

No. 12-1254

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston

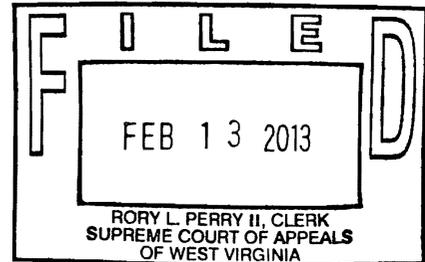
JOHANNA DORSEY,

*Petitioner,*

v.

PROGRESSIVE CLASSIC INSURANCE  
COMPANY,

*Respondent.*



ON APPEAL FROM THE CIRCUIT COURT  
OF OHIO COUNTY, WEST VIRGINIA

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RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF CASE..... 1

II. SUMMARY OF ARGUMENT ..... 3

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 4

IV. ARGUMENT ..... 4

    A. The standard of review for a motion to vacate a judgment is abuse of discretion ..... 4

    B. The Circuit Court properly interpreted and applied *Loudin v. National Liab. & Fire Ins. Co.* finding Petitioner, who is not a premium-paying policyholder, is a third-party claimant thus barred from pursuing common law and statutory bad faith claims against Progressive..... 5

        1. The proper inquiry is the status of the claimant, not the coverage sought..... 7

        2. West Virginia public policy grants greater protection to policyholders as first-party claimants ..... 8

        3. Petitioner is a Class Two insured ..... 9

V. CONCLUSION..... 12

## TABLE OF AUTHORITIES

### CASES

<i>Allstate Ins. Co. v. Watson</i> , 37 Tex.Sup.J. 408, 876 S.W.2d 145 (1994) .....	10, 11
<i>Charles v. State Farm Mut. Auto. Ins. Co.</i> , 192 W.Va. 293, 452 S.E.2d 384 (1994) .....	10
<i>Coffman v. West Virginia Div. of Motor Vehicles</i> , 209 W.Va. 736, ..... 551 S.E.2d 658 (2001)	5
<i>Elmore v. State Farm Mut. Auto. Ins. Co.</i> , 202 W.Va. 430, ..... 504 S.E.2d 893 (1998)	3, 4, 6
<i>Fernandez v. Fernandez</i> , 218 W.Va. 340, 624 S.E.2d 777 (2005) .....	5
<i>Goff v. Penn Mut. Life Ins. Co.</i> , 2012 W.Va. LEXIS 316, 729 S.E.2d 890 (2012).....	12
<i>Hayseeds, Inc. v. State Farm Fire and Cas. Co.</i> , 177 W.Va. 323, ..... 352 S.E.2d 73 (1986)	9
<i>Jividen v. Jividen</i> , 212 W.Va. 478, 575 S.E.2d 88 (2002).....	5
<i>Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA</i> , ..... 204 W.Va. 465, 513 S.E.2d 692 (1998)	5
<i>Loudin v. National Liab. &amp; Fire Ins. Co.</i> , 228 W.Va. 34, ..... 3, 4, 6, 7, 8, 9, 10, 12, 13 716 S.E.2d 696 (2011)	
<i>Marshall v. Saseen</i> , 192 W.Va. 94, 450 S.E.2d 791 (1994) .....	9
<i>Miller v. Fluharty</i> , 201 W.Va. 685, 500 S.E.2d 310 (1997) .....	9
<i>Nationwide Mut. Ins. Co. v. Dairyland Ins. Co.</i> , 191 W.Va. 243, ..... 445 S.E.2d 184 (1994).	2
<i>Shamblin v. Nationwide Mut. Ins. Co.</i> , 183 W.Va. 585, 396 S.E.2d 766 (1990) .....	9, 10
<i>Starr v. State Farm Fire &amp; Cas. Co.</i> , 188 W.Va. 313, 423 S.E.2d 922 (1992).....	11
<i>State ex rel. Allstate Ins. Co. v. Gaughan</i> , 203 W.Va. 358, 508 S.E.2d 75 (1998).....	6

**STATUTES**

W.Va. Code § 33-11-4a..... 4, 6

**RULES**

West Virginia Rule of Appellate Procedure 10 ..... 1  
West Virginia Rule of Appellate Procedure 19 ..... 5  
West Virginia Rule of Appellate Procedure 20 ..... 5  
West Virginia Rule of Civil Procedure 60..... 5  
W. Va. C.S.R. § 114-14-2.3..... 7  
W. Va. C.S.R. § 114-14-2.8..... 7

COMES NOW the Respondent, Progressive Classic Insurance Company (hereinafter "Progressive"), by and through its counsel, E. Kay Fuller and Martin & Seibert, L.C., and pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure presents its Respondent's Brief requesting the August 29, 2012 Memorandum Order of the Circuit Court of Ohio County, West Virginia be affirmed.

The Respondent notes Petitioner advised this Court in her Notice of Appeal in answer to question 11 she was not aware of any related cases pending in this Court or in a lower tribunal. Respondent, however, is aware of one other case in which the issue presented herein is before the Court and another where the issue is before the Court to a lesser extent. The issue of who is a first-party claimant who can bring a bad faith claim is also presented to this Court in *Salmons v. State Farm Mut. Auto. Ins. Co., et al.*, Appeal No. 12-0891, and to a lesser extent, the issue of who is a first-party claimant in an insurance claim is present in *Triad Insulation, Inc., et al. v. Nationwide Mut. Fire Ins. Co.*, Appeal No. 12-1110.

## **I. STATEMENT OF THE CASE**

This action arises from a September 18, 2007 motor vehicle accident. (App. 2, ¶ 7.) On that date, Petitioner was a passenger in a vehicle driven by Joshua Teacoach. (*Id.*) Mr. Teacoach's vehicle was insured by Progressive. (*Id.* ¶8.) The Teacoach vehicle was struck in the rear by a vehicle driven by James Renforth, owned by Comcast and insured by Liberty Mutual Insurance Company (hereinafter "Liberty Mutual"). (*Id.*) Petitioner Dorsey is not insured by Progressive. (Petitioner's Brief, p. 3, n.4.)

