

for the insurer's failure to reasonably attempt settlement of a claim against the insured, the insured must show that (1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it. Applying this standard, we hold that the evidence in this case is legally insufficient to support liability under article 21.21 because there is no evidence that the claimant presented the insurer with a proper settlement demand within policy limits that an ordinarily prudent insurer would have accepted. And assuming that the insured has an alternative cause of action for common-law negligence under the facts presented, which we do not decide, this failure of proof is similarly fatal. Finally, we agree with the court of appeals that the evidence is legally insufficient to support recovery under a misrepresentation theory because there is no evidence that the insurer's alleged misrepresentations caused the insured's damages. Accordingly, we reverse the court of appeals' judgment and render judgment for the insurer.

I. Background

Ralph Mueller was a driver for Rocor International, Inc., a trucking company. One evening in May 1989, after consuming a considerable amount of alcohol at a bar, Mueller swerved his truck off the road and struck two highway patrol officers who had stopped another drunk driver by the side of the road. Both officers were killed. Mueller, whose blood alcohol concentration tested 0.16, was arrested and charged with two counts of involuntary manslaughter. Several months later, the officers' families sued Rocor.

Rocor carried a \$1 million primary liability policy issued by Guaranty National Insurance Company, with a \$1 million self-insured retention endorsement. Rocor was also insured under an \$8 million umbrella policy issued by National Union Fire Insurance Co. of Pittsburgh. Both policies placed the duty to defend on Rocor. The National Union policy also obligated Rocor to cooperate with National Union in settling claims.

Soon after suit was filed, Rocor's attorney, Terrence Martin, began investigating the accident.

Martin quickly determined that Rocor would probably be found liable. Mueller claimed that he was not driving the truck when the accident occurred. He claimed that some unknown person had entered the truck and driven away while he was sleeping in the back. The alleged unknown person was never located, however, and Mueller had been apprehended fleeing the accident scene on foot; thus, Martin did not believe Mueller's story was credible.

Martin concluded that Rocor faced significant liability, especially if the case went to trial. Rocor's vice president for safety and risk management, Angel Arzaga, agreed, and directed Martin to begin settlement negotiations. As early as June 1989, the plaintiffs' attorney, Charles Soechting, informed Martin that he considered this a "policy limits" case (\$10 million), but indicated that he might be receptive to some form of structured settlement. In January 1990, the case was set for mediation.

Meanwhile, National Union was advised that liability would likely reach the excess coverage layer. National Union decided to take charge of the settlement efforts, as its policy allowed, and canceled the scheduled mediation. It also directed that no offer was to be made to the plaintiffs at that time. From that point on, National Union's attorney, Stanley Renneker, assumed control of the settlement negotiations.

Over the next fourteen months, the parties exchanged a number of settlement propositions for widely varying amounts. In April 1990, Renneker met with Soechting to discuss settlement. After that meeting, Martin wrote to Arzaga and Guaranty National:

Concerning settlement, I am pleased to announce that there has finally been some progress in this area. Stanley Renneker, attorney for National Union Fire Insurance Company, met with Mr. Soechting on Wednesday, April 11, 1990. Mr. Soechting requested a structured settlement worth 4.5 million dollars which in my opinion is fairly reasonable and amounts to an 8 million dollar reduction in his initial demand. Mr. Renneker responded to this demand on the following Friday offering a structured settlement worth \$2,848,267.00 and is awaiting Mr. Soechting's response. . . . [G]iven the "relative" closeness of the parties (2.8 v. 4.5), and Mr. Soechting's strong desire to settle this case, Mr. Renneker believes this case, if it is going to settle, will settle by the end of the month.

Soechting's \$4.5 million offer was orally communicated, and he later testified that it was intended to settle only the adults' claims, not the children's. Soechting testified that he was then willing to settle the children's

claims for \$1.8 million and all of the claims for \$6.3 million, and that he believed he communicated this to Renneker. However, Martin testified that he understood from Renneker that Soechting's \$4.5 million offer was for the entire case, and he was not aware of any offer to settle the children's claims separately until several months later in September.

