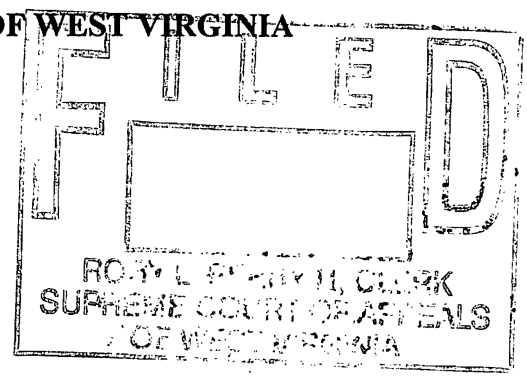
NO. 12-1254

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JOHANNA DORSEY,

Appellant,

v.

PROGRESSIVE CLASSIC INSURANCE COMPANY,

Appellee.

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 11-C-95

BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE PROGRESSIVE CLASSIC INSURANCE COMPANY

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I. INTRODUCTION

The West Virginia Insurance Federation (the "Federation") files this brief as *amicus curiae* in support of the brief filed by Appellee Progressive Classic Insurance Company ("Progressive") because Appellant Johanna Dorsey attempts to expand the definition of "first-party claimant" in order to maintain a third-party bad faith action.[1] The Circuit Court dismissed Ms. Dorsey's bad faith claim because it properly understood that Ms. Dorsey -- as a passenger in the vehicle of Joshua Teacoach, a Progressive insured, and not a party to the insurance contract between Mr. Teacoach and Progressive -- is a third-party claimant who cannot maintain a third-party bad faith civil action against Progressive.

In fact, in addition to this case, two (2) other cases before the Court this term present different arguments to expand the ability of claimants to sue insurance companies for bad faith.[2] The plaintiffs in each of these cases, however, have two things in common. First, each of the individual plaintiffs is a stranger to the insurance policy at issue in the respective case; hence, each seeks to circumvent the statutory prohibition on third-party bad faith claims. Second, to circumvent this prohibition, each contorts and misinterprets this Court's decision in Loudin v. Nat'l Liability & Fire Ins. Co., 228 W. Va. 34, 716 S.E.2d 696 (2011), and, specifically, its analysis of what constitutes a first-party claimant as opposed to a third-party claimant.

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[1] Pursuant to Section 30(b), the Federation provided notice on February 5, 2013, to all parties of its intention to file an *amicus curiae* brief.

[2] The other cases are (1) Triad Environmental, Inc., et al. v. Nationwide Mut. Fire Ins. Co., Docket No. 12-1110 (pending) (arguing that a third-party plaintiff may sue an insurance company for negligent handling of a property insurance claim); and (2) Salmons v. State Farm Mut. Ins. Co., Docket No. 12-0891 (pending) (arguing that a State Farm insured may sue State Farm even though the only coverages at issue arise under another State Farm insured's policy).

For the reasons detailed below, therefore, the Federation respectfully urges this Court to affirm the decision of the Circuit Court of Ohio County.[3]

II. FACTUAL BACKGROUND

The Federation incorporates by reference the factual background as outlined by Progressive. The Federation provides the following, however, inasmuch as it relates to the Federation's interest in the issue before this Court.

The dispute arises from an automobile accident that occurred on September 18, 2007, when Joshua Teacoach, a Progressive insured, was driving a vehicle that was rear-ended by another vehicle. Johanna Dorsey was riding as a passenger in Mr. Teacoach's vehicle. Ms. Dorsey was not insured by Progressive; however, as a result of the collision, she was entitled to file a medical payments claim with Progressive based upon the terms of Mr. Teacoach's policy (solely due to her permissive occupancy of the Teacoach vehicle). While Progressive paid the $5,000.00 medical payments policy limits pursuant to the terms of Mr. Teacoach's policy, a dispute arose thereafter between Progressive and Ms. Dorsey regarding Progressive's assertion of a subrogation lien for its payment of the medical payments policy limits. As a result, Ms. Dorsey filed a civil action in the Circuit Court of Ohio County against Progressive asserting statutory and common law bad faith claims.