Petitioner presented a medical payments claim under Mr. Teacoach's policy which Progressive honored, paying its policy limits of \$5,000.00. (App. 2, ¶ 9.) Thereafter, on at least four occasions, Progressive placed Liberty Mutual on notice of its subrogation lien pursuant to *Nationwide Mut. Ins. Co. v. Dairyland Ins. Co.*, 191 W.Va. 243, 445 S.E.2d 184 (1994). (App. 17, 18, 19, 88.)

Petitioner thereafter filed suit against Mr. Renforth and Comcast in the Court of Common Pleas for Jefferson County, Ohio. On November 3, 2010, the parties reached a settlement of \$60,000.00. (App. 2, ¶ 11; App. 89.) Liberty Mutual attempted to honor Progressive's lien to which Petitioner objected and filed a Motion to Enforce Settlement so that she would receive 100% of the settlement despite the proper assertion of the subrogation lien against the tortfeasor. (App. 113, 116-19, 121.) In so doing, Petitioner represented to the Ohio court that she would "settle and extinguish" the Progressive claim. (App. 113-14.) This representation was converted to an Order by the Ohio court on December 22, 2010, whereby Petitioner was ordered to indemnify and hold harmless those parties released resulting from any subrogated interests that Progressive may claim due and owing. (App. 130-31.) The Petitioner also signed a Release which stated, *inter alia*, she would satisfy all liens and subrogated interests. (App. 132-35.) However, after receiving 100% of the settlement proceeds, Petitioner failed to honor her representations and the December 22, 2010 Court Order.

Petitioner, on March 21, 2011, then filed suit in the Circuit Court of Ohio County, West Virginia against Progressive alleging Progressive refused to reduce its

subrogation claim and attempting to assert common law and statutory “bad faith” claims against Progressive. (App. 2, ¶ 12, 14 and 17; App. 89-90.)<sup>1</sup>

On June 29, 2011, Progressive filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment contending that Petitioner, as a third-party claimant, cannot assert direct claims against Progressive. (App. 24-73.) The trial court initially denied Progressive’s motion, finding Petitioner had standing to bring a common law bad faith claim against Progressive under *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893 (1990). (App. 152-53.)

Ten days after the trial court denied Progressive’s Motion to Dismiss or, in the Alternative, Motion for Summary, this Court issued its opinion in *Loudin v. National Liab. & Fire Ins. Co.*, 228 W.Va. 34, 716 S.E.2d 696 (2011), holding that bad faith claims in West Virginia are reserved for premium-paying insureds. Progressive thereafter timely filed a Motion For Reconsideration Based Upon New Law. (App. 169-72.) Therein, Progressive renewed its prior Motion to Dismiss on the basis that the Petitioner, who is not a premium-paying insured, lacked standing to assert first-party statutory and common law bad faith claims against Progressive. (App. 172.)

On August 29, 2012, the Circuit Court properly granted Progressive’s Motion for Reconsideration based on *Loudin*, vacated the September 12, 2011 Order, and granted Progressive’s Motion to Dismiss. (App. 267-69.)

The Petitioner now alleges the Circuit Court erred by misinterpreting *Loudin* and in finding Petitioner is a third-party not entitled to sue Progressive for bad faith. Those

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<sup>1</sup> Progressive does not have and did not assert a subrogation interest against Petitioner. Any claim Progressive may have against Petitioner would be a reimbursement claim, which claim was waived. (App. 73, Progressive’s Answer to Interrogatory No. 7.)

assertions must fail, however, and the August 29, 2012 Memorandum Order of the Circuit Court should be affirmed.

## II. SUMMARY OF ARGUMENT

The August 29, 2012 Memorandum Order properly granted Progressive's Motion for Reconsideration Based Upon New Law based on this Court's clarification that bad faith claims are reserved for premium-paying policyholders. The *Loudin* opinion is therefore dispositive of the question presented herein. Petitioner was merely a passenger in a Progressive insured vehicle. She is not a premium-paying policyholder; she has no contract with Progressive and therefore no basis to pursue extra-contractual claims against Progressive. Petitioner is a third-party claimant. Third-party claimants are prohibited by W.Va. Code § 33-11-4a (2005) from bringing a cause of action against another's insurer for alleged violations of the Unfair Trade Practices Act. Third-party claimants are also prohibited from pursuing common law bad faith claims. *Elmore, supra*.

Petitioner's Complaint states these causes of action. In that those claims, however, are reserved for premium-paying policyholders, Petitioner lacks standing. Petitioner admits she is not insured by Progressive (Petitioner's Brief, page 3, n.4) thus, as a matter of law, Petitioner is not a first-party claimant for whom these types of claims are reserved. Lacking the capacity to assert these claims, they must be dismissed and the August 29, 2012 Memorandum Order dismissing those claims should be affirmed.

### III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument pursuant to West Virginia Rule of Appellate Procedure 19. Petitioner claims assignments of error in the trial court's application of settled law, specifically the distinction between first- and third-party claimants, and a third-party claimant's lack of standing to pursue bad faith claims against an insurer. However, as there continues to be a dispute as to who qualifies as a first-party claimant, the Court may consider this as a Rule 20 case suitable for a new syllabus point of law.