Soechting's only written settlement offer was made in a May 4, 1990 letter to Martin and Renneker, which stated: "[W]e will settle this case now for the sum of \$10,000,000.00. The plaintiffs will consider a structured settlement having a present value of \$10,000,000.00." Martin and Soechting testified that they did not consider \$10 million to be a serious offer but merely an attempt by Soechting to "Stowerize" Renneker and pressure him to respond with an offer within total policy limits. *See G. A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). A few days later, Arzaga sent a letter to National Union that referred to a \$7.5 million settlement demand by Soechting. He also referred to a June 4th letter from Martin to Arzaga that mentioned a \$3.8 million settlement offer by National Union. Over the summer, though, the distance between the parties' respective settlement offers appears to have widened. On August 20th, Martin wrote to Arzaga, with copies to Guaranty National, National Union, and Renneker, reporting that the plaintiffs' settlement demand was \$9 million and that Renneker had offered \$3.2 million.

In December 1990, the children's claims settled for \$1.8 million. The remaining claims went to mediation at least twice, and Soechting's demand for those claims was \$5 million. Renneker offered \$3.8 million. The adults' claims finally settled in March 1991 for \$4.6 million.

Rocor filed this suit against National Union to recover attorney's fees and costs that it incurred as a result of National Union's alleged failure to promptly effectuate settlement. Rocor claimed that National Union was negligent, and that it violated article 21.21 of the Insurance Code.² The jury found that National

² Rocor also claimed that National Union violated the Texas Deceptive Trade Practices-Consumer Protection Act, but the trial court determined that Rocor could not seek DTPA relief because it was not a "consumer" under the Act. Rocor does not challenge that decision here.

Union's negligence proximately caused Rocor damages, and that National Union knowingly engaged in unfair or deceptive acts or practices in the business of insurance. National Union moved for judgment n.o.v., arguing that Rocor could not maintain common-law negligence or article 21.21 causes of action. Alternatively, National Union claimed there was no evidence to support the jury's findings. The trial court granted judgment n.o.v., and Rocor appealed.

The court of appeals, sitting *en banc*, reversed the trial court's judgment. Three justices believed that Rocor could assert causes of action for both common-law negligence and for unfair claim settlement practices under article 21.21. 995 S.W.2d at 811. Two justices concluded that Rocor could recover for common-law negligence, but not for article 21.21 violations. *Id.* at 816. And two dissenting justices believed that Rocor could not recover under either theory. *Id.* at 816-17. Accordingly, the court of appeals rendered judgment for Rocor on its common-law negligence claim. *Id.* at 806.

Both Rocor and National Union filed petitions for review. Rocor, having elected to recover under article 21.21, contends that the court of appeals' conclusion that it has no statutory cause of action is contrary to article 21.21's terms and purposes, and to our decision in *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129 (Tex. 1988). On the other hand, National Union argues that the court of appeals' judgment based on common-law negligence conflicts with our decisions in *Maryland Insurance Co. v. Head Industrial Coatings & Services, Inc.*, 938 S.W.2d 27 (Tex. 1996) and *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994). We granted both petitions to consider the remedies available to an insured in the circumstances presented.

II. Article 21.21

A. The Statute's Application

Rocor has elected to recover under article 21.21 should we determine that it has an action thereunder. Accordingly, we must first decide whether the statute, as it existed when this suit was filed, permits an insured to recover defense costs it incurred because its insurer unreasonably delayed settling a

third-party liability claim.³ Section 16(a) of article 21.21 provides:

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 this Article to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance . . . may maintain an action against the person or persons engaging in such acts or practices.

TEX. INS. CODE art. 21.21, § 16(a) (emphasis added). In interpreting article 21.21, we have recognized the Legislature's "intent to comprehensively regulate and prohibit deceptive insurance practices." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 385 (Tex. 2000) (quoting *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485-87, 486 (Tex. 1998)).

Section 16(a) allows insureds to pursue claims for conduct declared unfair in rules or regulations adopted by the State Board of Insurance under article 21.21. State Board of Insurance Order No. 18663, which was adopted under the statute, prohibits unfair or deceptive practices "as defined by the provisions of the Insurance Code." State Bd. of Ins., Bd. Order No. 18663 (codified at 28 TEX. ADMIN. CODE § 21.3). Insurance Code article 21.21-2, section 2(b)(4), in turn, defines as an unfair practice "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear." TEX. INS. CODE art. 21.21-2, § 2(b)(4). Although article 21.21-2 does not itself create a private cause of action, we held in *Vail* that conduct violating article 21.21-2 was actionable under article 21.21 by reference through Board Order 18663. *Vail*, 754 S.W.2d at 133-134.⁴

³ The Legislature has since amended article 21.21 to specifically make certain unfair claim settlement practices actionable by insureds. Section 4 now defines unfair or deceptive practices to include

(10) Unfair Settlement Practices.