Progressive filed a Motion to Dismiss or in the alternative, Motion for Summary Judgment asserting that Ms. Dorsey was not permitted under West Virginia law to file a bad faith claim against Progressive because she was a third-party claimant. Initially, the Circuit Court denied the

[3] The undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5) of the Revised Rules of Appellate Procedure.

Motion, but following this Court's decision in Loudin, Progressive filed a Motion for Reconsideration Based Upon New Law, which stated:

> On September 22, 2011, the West Virginia Supreme Court of Appeals released its opinion in Loudin, supra, which distinguished between first-party and third-party bad faith claims and first-party and third-party claimants. Reiterating prior case law, the Court held:
>
> > [A] first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim . . . filed by the insured.
>
> Id., slip opinion at 6 (emphasis added) (internal citations omitted).

(App. 170-171). The Circuit Court granted the Motion and held as follows:

> Dorsey does not fall within the definition of first-party claimant. She is not the named insured on the policy in question. She did not buy the policy. She is not a premium-paying insured. There is no argument, as there was in Loudin, that the court needs to protect her because she bought this insurance contract for peace of mind and security. There is no argument that she should get the benefit of a contractual bargain. There are no unique facts in this case to cause the court to conclude that Dorsey's bad faith cause of action has characteristics of both first-party and third-party bad faith claims.

(App. 268-269) (Order of August 29, 2012).

It is clear the Circuit Court understood that (1) Ms. Dorsey was a third-party claimant, and (2) as a result, she could not bring a bad faith claim. Nevertheless, despite the clear language of Loudin, Ms. Dorsey appealed to this Court seeking to expand the definition of first-party claimant and permit third-parties to file prohibited bad faith actions.

III. STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurers doing business in West Virginia. Its members insure more than 80% of the automobiles insured in West Virginia, as well as approximately 70% of West Virginia's homes, and more than 80% of the workers' compensation policies insuring West Virginia workers. The Federation is widely-

regarded as the voice of West Virginia's insurance industry and has a strong interest in promoting a healthy and competitive insurance market to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief pursuant to Rule 30 of the Revised Rules of Appellate Procedure in support of Progressive because the Circuit Court's reliance on the Supreme Court's caselaw provides predictability and stability for the insurance market and, in turn, West Virginia policyholders.

IV. ARGUMENT

The Federation files this brief in support of Progressive for one primary reason: to ensure that this Court considers the implications of overturning the Legislature's prohibition on third party causes of actions and its long line of cases defining first-and third-party claimants, as they are essential to ensuring the predictability, stability, and viability of West Virginia's insurance climate.

The West Virginia Legislature expressly prohibited private third-party causes of action for violations of the Unfair Trade Practice Act, or bad faith claims, in 2005. In addition, this Court has painstakingly examined and defined who is a first-party claimant and who is a third-party claimant in a long line of cases, including the recent decision in Loudin v. Nat'l Liability & Fire Ins. Co., 228 W. Va. 34, 716 S.E.2d 696 (2011), which reaffirmed its prior decisions concerning its definitions of first-party and third-party claimant. Simply put, insurers need to be able to rely on what the law is in West Virginia – both what our Legislature and Court has stated - in conducting business.

A. West Virginia Law Does Not Permit Private Third-Party Causes of Action for Bad Faith.

The West Virginia Legislature's passage of W. Va. Code § 33-11-4a(a) demonstrated a clear intent to prohibit the exact type of civil action that Ms. Dorsey filed in this case. In that statute, the Legislature stated: "A *third-party claimant* may not bring a private cause of action or any other action against any person for an unfair claims settlement practice." W. Va. Code § 33-11-4a(a) (2012) (emphasis added).

Here, Ms. Dorsey was a passenger in Mr. Teacoach's vehicle. She was not a party to his insurance contract with Progressive. She was not Progressive's insured. She did not apply for, buy or pay the premium for the Progressive policy. As the Circuit Court stated, "[t]here is no argument that she should get the benefit of a contractual bargain." In short, she obviously represents a third-party claimant who cannot file a civil action for bad faith against another person's insurance company.