### IV. ARGUMENT

#### A. The standard of review for a motion to vacate a judgment is abuse of discretion.

A motion to vacate a judgment<sup>2</sup> is addressed to the sound discretion of the trial court and the trial court's ruling will not be disturbed on appeal unless there is a showing of an abuse of such discretion. *Fernandez v. Fernandez*, 218 W.Va. 340, 624 S.E.2d 777 (2005); *Jividen v. Jividen*, 212 W.Va. 478, 575 S.E.2d 88 (2002); *Coffman v. West Virginia Div. of Motor Vehicles*, 209 W.Va. 736, 551 S.E.2d 658 (2001). When reviewing trial court rulings on motions to vacate judgment, this Court has held it is careful not to substitute its discretion for that of the trial court when the trial court has not abused its discretion. *Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 204 W.Va. 465, 513 S.E.2d 692 (1998). In this case, the Circuit Court did not abuse its discretion in applying dispositive case law to the facts of this case and granting Progressive's Motion For Reconsideration.

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<sup>2</sup> Although styled as a Motion For Reconsideration, Progressive's motion was properly treated by the Circuit Court as a Rule 60(b) motion for relief from a judgment or order.

**B. The Circuit Court properly interpreted and applied *Loudin v. National Liab. & Fire Ins. Co.* finding Petitioner, who is not a premium-paying policyholder, is a third-party claimant and thus barred from pursuing common law and statutory bad faith claims against Progressive.**

Third-party claimants may not pursue bad faith claims. W.Va. Code §33-11-4a. Petitioner therefore attempts to elevate her status to a first-party claimant which this Court has defined as a premium-paying policyholder. Petitioner argues the Circuit Court misinterpreted *Loudin* when it prohibited Petitioner, who is not a premium-paying insured, from bringing a bad faith action against Progressive. (Petitioner's Brief, p. 11.) Specifically, Petitioner asserts *Loudin* represents an "expansion" of the definition of a first-party claimant. (*Id.*, p. 12.) However, it is Petitioner who has misinterpreted this Court's holding.

*Loudin* reiterated longstanding case law and simply elevated prior definitions of a first-party claimant to a syllabus point of law which is controlling upon the circuit courts. Beginning in *Elmore*, this Court held the common law duty of good faith and fair dealing runs between insurers and insureds based on the existence of a contractual relationship. Absent that contractual relationship, the claimant is a third-party claimant barred from asserting a common law bad faith claim. *Id.*, 504 S.E.2d at 897.<sup>3</sup> That principle was again discussed in *State ex rel. Allstate v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998), which further elaborated on the first-party/third-party distinction holding a first-party claimant is one who sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured. *Id.*, 508 S.E.2d at 86. (emphasis added). *Loudin* simply took that definition from *Gaughan*

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<sup>3</sup> Throughout the *Elmore* decision, this Court used the terms "insured" and "first-party claimant" interchangeably

and elevated it to a syllabus point of law. *Id.*, Syl. Pt. 2. (“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.” (emphasis added.)

Thus, in deciding *Loudin*, this Court neither narrowed nor expanded the definition of a first-party claimant; it merely reiterated the earlier definition, but in the form of a controlling syllabus point of law. The Circuit Court of Ohio County, upon learning of this syllabus point when considering Progressive’s Motion for Reconsideration, heeded the syllabus point and acted appropriately. The Circuit Court correctly found that Petitioner is not suing her own insurer and is not a premium-paying policyholder of Progressive. Therefore, Petitioner does not meet the definition of a first-party claimant and her claim against Progressive is barred.

In considering the proper status of a claimant, this Court has considered the West Virginia Insurance Commissioner’s definitions of first- and third-party claimants which likewise place emphasis on the policyholder. Under W. Va. C.S.R. § 114-14-2.3, the Commissioner has defined a first-party claimant, in part, as:

“First-party claimant” or “Insured” means 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.

(emphasis added.)

W. Va. C.S.R. § 114-14-2.8 defines a third-party claimant, in part, as:

“Third-party claimant” means any individual...asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer.

This Court held the Commissioner's definitions for first- and third-party claimants are unambiguous and that the definitions are consistent with case law definitions of first- and third-party claimants. *Loudin*, 716 S.E.2d at 701.<sup>4</sup> Both in the case law and in the regulatory definitions, a first-party claimant is synonymous with a policyholder; Petitioner is not a Progressive policyholder, thus she is a third-party claimant.

**1. The proper inquiry is the status of the claimant, not the coverage sought.**

Petitioner attempts to avoid the clear definition of a third-party claimant alleging that her medical payments claim was not adversarial. (Petitioner's Brief, pp. 16-18; 21-23.) However, the line of coverage pursued is not the proper inquiry. The proper inquiry is the status of the individual making the claim. *Loudin* is dispositive of this point. "A first-party bad faith action is one wherein the *insured* sues *his/her own insurer*..." *Id.*, Syl. Pt. 2. Thus, any characterization of the claim in an attempt to avoid the fact the Petitioner is a third-party claimant must fail.

**2. West Virginia public policy grants greater protection to policyholders as first-party claimants.**

Public policy also demonstrates the Petitioner is a third-party claimant and as such does not enjoy benefits reserved for policyholders as first-party claimants. In *Loudin*, this Court re-emphasized West Virginia public policy that first-party bad faith

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<sup>4</sup> Petitioner will argue she is a definitional insured for purposes of medical payments coverage. That designation, however, only makes her eligible for medical payments coverage because she was a passenger in a Progressive insured vehicle. It does not elevate her to a premium-paying policyholder for whom first-party bad faith claims are reserved. A guest passenger is known as a Class Two insured. Class Two insureds have lesser rights than premium-paying Class One insureds.

claims apply to “premium-paying insureds.” *Id.* “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.

*Id.* (citing *Miller v. Fluharty*, 201 W.Va. 685, 694, 500 S.E.2d 310, 319 (1997)). In fact, the *Loudin* Court held “the central and controlling point” that the trial court failed to consider in determining whether to apply the label of first- or third-party in its standing analysis was who purchased the insurance policy at issue. *Id.*, 716 S.E.2d at 703. Thus, as *Loudin* instructs, the focus of any inquiry on who can bring a bad faith cause of action is the status of the claimant, not the line of coverage under which a claim is being made. If the claimant is the policyholder, *i.e.*, paid the premium or is the named insured on the policy, that individual has greater rights including the ability to bring a first-party bad faith claims against his/her own insurer.