(a) Engaging in any of the following unfair settlement practices with respect to a claim by an insured or beneficiary:

* * *

(ii) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear.

⁴ When *Vail* was decided, article 21.21-2, section 2(b)(4) was codified at article 21.21-2, section 2(d).

Accordingly, *Vail* recognized that an insured may sue its insurer under article 21.21, section 16 for not attempting in good faith to settle a claim promptly, fairly, and equitably after liability has become reasonably clear.

In *Watson*, we refused to extend *Vail* to allow a third-party claimant to sue the defendant's insurer for not settling a liability claim against its insured. *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 147-50 (Tex. 1994). We emphasized that the Legislature had specifically refused to create such a cause of action under the statute, and distinguished the unfair settlement practice in *Vail* as one that arose in the context of the special relationship between an insured and its insurer. *Id.* at 149. Because a third party to the insurance contract enjoys no such special relationship, we refused to confer upon *Watson*, a third-party claimant, the rights and remedies of an insured:

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.

Id. Our holding in *Watson* was consistent with the remedial purposes underlying article 21.21. We expressed concern about undermining the duties owed by an insurer to its insured by creating an inherently conflicting duty to a third party. *Id.* at 150. To hold otherwise, we stated, “would undermine the duties insurers owe to their insureds,” contrary to article 21.21's purpose. *Id.* These considerations led us to conclude that *Watson* had no standing under article 21.21, section 16 to sue the insurer for unfair claim settlement practices. *Id.* But we emphasized that “*Vail* remains the law as to claims for alleged unfair claim settlement practices brought by insureds against their insurers.” *Id.* at 149.

National Union suggests that we resolved the issue presented in this case against the insured in *Garcia*. There, an insurer had refused to settle a medical malpractice suit against its insured on the ground that the plaintiffs' claims were not covered by the policy. *Garcia*, 876 S.W.2d at 845. The plaintiffs settled with the physician, agreeing to enforce the judgment they obtained against him only against his insurer, and taking an assignment of his rights against the insurer. *Id.* The plaintiffs then sued the insurer

solely as its insured's assignees, alleging that its failure to settle was negligent and violated article 21.21 and the DTPA. *Id.* at 845-46. Based on jury findings that the insurer's failure to settle was negligent and "an unfair practice in the business of insurance," the trial court rendered judgment against the insurer under article 21.21, and the court of appeals affirmed. *Id.* at 846. We held that (1) the evidence conclusively established that the insurer discharged its duty to defend, and (2) the insurer did not breach its *Stowers* duty to settle because it never received a settlement demand within policy limits. *Id.* at 843. We also emphasized that the record was "devoid of evidence that [the insurer] ever engaged in any unfair or deceptive act or practice as defined in the relevant statutes." *Id.* at 847.

National Union points to language in *Garcia* that it claims suggests that an insured has no cause of action against its insurer under article 21.21 for failing to settle a third-party claim against the insured. For example, we wrote that "[b]reach of the *Stowers* duty does not constitute a violation of article 21.21," *id.* at 847, and "*Vail* is inapposite [because it involved a first-party property insurance policy]." *Id.* at 847, n. 10. But neither of these statements indicates that we intended to limit an insured's statutory claims against its own insurer for unfair claim settlement practices to first-party insurance claims, and neither was necessary to our decision. Nor can we identify a principled basis upon which to draw a distinction between first-party and third-party claims when the insured has been directly injured as a result of its insurer's unfair claim settlement practices.

When construing statutes, our ultimate purpose is to ascertain the Legislature's intent. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). In determining that intent, we may look to the statute's underlying purpose. TEX. GOV'T CODE § 311.023(1); *see Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996). The Legislature has directed that article 21.21 "shall be liberally construed and applied to promote its underlying purposes as set forth in this section." TEX. INS. CODE art. 21.21, § 1(b). The statute was enacted to protect insurance consumers by prohibiting unfair or deceptive practices in the business of insurance. *Id.* § 1(a); *see State*

Farm Life Ins. Co. v. Beaston, 907 S.W.2d 430, 435 (Tex. 1995). We see nothing in the statute’s language or in its underlying purposes to support a conclusion that the Legislature intended to limit the statute’s application to first-party claims when the insured has sustained actual damages as a result of unfair practices. Accordingly, we conclude that Rocor may assert an article 21.21 claim against its excess liability carrier for damages that it sustained as a result of National Union’s unfair claim settlement practices.