The West Virginia Legislature's adoption of § 33-11-4a in 2005 repealed a third-party cause of action for bad faith that had existed for decades and that some believed had a increasingly-adverse impact on the insurance market, including the premiums paid by customers. W. Va. Code § 33-20-19 requires the Insurance Commissioner to publish a survey annually that lists current premiums for minimum limits of automobile liability insurance coverage. This survey provides a comparison of rates between auto writers for the mandatory coverage limits required by W. Va. Code § 17D-4-2. The contents of these surveys are telling. For example, that Commissioner's 2005 survey, which was based on data from 2004 (prior to the passage of §33-11-4a(a)), noted:

> The average annual rate of price change is 6.4% over the past two years. This is significantly more than the 2.6 percent annual rate of inflation (Consumer Price Index) over the same years.

See 2005 West Virginia Annual Automobile Survey, p. 30. By 2006, however, the survey recognized the effects of the Legislature's actions:

> Auto insurance rates in this survey have fallen 13.4 percent over the past four years. This happened in spite of a general increase of prices of 2.8 percent average annually (Consumer Price Index) over the same period. The 2005-06 decreases were due in part to the civil justice reforms enacted by the West Virginia Legislature in 2005.

See 2007 West Virginia Annual Automobile Survey, p. 31 (emphasis added).

Indeed, the Commissioner's most recent survey continues to acknowledge the positive impact on rates from the Legislature's enactment of §33-11-4a(a):

> While the increase in auto insurance premiums from 2000 to 2004 was somewhat dramatic, premium volume has shown to have leveled out since that time. Further, as our premium volume has currently stabilized, loss experience has likewise further improved and should generally impact future auto insurance premiums in West Virginia favorably as future rates are based upon past loss experience.

See 2012 West Virginia Annual Automobile Survey, p. 79.

The point is simple, but clear. The Legislature prohibited third-party bad faith causes of action primarily because allowing a person who is a stranger to the insurance contract and who cannot possibly have obtained insurance "for peace of mind and security" to bring bad faith claims has a significantly adverse effect on insurance premiums that makes it far more expensive for all West Virginia consumers to purchase insurance. Under the scheme proposed by Ms. Dorsey, the definition of "first-party claimant" would expand to include individuals who are not parties to insurance contracts, and who cannot possibly have expected to enjoy the "benefit of a contractual bargain." In short, Ms. Dorsey invites this Court to do exactly what the Legislature

sought to avoid in adopting § 33-11-4a(a) -- significantly expand the group who can bring bad faith causes of action.

West Virginia insurance companies need reliability and predictability in the law to accurately underwrite insurance. This reliability and predictability inures to the benefit of West Virginia consumers. Here, the Legislature has prohibited third-party bad faith civil actions. Likewise, this Court has clearly articulated that a person in Ms. Dorsey's position is a third-party claimant. She cannot, therefore, maintain a civil action for bad faith, and Progressive – like all insurers and consumers – must be able to rely upon this Court to find as such.

B. This Court Settled the Issue of Who May Bring a First-Party Bad Faith Claim in Loudin.

This Court definitively clarified the definition of a "first party claimant" who is entitled to maintain a bad faith civil action against an insurer in Loudin. Before even examining the facts in Loudin, this Court emphatically stated:

> [A] first party bad faith action is one wherein the insured sues *his/her own insurer* for failing to use good faith in settling a claim . . . filed by the insured.

Loudin, 228 W. Va. at 38, 716 S.E.2d at 700 (emphasis added). Against this definition, the Court examined the admittedly "unique facts" presented in Loudin because the claim at issue "has characteristics of both first-party and third-party bad faith claims." Loudin, 228 W. Va. at 40, 716 S.E.2d at 702.

In conducting its analysis in Loudin, this Court found that who *actually purchased* the insurance policy *at issue* represented the critical factor in determining whether a claim presented a first-party or a third-party claim. As this Court noted at the beginning of its analysis:

> This Court has made clear that, with respect to purchasers of insurance,

> [a] policyholder buys an insurance contract for peace of mind and security, not financial gain, and certainly not to be embroiled in litigation. The goal is for all policyholders to get the benefit of their contractual bargain: they should get their policy proceeds promptly without having to pay litigation fees to vindicate their rights.