In other pronouncements of West Virginia public policy, this Court has consistently held that policyholders hold greater rights. In the seminal decision of *Hayseeds, Inc. v. State Farm Fire and Cas. Co.*, 177 W.Va. 323, 352 S.E.2d 73 (1986), this Court considered the right of a policyholder to pursue a substantially prevailed claim holding whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for additional damages beyond the contract. (emphasis added.) The *Hayseeds* doctrine is premised on a contractual relationship between insurer and insured. See also *Marshall v. Saseen*, 192 W.Va. 94, 450 S.E. 2d 791 (1994). Similarly, the *Shamblin* doctrine stands for the proposition that an insurer owes

*its insured* a duty of good faith and fair dealing. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990). This Court later stated: “It is beyond cavil that the ... *Shamblin* doctrine was created to protect policyholders.” *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W.Va. 293, 452 S.E.2d 384 (1994) (emphasis added).

Thus, it is clear this Court has consistently considered the status of the claimant in determining rights. Policyholders, who purchased and paid for a policy of insurance, are vested with greater protections and rights. Here, the Petitioner is not a policyholder, therefore, she lacks certain privileges. Most notably, she lacks the standing to file a first-party action against Progressive.

### **3. Petitioner is a Class Two insured.**

In considering the distinction between “premium-paying insureds” and third-party claimants, *Loudin* cited with approval *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex. 1994)(attached):

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 benefit 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. Here, Petitioner has no contract with Progressive; has not paid any premiums to Progressive; has no legal relationship to Progressive; has no special relationship of trust with Progressive; and, therefore, has no basis upon which to expect or demand the benefit of extra-contractual obligations imposed upon insurers. As the Circuit Court held in its Memorandum Order: “There is no argument that she [Petitioner] should get the benefit of a contractual bargain.” (App. 268.)

The *Watson* case is another manner of defining classes of insureds which this Court established in *Starr v. State Farm Fire and Cas. Co.*, 188 W.Va. 313, 423 S.E.2d 922 (1992). In *Starr*, this Court recognized the distinction between Class One and Class Two insureds for purposes of determining what benefits each class is entitled to receive. While in the context of stacking, the principle remains the same. Class One insureds, defined as the policyholder, spouse and resident relatives, are afforded broader coverage than Class Two insureds whose status is tied to use or occupancy of a covered motor vehicle at the time of injury. *Id.*, 423 S.E.2d at 926. That distinction is again based upon premium-paying policyholders. “The purpose for allowing a named insured the benefit of all policies for which he has paid premiums is to provide a fulfillment of the contractual expectations that the party had when purchasing those policies.” *Id.*, 423 S.E.2d at 926 (emphasis added) (internal citations omitted).

With regard to Class Two insureds, the Progressive policy issued to Joshua Teacoach states in pertinent part:

**“Insured person” and “insured persons” means:**

...

d. any other person while **occupying a covered vehicle**;...

(App. 44, Policy, p. 13, emphasis in original.)

This definition is similar to that which was at issue in *Starr, supra*, which this Court accepted as the proper delineation between Class One and Class Two insureds. As such, Class Two insureds, also known as third-party claimants, cannot pursue bad faith claims.

Petitioner also argues that the recent decision of *Goff v. Penn Mut. Life Ins. Co.*, 2012 W.Va. LEXIS 316, 729 S.E.2d 890 (2012), expands the definition of first-party claimants entitled to bring bad faith actions in an attempt to stretch her situation into a first-party status. That argument must also fail. *Goff*, which is limited to life insurance policies, merely provides for a designated beneficiary to stand in the shoes of the named insured in order to pursue a life insurance claim. By virtue of the type of policy involved, a life insurance policy claim is never ripe until the named insured is deceased. Life insurance policies include specifically named beneficiaries. Thus, it stands to reason that the specifically named beneficiary is vested with the right to sue an insurer on a life insurance claim. Otherwise, there would be no person eligible to hold a life insurer accountable for any claim handling issues.

Contrary to Petitioner's argument, the limited inclusion of a specifically named life insurance beneficiary as a first-party claimant upon the death of the insured does not expand the definition of a first-party claimant. Rather, *Goff* is consistent with *Loudin* and well-established West Virginia case law in recognizing the distinction between first- and third-party claimants in the context of bad faith actions. Both *Goff* and *Loudin* recognize the key inquiry to determining whether a claimant is a first- or third-party claimant is to determine who occupies the status, or stands in the shoes of, a premium-paying policyholder.

The Circuit Court correctly held Petitioner fails to meet the definition of a first-party claimant because she is not a premium-paying insured pursuant to the dispositive holding in *Loudin*. As such, Petitioner lacks standing to assert a statutory or common law bad faith against Progressive. Having correctly analyzed Petitioner's status, the

Circuit Court of Ohio County correctly ruled and its Memorandum Order should be affirmed.

## V. CONCLUSION

The Circuit Court correctly interpreted and applied *Loudin* in finding Petitioner is a third-party claimant who is barred from pursuing statutory and common law bad faith claims against Progressive. The Circuit Court's Order is consistent with well-established case law noting the distinction and defining first- and third-party claimants, and the rights afforded each. It is undisputed that Petitioner is not a Progressive insured, did not pay premiums for the Progressive policy in question, and is a stranger to the insurance contract with Progressive. As such, she is a third-party claimant who cannot pursue her present allegations against Progressive.

Therefore, the Respondent respectfully requests the August 29, 2012 Order of the Circuit Court of Ohio County be affirmed.

