudin attempts to turn the liability coverage under the Policy into something that it is not.

As noted above, a “first-party claimant” has a “right to payment” that “aris[es] out of the occurrence of the contingency or loss covered by such policy or contract.” Here, the “contingency or loss covered” by the Liability Coverage of the Policy is the risk that an “insured” legally must pay as damages” sums for “bodily injury” or “property injury” to which the Policy applies. (Defendants’ Memorandum, Exhibit 1.) Under the facts of this case, for purposes of a claim under the Liability Coverage, the “insured” is William Loudin – not Thomas Loudin.<sup>1</sup> The question in the underlying case was whether William Loudin was negligent in his operation of Thomas Loudin’s truck, such that William Loudin would have to “legally . . . pay as damages sums for ‘bodily injury’” to Thomas Loudin. In other words, under the Liability

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<sup>1</sup> The Federation notes that the parties do not dispute that William Loudin is an “insured” under the Policy as he was operating the motor vehicle at the time of the accident. Indeed, in their Complaint, Thomas and Alice Loudin admit that “Defendant [William] Loudin was an insured authorized operator” under the Policy. (Complaint ¶ 9.)

Coverage portion of the Policy, the “contingency or loss covered” represents the risk that William Loudin would have to pay damages to Thomas Loudin as a result of the accident; hence, the term “first-party claimant” applies to William Loudin.

Conversely, the term “first-party claimant” cannot apply to Thomas Loudin because, to do so, the Court would have to completely ignore the “contingency or loss covered” under the Liability Coverage and, in the process, turn the Liability Coverage into uninsured or underinsured motorist coverage. As noted above, under the facts of this case, it is Thomas Loudin who sought to make William Loudin “legally . . . pay as damages” monies for Thomas Loudin’s “bodily injury” sustained in the accident. Thomas Loudin did *not* file his civil action to make *himself*, as an “insured” under the Policy, “legally . . . pay” damages for his personal injuries. In other words, the contractual language of the Liability Coverage only provides liability insurance coverage to *William* Loudin in this case if he had made the claim, not *Thomas* Loudin. Thomas Loudin cannot possibly be a “first-party claimant” because, for purposes of his claim, the Liability Coverage does not provide a “contingency or loss covered” to which he has a “right to payment.”

Put another way, the “risk” for which Thomas Loudin seeks to be a “first-party claimant” – being injured by someone who is an “insured” under the Policy – is not a “risk” for which he contracted with National Liability to cover under the Liability Coverage. One *can* contractually cover for this type of risk by purchasing uninsured or underinsured motorist coverage, which is designed to provide insurance coverage in the event that an “insured” is injured by the negligence of another who does not have enough (or any) liability insurance to cover the losses incurred by the insured.

Here, Thomas Loudin essentially is seeking to convert the Liability Coverage in his Policy into uninsured or underinsured motorist coverage by asserting that, for purposes of his claim, he is a “first-party claimant.” As discussed above, however, a “first-party claimant” has a “right to payment under an insurance policy or insurance contract” that is granted by the contract itself. In the case of motor vehicle insurance, benefits payable directly to an insured as provided by the contract include underinsured, uninsured, and (in some cases) medical payment benefits. Conversely, a third-party claimant does not have a “right to payment” – only a “claim” to payment. This “claim” is granted by law, not by the contract. As such, Thomas Loudin, under the facts of this case, made a “claim” against William Loudin that is governed by law. He did not, and cannot, have a “right to payment” arising from the insurance policy. Necessarily, therefore, Thomas Loudin’s claim against William Loudin was made as a “third-party claimant,” and his attempt to argue otherwise is a thinly-veiled attempt to turn the Liability Coverage into something it is not.

**C. LET COMMON SENSE REIGN, AS EVERY OTHER COURT HAS DONE.**

The Federation acknowledges that the issue presented is one of first impression in West Virginia. Fortunately, however, this Court need not operate in a vacuum, as *every court* that has addressed this issue has determined that an individual such as Thomas Loudin, who makes a liability claim against another “insured” under a policy of insurance, is a “third-party claimant” for purposes of that liability claim.

Importantly, courts that have addressed this issue reject the rigid and monolithic approach advocated by the Appellants, who seek to have this Court find that Thomas Loudin was a “first-party claimant” simply because he purchased the policy and because he was noted to be a “named insured” in National Liability’s claim documents. Instead, the determination of whether

a claim represents a first-party claim or a third-party claim must be made on a specific, transaction-per-transaction basis. See *Sperry v. Sperry*, 990 P.2d 381 (Utah 1999); *Rumley v. Allstate Indem. Co.*, 924 S.W. 2d 448 (Tex. 1996).