Loudin, 228 W. Va. at 40, 716 S.E.2d at 702 (quoting Miller v. Fluharty, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997)). The Court explicitly recognized that "[w]e adopted this rule in recognition of the fact that, when an insured purchases a contract of insurance, he buys insurance – not a lot of vexatious, time-consuming litigation with his insurer." Loudin, 228 W. Va. at 40, 716 S.E.2d at 702 (quoting Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 329, 352 S.E.2d 73, 79 (1986)).

The Court emphasized that its "observations expressed in Miller and Hayseeds echo a firm public policy of this State to hold insurers accountable in a court of law when they wrongfully deny coverage *to their premium-paying insureds*." Loudin, 228 W. Va. at 40-41, 716 S.E.2d at 702-703 (emphasis added). In fact, this Court emphasized in Loudin that the fact that "[t]he insurance policy submitted in the record of this case shows only the name of Mr. Thomas Loudin as the party procuring the insurance" represented "the central and controlling point" in determining that Thomas Loudin's claim represented a first-party claim. In reaching this conclusion, the Court stated:

> A third party claimant has no contract with the insurer . . . , has not paid any premiums, has no legal relationship to the insurer or special relationship of trust with the insurer, and in short, has no basis upon which to expect or demand the benefits of the extra-contractual obligations imposed on insurers . . . with regard to their insureds.

Loudin, 228 W. Va. at 41, 716 S.E.2d at 703 (quoting Allstate Ins. Co. v. Watson, 876 S.W.2d 145, 149 (Tex. 1994)).

This Court's analysis and holding in Loudin rejected exactly what Ms. Dorsey is attempting to do in this case. She is not a named insured under Progressive's policy issued to Mr. Teacoach. She is not a premium-paying customer of Progressive, and she has no expectation of gaining "the benefit of [her] contractual bargain" because she does not have a contract with Progressive -- there never was any contractual bargain. See Loudin, 228 W. Va. at 40, 716 S.E.2d at 402.[4]

In short, Ms. Dorsey's claim, arising solely from her permissive occupancy of the Teacoach vehicle, does not possess the characteristics of a claim identified in Loudin as being necessary to qualify as a "first-party claim," and as a result, she was a third-party claimant who could not maintain a bad faith claim in a civil action. The Circuit Court, relying on Loudin, got it right, and this Court should recognize and affirm that correct ruling.

V. CONCLUSION

The Legislature has prohibited third-party claimants from maintaining private civil actions for bad faith. This prohibition, however, does not extend to first-party claimants, and this Court has long recognized the "firm public policy of this State to hold insurers accountable in a court of law when they wrongfully deny coverage *to their premium-paying insureds*." Loudin, 228 W. Va. at 40-41, 716 S.E.2d at 702-703 (emphasis added). That same public policy, however, does not extend to individuals such as Ms. Dorsey, who paid no premiums to Progressive, who is not a named insured under Mr. Teacoach's policy with Progressive, and who did not enter into a contract with Progressive. Ms. Dorsey presents no good reason why this

[4] Notably, in the Salmons case pending before the Court, the plaintiff is a State Farm insured; however, she is *not* making a claim on *her* policy; i.e., her State Farm policy is not the policy "at issue[.]" See Loudin, 228 W. Va. at 41, 716 S.E.2d at 703 ("To be clear, in this proceeding, there is no evidence in the record to show that the tortfeasor, William Loudin, purchased the insurance policy *at issue*." (emphasis added)). Rather, she is making a liability claim on another State Farm insurance policy that she did *not* procure, on which she is *not* a named insured, for which she did *not* pay premiums, and to which, therefore, she is a stranger. Under the circumstances in that case, therefore, using this Court's reasoning and logic in Loudin, she presents a third-party claim only.

Court should ignore its own analysis in Loudin and expand the carefully proscribed limits on who may bring private causes of action for bad faith.

For the reasons detailed above, therefore, the Federation asks that this Court affirm the Order entered by the Circuit Court of Ohio County, and in doing so, affirm that an individual who is not a premium-paying insured under an insurance policy at issue is a third-party claimant who may not maintain a private cause of action for bad faith claim in a civil action.

WEST VIRGINIA INSURANCE FEDERATION

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CERTIFICATE OF SERVICE

I hereby certify that I have this day 13th day of February, 2013, served a copy of *Brief of the West Virginia Insurance Federation as Amicus Curiae in Support of Appellee Progressive Classic Insurance Company* upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

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