Respectfully submitted,

**PROGRESSIVE CLASSIC  
INSURANCE COMPANY**  
By Counsel

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**CERTIFICATE OF SERVICE**

I, E. Kay Fuller, Counsel for the Respondent, Progressive Classic Insurance Company, hereby certify that I served a true copy of the foregoing ***Respondent's Brief*** upon the following individuals by delivery via UPS on this the **12th** day of **February**, **2013**:

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ALLSTATE INSURANCE COMPANY, PETITIONER v. KATHLEEN G. WATSON, RESPONDENT

No. D-2474

SUPREME COURT OF TEXAS

876 S.W.2d 145; 1994 Tex. LEXIS 126; 37 Tex. Sup. J. 408

January 12, 1994, Delivered

**SUBSEQUENT HISTORY:** Rehearing dismissed by, 02/02/1994

**PRIOR HISTORY:** **[\*\*1]** ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS.

This Opinion Substituted on Overrule of Rehearing for Withdrawn Opinion of November 24, 1993, Previously Reported at: 1993 Tex. LEXIS 152. *Allstate Ins. Co. v. Watson*, 1993 Tex. LEXIS 152, 37 Tex. Sup. Ct. J. 169 (Tex., 1993)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appeals were taken from a judgment of the Court of Appeals for the Second District of Texas which affirmed, in part, the trial court's summary judgment for an insurer on a third party's suit for unfair claims practices.

**OVERVIEW:** Respondent, injured in an automobile accident, sued the other driver and also sued the other driver's insurer, alleging failure to settle promptly. The trial court struck the pleadings as to the insurer for failure to state a claim and gave summary judgment to petitioner insurer. The court of appeals affirmed in part, but reversed and remanded as to respondent's claim under *Tex. Ins. Code Ann. art. 21.21*, finding that respondent had standing to sue the insurer. The Texas Supreme Court reversed the finding that respondent had standing to sue the insurer, holding that third parties had no cause of action for unfair claims practices; the court affirmed the remainder of the judgment.

**OUTCOME:** The court reversed the finding that respondent had standing to sue the insurer, holding that third parties had no cause of action for unfair claims practices; the court affirmed the remainder of the judgment.

**LexisNexis(R) Headnotes**

*Insurance Law > Bad Faith & Extracontractual Liability > Settlement Obligations > General Overview*  
*Insurance Law > Industry Regulation > Unfair Business Practices > Private Causes of Action*

[HN1] To have a private cause of action for alleged unfair claim settlement practices under *Tex. Ins. Code Ann. art. 21.21, § 16*, such practices must be declared unfair or deceptive acts or practices in the business of insurance in *Tex. Ins. Code Ann. art. 21.21, § 4*, the rules and regulations of the State Board of Insurance adopted under *Tex. Ins. Code Ann. art. 21.21*, or be defined unlawful deceptive trade practices in *Tex. Bus. & Comm. Code § 17.46*.

*Insurance Law > Industry Regulation > Unfair Business Practices > General Overview*

[HN2] See *Tex. Ins. Code Ann. art. 21.21, § 16*.

*Insurance Law > Bad Faith & Extracontractual Liability > Settlement Obligations > General Overview*  
*Insurance Law > Industry Regulation > Unfair Business Practices > General Overview*

[HN3] *Tex. Ins. Code Ann. art. 21.21, § 4* is an exclusive list of statutory unfair or deceptive acts or practices in

the business of insurance. This list does not define unfair claim settlement practices as an unfair or deceptive act or practice. Unfair claim settlement practices are not actionable under *Tex. Ins. Code Ann. art. 21.21, § 16* by virtue of *Tex. Ins. Code Ann. art. 21.21, § 4*.

***Insurance Law > Claims & Contracts > Disclosure Obligations > General Overview***

***Insurance Law > Industry Regulation > Unfair Business Practices > General Overview***

[HN4] 28 *Tex. Admin. Code § 21.3* (October 1, 1992) provides that misrepresentation of insurance policies, unfair competition, and unfair practices by insurers, agents and other connected persons are prohibited. No person shall engage in any trade practice that is a misrepresentation of an insurance policy, an unfair method of competition, or an unfair or deceptive act or practice as defined by the provisions of the Insurance Code or as defined by these sections and other rules and regulations of the State Board of Insurance authorized by the Code. Irrespective of the fact that the improper trade practice is not defined in any other section of these rules and regulations, no person shall engage in this state in any trade practice which is determined pursuant by law to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

***Insurance Law > Bad Faith & Extracontractual Liability > Settlement Obligations > General Overview***

***Insurance Law > Industry Regulation > Unfair Business Practices > General Overview***

[HN5] Because 28 *Tex. Admin. Code § 21.3* (October 1, 1992) does not declare unfair claim settlement practices to be an unfair or deceptive act or practice, such practices are not actionable under *Tex. Ins. Code Ann. art. 21.21* by reference to 28 *Tex. Admin. Code § 21.3* (October 1, 1992) alone.

***Insurance Law > Bad Faith & Extracontractual Liability > Settlement Obligations > General Overview***

***Insurance Law > Industry Regulation > Unfair Business Practices > General Overview***

[HN6] *Tex. Ins. Code Ann. art. 21.21* expressly makes actionable those acts or practices that are defined in *Tex. Bus. & Comm. Code § 17.46* as unlawful deceptive trade practices. Unfair claim settlement practices are not listed and, therefore, they are not actionable under *Tex. Ins. Code Ann. art. 21.21, § 16*.

***Civil Procedure > Justiciability > Standing > Third Party Standing***

***Contracts Law > Third Parties > General Overview***

***Insurance Law > Bad Faith & Extracontractual Liability > Settlement Obligations > General Overview***

[HN7] A third party claimant has no contract with the insurer or the insured, 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 benefit of the extracontractual obligations imposed on insurers under *Tex. Ins. Code Ann. art. 21.21* with regard to their insureds. A third party claimant lacks standing under *Tex. Ins. Code Ann. art. 21.21, § 16* to sue an insurer directly for unfair claim settlement practices.