B. The Statutory Liability Standard

National Union claims that there is no evidence to support the jury’s finding that it is liable under the statute for engaging in unfair claim settlement practices. But before we can conduct a meaningful evidentiary review, we must first define the statutory liability standard against which to measure the evidence. An insurer faces article 21.21 liability if it does not “attempt[] in good faith to effectuate prompt, fair, and equitable settlements of claims submitted . . . in which liability has become reasonably clear.” We have never determined when liability has become “reasonably clear” within the statute’s meaning so that an insurer may be held liable for failing to reasonably and promptly settle a third party’s claim against its insured.

1. Reasonably Clear Liability

Neither the Insurance Code, nor the rules or regulations the Board has adopted thereunder, articulate when liability has become reasonably clear for purposes of triggering the insurer’s duty to reasonably attempt settlement under the statute. National Union claims that, by failing to define a standard, the Legislature must have intended the common-law *Stowers* standard to apply. There is nothing to indicate that the Legislature had in mind any standard other than the familiar *Stowers* standard, and certainly there was merit to unifying the common-law and statutory standards in this context. See *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997). Applying the familiar common-law standard promotes uniformity and prevents insurers from facing conflicting liability standards for failing to settle lawsuits filed

by injured third-party claimants. *See id.* *Stowers* has long defined an insurer's duty to its insured in attempting to settle third-party liability claims. *Stowers*, 15 S.W.2d at 547-48. While this case does not fit neatly within the *Stowers* paradigm because the insurer ultimately settled within policy limits, we believe that *Stowers* provides an appropriate framework for understanding and applying the statutory standard.

Under the common law, an insurer generally has no obligation to settle a third-party claim against its insured unless the claim is covered under the policy. *See Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997). Nor is an insurer obligated to indemnify its insured for a third-party claim on which the insured is not liable. *Cf. Linkenhoger v. American Fidelity & Cas. Co.*, 260 S.W.2d 884, 887 (Tex. 1953) (holding that insured's *Stowers* claim against insurer did not accrue until insured's liability was finally adjudicated), *overruled in part on other grounds by Street v. Second Court of Appeals*, 756 S.W.2d 299 (Tex. 1988), *Hernandez v. Great Am. Ins. Co. of N.Y.*, 464 S.W.2d 91 (Tex. 1971). These well-established common-law precepts, which reflect the parties' expectations in contracting for insurance, inform our determination of the scope of the duty the Legislature imposed. Accordingly, we hold that to trigger an insurer's statutory duty to reasonably attempt settlement of a third-party claim against its insured, the policy must cover the claim and the insured's liability to the third party must be reasonably clear. In this case, National Union does not dispute coverage under the policy, nor does it claim that Rocor's liability was not reasonably clear. Thus, these two elements of Rocor's statutory claim are satisfied. But National Union maintains that these elements alone are not enough to trigger an insurer's obligation to reasonably attempt settlement. It claims that the insured must also show that the plaintiffs made a proper settlement demand within policy limits that an ordinarily prudent insurer would have accepted.

In some jurisdictions, an insurer that has had a reasonable opportunity to determine that its insured is liable on a covered claim may incur tort liability for failing to settle even if the third-party claimant has not

made a firm settlement offer. *See, e.g., City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 586 (10th Cir. 1998) (applying New Mexico law); *First State Ins. Co. v. Utica Mut. Ins. Co.*, 870 F. Supp. 1168, 1176 (D. Mass. 1994) (applying Massachusetts law); *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 693 P.2d 1296, 1303 (Ore. 1985); *Alt v. American Family Mut. Ins. Co.*, 237 N.W.2d 706, 711-12 (Wisc. 1976); *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 323 A.2d 495, 505-07 (N.J. 1974); *State Auto. Ins. Co. of Columbus, Ohio v. Rowland*, 427 S.W.2d 30, 35 (Tenn. 1968). These jurisdictions generally reason that the lack of a firm settlement offer is merely evidence that a jury may consider in deciding the insurer's liability, and does not preclude a tort claim against the insurer. *Rova Farms*, 323 A.2d at 505; *see also Rowland*, 427 S.W.2d at 35. But in Texas, the common law imposes no duty on an insurer to accept a settlement demand in excess of policy limits or to make or solicit settlement proposals. *See Garcia*, 876 S.W.2d at 849, 851. As we noted in *Garcia*, "[r]equiring the claimant to make settlement demands tends to encourage earlier settlements." *Id.* at 851 n.18. A converse rule, we concluded, would discourage early dispute resolution by effectively "requir[ing] the insurer to bid against itself." *Id.* at 851. Consequently, an insurer's settlement duty is not activated until a settlement demand within policy limits is made, and the terms of the demand are such that an ordinarily prudent insurer would accept it. *See id.* at 849.