Using this flexible approach has led the courts that have addressed this issue to reach the common sense conclusion that an individual in Thomas Loudin's position is, under the facts presented in this appeal, a third-party claimant. These cases recognize that the basis for a personal injury liability claim made by someone in Thomas Loudin's position stems from the duty of the insurer to pay for damages caused by the tortfeasor who is an "insured" under the insurance policy, and not from any contractual duty owed by the insurer directly to the person in Thomas Loudin's position. For example, in *Gillette v. Estate of Gillette*, 837 N.E.2d 1283 (Ohio App., 10 Dist. 2005), a wife sued her husband for injuries sustained while the husband was driving the insured vehicle. While the wife was not a named insured, the parties agreed that, by virtue of being the named insured's wife, she was an "insured" under the policy. The court held that, for purposes of her liability claim against her husband, the wife was a third-party claimant as against the insurance company and could not bring a bad faith claim. In reaching this conclusion, the court reasoned: "From this antagonistic position, the insured spouse did not seek benefits based upon a duty the insurer owed directly to her. Rather, the insured spouse sought benefits based upon the duty the insurer owed to the coinsured to pay for damages for which the coinsured was liable." *Id.* at 1288.

Likewise, in *Smith v. Allstate Ins. Co.*, 202 F. Supp. 2d 1061 (D. Ariz. 2002), a wife sued her husband for injuries suffered while the husband was driving his motor vehicle. Although the wife was a named insured under the policy, the court held that the wife was a third-party claimant because she was bringing a claim for benefits under coverage owed to her

husband – not to her: “In the situation where, as here, a person sues because of the negligence of her spouse, she is seeking benefits based on her husband's coverage and not her own.” *Id.* at 1065. See also *Rumley v. Allstate Indem. Co.*, 924 S.W. 2d 448 (Tex. 1996) (Wife injured in one-vehicle accident that occurred while husband was driving was making a claim for liability coverage extended to husband, and so was a third-party claimant); *Wilson v. Wilson*, 468 S.E.2d 495 (N.C. 1996) (Wife injured in accident that occurred while husband was driving was a third party claimant as to the liability coverage under the policy, and hence could not maintain a bad faith claim); *Herrig v. Herrig*, 844 P.2d 487 (Wy. 1992) (Husband and daughters injured when wife was driving family van were third party claimants as to the liability claims made against wife under the insurance policy).

That anything other than a common-sense approach to this issue would lead to an untenable, if not impossibly difficult position for an insurer was addressed in *Sperry v. Sperry*, 990 P.2d 381 (Utah 1999). There, the wife sued the husband for the death of their son, which occurred as a result of the husband’s negligence while he was driving a motor vehicle. In finding that the wife, for purposes of her liability claim made against the husband under the insurance policy that governed the vehicle involved in the accident, was a third-party claimant, the court stated:

A finding that [insurer] also owed [wife] a duty of good faith and fair dealing . . . would mean that [insurer] owed inconsistent duties simultaneously to both [wife] and [husband], creating an almost certain conflict of interest. This would make any such insurer an almost certain target for a claim of breach of one of these duties, in addition to the claim for the underlying negligence.

*Sperry*, 990 P.2d at 384. In other words, recognizing that an insurer possesses a contractually-based, first-party duty of good faith and fair dealing to *both* a plaintiff (in this case, Thomas Loudin) *and* a defendant (in this case, William Loudin) would put the insurer in the untenable

position of doing all it could to both prove liability and obtain damages (for Thomas Loudin) *and* doing all it could to disprove liability and limit damages (for William Loudin). That is an absurdity that simply should not be introduced into West Virginia law.

Every court that has considered the issue before this Court has found, under law that is virtually identical to the law in West Virginia and through the application of common sense, that a person in the position of Thomas Loudin is a third-party claimant when he made his liability claim against William Loudin. The Circuit Court of Upshur County found this logic and common sense compelling, and the Federation asks that this Court affirm the Order of the Circuit Court.

**CONCLUSION**

For the reasons detailed above, the Federation asks that this Court affirm the Order entered by the Circuit Court of Upshur County, and in doing so, affirm that an individual in Thomas Loudin's position, when making a liability claim against an insured under a motor vehicle insurance policy, makes such a claim as a third-party claimant.

**WEST VIRGINIA INSURANCE FEDERATION**

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From the Circuit Court of Upshur County, West Virginia  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing **Brief of the West Virginia Insurance Federation as *Amicus Curiae* in Support of Brief of Appellees National Liability Insurance Company, Jack Sergent, D.L. Thompson and Consolidated Claim Service, Inc.** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

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This 4<sup>th</sup> day of March, 2011.

A handwritten signature in cursive script, appearing to read "Jill C. Bentz", written over a horizontal line.

Jill C. Bentz  
*Attorney for Amicus Curiae*  
*West Virginia Insurance Federation*