**JUDGES:** ENOCH, PHILLIPS, GONZALEZ, HIGHTOWER, HECHT, CORNYN

**OPINION BY:** CRAIG ENOCH

**OPINION**

[\*146] Respondent's motion for rehearing is overruled. We withdraw our opinion of November 24, 1993 and substitute the following opinion in its place.

The issue in this case is whether the legislature has conferred upon a third party claimant a direct cause of action against an insurer for unfair claim settlement practices under *section 16* of *art. 21.21* of the *Texas Insurance Code*. We hold that a third party claimant has no such direct cause of action under *art. 21.21* and therefore, we reverse in part and affirm in part the judgment of the court of appeals.

Kathleen Watson was injured in a car accident on March 31, 1989. The driver of the other car was M.D. Townley, an insured under an automobile liability policy issued by Allstate Insurance Company. Watson filed suit on June 28, 1989 against Townley alleging that Townley was negligent and that his negligence was a proximate [\*\*2] cause of the accident and her injuries. In the same action, Watson also sued Allstate under *art. 21.21, section 16*, for alleged unfair claim settlement practices in failing to attempt in good faith to effectuate prompt settlement of her claims where liability had become reasonably clear and in denying or unreasonably delaying payment of her claim. Watson alleged that Allstate's conduct violated 28 *Tex. Admin. Code § 21.3* (Board Order 18663) and *section 17.46* of the Texas Deceptive Trade Practices - Consumer Protection Act (DTPA), thereby giving rise to her cause of action under *art. 21.21, section 16*.<sup>1</sup> In addition to her claim under *art. 21.21*, Watson alleged violations of the DTPA, breach of contract, breach of the duty of good faith and fair dealing, and sought a declaratory judgment that Watson was an intended third party beneficiary of the Allstate liability policy.

1 Watson claims in this Court that through Board Order 18663, Allstate' conduct also violates *art. 21.21-2 of the Texas Insurance Code* and 28 Tex. Admin. Code § 21.203 (Board Order 41454).

[\*147] [\*\*3] On Allstate's motion, the trial court severed the claims against Allstate, struck Watson's pleadings as to Allstate for failure to state a claim, and granted Allstate's motion for summary judgment. The court of appeals affirmed the judgment of the trial court except as to Watson's claim under *art. 21.21 of the Texas Insurance Code*. 828 S.W.2d at 425. The court of appeals reversed and remanded Watson's art. 21.21 claim, holding that Watson, as a third party beneficiary of an automobile liability policy, could bring an action under art. 21.21 without first proceeding directly against the named insured of the policy. <sup>2</sup> *Id.* For the reasons stated below, we reverse the judgment of the court of appeals concerning Watson's art. 21.21 claim.

2 Watson has not appealed in this Court the decision of the court of appeals affirming the trial court's summary judgment on her remaining claims. Thus, the only issue presented here is whether the court of appeals erred in reversing and remanding the summary judgment on Watson's art. 21.21 claim.

[\*\*4] I.

In this case, we are asked to expand our holding in *Vail v. Texas Farm Bureau Mutual Ins. Co.*, 754 S.W.2d 129 (Tex. 1988) and conclude that *section 16* of art. 21.21 confers upon third party claimants a direct cause of action against an insurer for unfair claim settlement practices. In essence, we are asked to extend to a party adverse to the insured, the same duties and obligations insurers owe to their insureds under *Vail*. For the reasons stated below, we decline to do so.

[HN1] To have a private cause of action for alleged unfair claim settlement practices under art. 21.21, *section 16*, such practices must be *declared unfair or deceptive acts or practices* in the business of insurance in *section 4* of art. 21.21, the rules and regulations of the State Board of Insurance adopted under art. 21.21, or be *defined unlawful deceptive trade practices* in *section 17.46* of the DTPA. *TEX. INS. CODE ANN. art. 21.21, § 16*. [HN2] The full text of art. 21.21, *section 16* reads:

(a) Any person who has sustained actual damages as a result of another's engaging in an act or practice declared in *Section 4* of this Article or in rules or regulations lawfully adopted by the Board under

[\*\*5] this Article to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance or in any practice defined by *section 17.46 of the Business & Commerce Code*, as amended, as an unlawful deceptive trade practice may maintain an action against the person or persons engaging in such acts or practices.

*Id.* We address each basis for art. 21.21 liability separately.

#### A. *Section 4 of art. 21.21*

The express purpose of art. 21.21 is to regulate trade practices in the business of insurance by defining or providing for determination of "*all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices*" and prohibiting such practices. *TEX. INS. CODE ANN. art. 21.21, § 1* (emphasis added). *Section 4* of art. 21.21 defines those practices that constitute unfair methods of competition or unfair or deceptive acts or practices. *Id.* at § 4. We note that unlike *section 17.46* of the DTPA, discussed below, *section 4* of art. 21.21 does not use the phrase "includes, but is not limited to" when defining prohibited acts. As written, art. 21.21, *section 4*, [HN3] is an exclusive list of statutory [\*\*6] unfair or deceptive acts or practices in the business of insurance. <sup>3</sup> Within this list, *section 4* does *not* define unfair claim settlement practices as an unfair or deceptive act or practice. Unfair claim settlement practices are not actionable under art. 21.21, *section 16*, by virtue of art. 21.21, *section 4*.

3 *Section 17.46* of the DTPA provides that the term deceptive acts or practices "includes, but is not limited to" acts or practices which that section thereafter lists. Following this legislative directive, this Court held that *section 17.46* is not an exclusive list of deceptive acts or practices under the DTPA. *Spradling v. Williams*, 566 S.W.2d 561, 564 (Tex. 1978).