We see no reason why an insurer's duty to its insured under article 21.21 should not be similarly circumscribed. Accordingly, we hold that an insurer's statutory duty to reasonably attempt settlement of a third-party claim against its insured is not triggered until the claimant has presented the insurer with a proper settlement demand within policy limits that an ordinarily prudent insurer would have accepted. *See id.* A proper settlement demand generally must propose to release the insured fully in exchange for a stated sum, although it may substitute the "policy limits" for that amount. *See id.* 848-49. At a minimum, the settlement demand must clearly state a sum certain and propose to fully release the insured. *See id.* at 849.

The dissent seems to take the position that liability is reasonably clear under the statute if the insured

clearly caused the third party's injuries. But under that view of the statute, an insurer could be held liable for failing to settle even if the amount of the injured third party's damages were unknown or unclear. And our view of the statute is consistent with the statutory purpose the dissent identifies, because it is expressly intended to encourage swifter dispute resolution. *See Garcia*, 876 S.W.2d at 851 & n.18.

In sum, we hold that an insurer's liability is not reasonably clear, and liability may not be imposed under article 21.21, unless the insured shows that (1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it. These elements comprise the statutory liability standard against which to measure legal sufficiency.

2. No Evidence Review

National Union claims that there is no evidence to support the jury's finding that it engaged in unfair claim settlement practices under article 21.21. In deciding whether legally sufficient evidence supports a jury finding, we view the evidence in a light that tends to support the finding and disregard all evidence and inferences to the contrary. *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001). If more than a scintilla of evidence supports the jury's finding, we must sustain their verdict. *Id.* More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence. *Id.*

National Union does not dispute coverage under the policy, nor does it claim that Rocor's liability was not reasonably clear. Thus, we must determine whether there is any evidence that the claimant made a proper settlement demand within policy limits that was reasonable under the circumstances such that an ordinarily prudent insurer would have accepted it. As we have said, a proper settlement demand must clearly state a sum certain and propose to fully release the insured. *See Garcia*, 876 S.W.2d at 848-49. The record in this case reflects no such demand. The plaintiffs' only written settlement demand was for \$10 million, which was conveyed in a May 4, 1990 letter to Martin and Renneker. Rocor does not base its

unfair settlement practices claim on National Union's failure to accept this demand, nor could it, given the disparity between that amount and the \$6.4 million for which the case ultimately settled.

Rocor relies primarily upon Soechting's oral offer made to Renneker at the April 11, 1990 meeting. However, the record reveals great confusion about that offer's terms. At the meeting, Soechting requested a structured settlement worth \$4.5 million. At trial, Soechting testified that he intended that figure to settle only the adults' claims, and that he was willing to settle the children's claims for \$1.8 million, for a total combined settlement of \$6.3 million. Because the case ultimately settled for close to that amount nearly one year later, Rocor claims that National Union unreasonably delayed settlement and is liable for unfair claim settlement practices. But correspondence from Martin to Rocor contemporaneous with the April negotiations suggests that Renneker understood the \$4.5 million offer was to settle all claims, including the children's. Although Soechting testified that he "believed" he communicated to Renneker that the offer's scope was limited, the record indicates that Renneker did not understand the terms of Soechting's proposal.

In *Garcia*, we stated that the *Stowers* remedy of shifting the risk of an excess judgment onto the insurer is not appropriate unless there is proof that the insurer was presented with a reasonable opportunity to settle within policy limits. *Garcia*, 876 S.W.2d at 849. We implied that a formal settlement demand is not absolutely necessary to hold the insurer liable, *see id.*, although that would certainly be the better course. But at a minimum we believe that the settlement's terms must be clear and undisputed. That is because "settlement negotiations are adversarial and . . . often involve[] hard bargaining by both sides." *Id.* Moreover, the settlement process can be fluid and complex, as the negotiations in this case indicate. Given the tactical considerations inherent in settlement negotiations, an insurer should not be held liable for failing to accept an offer when the offer's terms and scope are unclear or are the subject of dispute. Soechting's oral proposal at the April 11th meeting did not clearly state the proposed settlement's terms, nor did it mention a release. Accordingly, there is no evidence that National Union was presented with a

proper settlement demand, which is a prerequisite to article 21.21 liability.