#### B. *Rules and regulations adopted under art. 21.21*

Board Order 18663 was adopted by the State Board of Insurance pursuant to art. [\*\*148] 21.21. Through that order, Watson claims she is entitled to sue Allstate for unfair claim settlement practices. Board Order 18663 does *not* declare unfair claim settlement practices to [\*\*7] be an unfair or deceptive act or practice. Rather, like *art. 21.21 of the Insurance Code*, this regulation prohibits insurers from engaging in unfair or deceptive acts or practices as *defined elsewhere*. The relevant portion of Board Order 18663 provides:

[HN4] (a) Misrepresentation of insurance policies, unfair competition, and unfair practices by insurers, agents and other connected persons are prohibited by Article 21.20 and Article 21.21 or by other provisions of the Insurance Code. No person shall engage in this state in any trade practice that is a misrepresentation of an insurance policy, that is an unfair method of competition, or that is an *unfair or deceptive act or practice* as defined by the provisions of the Insurance Code or as defined by these sections and other rules and regulations of the State Board of Insurance authorized by the Code.

(b) Irrespective of the fact that the improper trade practice is not defined in any other section of these rules and regulations, no person shall engage in this state in any trade practice which is determined pursuant by law to be an unfair method of competition or an unfair or deceptive act or practice in the business [\*\*8] of insurance.

State Bd. of Ins., 28 Tex. Admin. Code § 213 (West October 1, 1992) (emphasis added). [HN5] Because Board Order 18663 does not declare unfair claim settlement practices to be an unfair or deceptive act or practice, such practices are not actionable under art. 21.21 by reference to Board Order 18663 alone. *TEX. INS. CODE ANN. art. 21.21, § 16*.

Watson argues, however, that through Board Order 18663, Board Order 41454 is implicated. <sup>4</sup> This Court held in *Vail* that an insured could not rely on Board Order 41454 because the definition of unfair or deceptive acts or practices required that such acts be committed with "such frequency as to indicate a general business practice." *Vail, 754 S.W.2d at 135*. Thus, *Vail* precludes Watson's claims under Board Order 41454. <sup>5</sup> While Board Order 41454 was amended effective August 19, 1992 to delete any frequency requirement, because of its effective date, this amendment does not apply to this case. In any event, Board Order 41454 was adopted pursuant to art. 21.21-2, not art. 21.21 and, thus, cannot form the basis of a claim under *art. 21.21, section 16. TEX. INS. CODE ANN. art. 21.21, § 16*.

4 Board Order 41454 provides:

No insurer shall engage in unfair claim settlement practices. Unfair

claim settlement practices means committing or performing with such frequency as to indicate a general practice any of the following:

(4) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear.

State Bd. of Ins., Board Order 41454 (1982) (now *28 Tex. Admin. Code § 21.203*).

[\*\*9]

5 Kathleen Watson's affidavit in response to Allstate's motion for summary judgment states only that Allstate failed to settle her claim in a reasonable manner. Board Order 41454 requires proof of more than the denial or delay in payment of one claim. *Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 643 (Tex. 1987)*. The undisputed facts, as a matter of law, do not show the requisite frequency under Board Order 41454.

Watson also argues that art. 21.21-2, which defines and prohibits unfair claim settlement practices, is made available as a private cause of action through Board Order 18663. <sup>6</sup> To the contrary, art. 21.21-2 does not create a private cause of action for violations of that statute. *See CNA Ins. Co. v Scheffey, 828 S.W.2d 785, 791 [\*149] (Tex. App.--Texarkana 1992, writ denied); Cantu v. Western Fire & Casualty Ins. Co., 716 S.W.2d 737, 741 (Tex. App.--Corpus Christi 1986), writ ref'd n.r.e. per curiam, 723 S.W.2d 668 (Tex. 1987)*. Significantly, the legislature in 1985 specifically rejected a proposed amendment to art. 21.21, *section 16*, that would have created [\*\*10] a private cause of action for unfair claim settlement practices as defined in art. 21.21-2. H.J. OF TEX., 69th Leg., R.S. 417 (1985). And more recently, in 1991, the legislature deleted a provision from H.B. 2 that would have provided a private cause of action in art. 21.21-2 to any "claimant" for unfair claim settlement practices. H.B. 2, § 9.12, 72d Leg., R.S. (1991) (original version of bill filed February 2, 1991). In construing art. 21.21 and Board Order 18663 promulgated thereunder, we cannot ignore the legislature's refusal to create a statutory private cause of action for unfair claim settlement practices for third party claimants such as Watson. *See Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334, 338 (Tex. 1979) and Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980)* (deletion of provision in a pending bill discloses legislative intent to reject the proposal). We will not construe art. 21.21, *section 16* to permit, indirectly, a third party claimant to sue an insurer for unfair

claim settlement practices through Board Order 18663 where she may not do so directly and where the legislature has specifically refused to create such a cause of action for unfair claim [\*\*11] settlement practices under art. 21.21, *section 16* and art. 21.21-2.

6 Art. 21.21-2 provides in pertinent part as follows:

Any of the following acts by an insurer, if committed without cause and performed with such frequency as determined by the State Board of Insurance as provided for in this Act, shall constitute unfair claim settlement practices:

(d) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear.

*TEX. INS. CODE ANN. art. 21.21-2, § 2* (Vernon 1981). Like Board Order 41454, art. 21.21-2 was amended in 1991 to eliminate any frequency requirement. The amendment, effective January 1, 1992, does not apply to this case, and, in fact, is irrelevant to our analysis because we conclude that Board Order 18663 does not create a private cause of action in favor of third party claimants for violations of art. 21.21-2.

### C. *Section 17.46 of the DTPA*

Art. 21.21, *section 16* provides a [\*\*12] private cause of action for any practice *defined by section 17.46* of the DTPA as an unlawful deceptive trade practice. *TEX. INS. CODE ANN. art. 21.21, § 16*. "Unfair claim settlement practices" is not among the enumerated items defined by *section 17.46* as an unlawful deceptive trade practice. While *section 17.46* may not be a complete list of unlawful deceptive trade practices for purposes of asserting claims under the DTPA, <sup>7</sup> art. 21.21 [HN6] expressly makes actionable those acts or practices that, in fact, are defined in *section 17.46* as unlawful deceptive trade practices. Unfair claim settlement practices are not listed and, therefore, they are not actionable under art. 21.21, *section 16 of the Insurance Code*.