3. Liability Absent a Duty to Defend

National Union contends that, irrespective of Rocor's liability theory or the sufficiency of the evidence to support it, National Union cannot be liable for Rocor's defense costs because it had no duty to defend Rocor, and the *Stowers* duty is premised upon the insurer's control of the insured's defense. We disagree.

In *Stowers*, we held that an insurer that failed to use ordinary care could be liable for a judgment against its insured in excess of policy limit. *Stowers*, 15 S.W.2d at 546-47. While the insurer in that case, unlike National Union, had the duty to defend its insured, our decision was also based upon the insurer's control over settlement:

[T]he indemnity company had the right to take complete and exclusive control of the suit against the assured, and *the assured was absolutely prohibited from making any settlement*, except at his own expense, or to interfere in any negotiations for settlement or legal proceeding without the consent of the company; *the company reserved the right to settle any such claim or suit brought against the assured.*

Id. at 547 (emphasis added).

In this case, while National Union did not have a contractual duty to defend Rocor, it did have a duty to indemnify Rocor for covered losses. As in *Stowers*, the policy prohibited the insured from settling a suit, except at its own expense, without the insurer's consent. And it is undisputed that National Union assumed exclusive control over settlement negotiations after January 1990. Rocor seeks to recover its defense costs not as a measure of contractual damages, but as tort damages for National Union's alleged delay in settling the case once it assumed control of the settlement negotiations. In light of that control, the same considerations that led to our decision in *Stowers* are present in this case. National Union is not exempt from liability for unfair claim settlement practices merely because it had no contractual duty to defend Rocor.

III. Alternative Recovery Theories

A. Misrepresentation

Rocor claims that it is entitled to recover under the jury's alternative finding that National Union made misrepresentations to Rocor during the settlement process. Specifically, Rocor claims that National Union, through Renneker: (1) represented in May 1990 that the case would settle by the end of the month, but then made no effort to settle; (2) did not disclose that, as early as April or May of 1990, Soechting had offered to settle the minors' claims for \$400,000 each; and (3) falsely represented in December 1990 that the case had been settled for \$3.8 million. Because there was evidence to support the jury's alternative finding, Rocor argues, the trial court erred in granting a judgment n.o.v. on this claim. In response, National Union argues that article 21.21's misrepresentation provisions apply only to advertising and unfair competition between insurers and so do not afford Rocor grounds for relief. Alternatively, National Union claims that there is no evidence to support the jury's misrepresentation finding.

We agree with National Union and the court of appeals that there is no evidence that the alleged misrepresentations affected Rocor's trial preparation costs and thus caused it damage. Accordingly, without considering the misrepresentation claims' legal underpinnings, we affirm the trial court's judgment n.o.v. insofar as it relates to Rocor's misrepresentation claims.

B. Negligence

Finally, National Union claims that the court of appeals erred in rendering judgment against it based on a negligence theory. National Union contends that *Stowers* defines an insurer's common-law duty to settle third-party claims against its insured, and that there can be no *Stowers* liability absent an excess judgment against the insured. On the other hand, Rocor argues that *Stowers* is merely a particularized aspect of ordinary negligence that does not preclude an insured from recovering damages caused by its insurer's negligent delay in effectuating a settlement.

Whether or not Rocor can recover delay damages under a common-law negligence theory based on the facts presented, which we do not decide, it must first establish that National Union was presented

with a proper settlement demand within policy limits that an ordinarily prudent insurer would have accepted. As we have said, there is no evidence that National Union was presented with such a demand, and this failure of proof is fatal to Rocor's common-law claim.

IV. Conclusion

In sum, we hold that an insured may assert a cause of action against its insurer under article 21.21 for failure to attempt settlement of a third-party claim once liability has become reasonably clear. To establish liability, the insured must show that (1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it. Because there is no evidence that the claimants made a proper settlement demand in this case, we hold that Rocor is not entitled to recover under article 21.21. This failure of proof is similarly fatal to Rocor's common-law negligence claim. Finally, we hold that there is no evidence to support Rocor's recovery on a misrepresentation theory. Accordingly, we affirm the court of appeals' judgment on Rocor's article 21.21 and misrepresentation claims, and reverse and render a take nothing judgment on Rocor's negligence claim.

Harriet O'Neill
Justice

OPINION DELIVERED: May 23, 2002