<sup>7</sup> See *Spradling v. Williams*, 566 S.W.2d 561, 564 (Tex. 1978).

To be sure, art. 21.21, *section 16* is worded as providing a cause of action to "any person." However, for Watson to assert her cause of action against Allstate for unfair claim settlement practices, she must do so through [\*\*13] the reasoning of *Vail*. *Vail*, an opinion delivered in 1988, followed closely after our decision in *Arnold v. National County Mutual Ins. Co.*, 725 S.W.2d 165 (Tex. 1987). *Vail* thus presented the question of construction of art. 21.21, *section 16* in the context of an insured-insurer relationship and in light of the preexisting common law duty of good faith and fair dealing recognized in *Arnold*. In reaching our decision today, we are particularly mindful of the duties imposed on insurers as to their insureds. See *Vail*, 754 S.W.2d at 136; *Arnold* 725 S.W.2d at 167. *Vail* is predicated upon this Court's expressed belief that a special relationship exists between an insured and the insurer. See *Arnold*, 725 S.W.2d at 167. *Vail* remains the law as to claims for alleged unfair claim settlement practices brought by insureds against their insurers.

Watson, however, is not an insured. Rather, she asserts her claims against Allstate as a third party to the contract between Allstate and its insured. The obligations imposed by art. 21.21 of the *Insurance Code* and *Vail* are engrafted onto the contract between the insurer and insured and are extra-contractual [\*\*14] in nature. [HN7] A third party claimant has no contract with the insurer or the insured, 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 benefit of the extra-contractual obligations imposed on insurers under art. 21.21 with regard to their insureds. Nothing in *Vail* suggests that the extra-contractual obligations, rights, and remedies of art. 21.21, *section 16* extend to third party claimants.

[\*150] More to the point, in construing art. 21.21, *section 16* as Watson would have us construe it to give her standing in this case, we would undermine the duties insurers owe to their insureds under *Vail* and *Arnold*. In construing art. 21.21 in *Vail*, we were not faced with potentially conflicting duties. There is nothing inconsistent between the common law duty of good faith and fair dealing owed by an insurer to its insured and a duty imposed under *Vail* and art. 21.21, *section 16* on an insurer as to its insured prohibiting unfair claim settlement practices. Were we to extend to third party claimants the same duties insurers owe to their insureds, insurers [\*\*15] would be faced with owing coextensive and conflicting duties. An insurer owes to its insured a duty to defend the insured *against* the claims asserted by a third party. Recognizing concomitant and coextensive duties under art. 21.21 to third party claimants, parties adverse to the insured, necessarily compromises the duties the insurer owes to its insured. In fact, the logical result of permitting a separate and direct cause of action in favor

of third party claimants allows third parties to sue for unfair claim settlement practices *even though the insured has no claim for an unfair claim settlement practice*. As troublesome, it is conceivable that in attempting to settle claims pursuant to the demands of a third party claimant, insurers may be liable to the insured for settling too quickly. *See Texas Farmers Insurance Co. v. Soriano*, 844 S.W.2d 808 (Tex. App.--San Antonio 1993, writ granted) (affirming a judgment for actual and punitive damages against an insurer and in favor of the insured for breach of the common law duty of good faith and fair dealing where the insurer attempted to settle multiple claims for its underinsured by offering the full policy limits against [\*\*16] the insured's wishes). In refusing to provide a direct cause of action for third party claimants, the legislature may well have been aware of this potential for conflicting duties. We will not construe art. 21.21 or *Vail*, absent explicit directive from the legislature, so as to compromise the insurer's loyalties and obligations owed to the insured.<sup>8</sup>

8 On motion for rehearing, Watson argues that through Board Order 18663 § 4(b), Watson has standing to sue Allstate under *section 16*, art. 21.21 for breach of the duty of good faith and fair dealing as articulated in *Arnold, supra*, and *Aranda v. Insurance Co. of America*, 748 S.W.2d 210 (Tex. 1988). *See Vail*, 754 S.W.2d at 135; State Bd. of Ins., 28 Tex. Admin. Code § 21.3(b). The court of appeals below held that Allstate did not owe Watson, a third party claimant, a common law duty of good faith and fair dealing under *Arnold* and *Aranda* and Watson has not appealed that determination. 828 S.W.2d at 426. Moreover, because Watson is not an insured, we decline to construe art. 21.21, *section 16* and Board

Order 18663 so as to permit a cause of action which would be contrary to the common law duties recognized in favor of insureds under *Arnold* and the related duties under *Aranda*.

[\*\*17] We hold that Watson, as a third party claimant, lacks standing under *section 16* of art. 21.21 to sue Allstate directly for unfair claim settlement practices.

### III.

In coming to our conclusion, we also note that the court of appeals incorrectly determined that Watson had standing to sue under art. 21.21 as a third party beneficiary of the automobile liability policy. 828 S.W.2d at 428. In *Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770 (Tex. 1990), this Court held that for purposes of recovering attorney's fees under an insurance contract, a third party who has obtained a judgment against an insured is an intended third party beneficiary of the insurance contract and is entitled to enforce the contract: *Dairyland* does not give third party claimants standing to sue to enforce the extra-contractual obligations under art. 21.21, *section 16*. Therefore, *Dairyland* is not applicable to this case.

The court of appeals erred in reversing the trial court's judgment as to Watson's art. 21.21 claim. We reverse in part the judgment of the court of appeals as to Watson's art. 21.21 claim and affirm the remainder of the judgment of the court of appeals.

Craig Enoch

[\*\*18] Justice

Opinion delivered: January 12, 1994.