

So given this failure of proof, there is no good reason for deciding, theoretically, whether if Rocor had met its burden of proof it *could* recover under the version of article 21.21 of the Texas Insurance Code that was amended seven years ago,¹ nor is there good reason for dismissing the plain words of the Court’s opinion in *American Physicians Insurance Exchange v. Garcia*² as misstating the Court’s intent in 1994 when the case was decided. In *Garcia*, an insurer, APIE, had refused to settle a medical malpractice suit against its insured, Garcia, on the ground that the plaintiffs’ claims were not covered by the policy.³ The plaintiffs reached an agreement with Garcia, obtaining a judgment against him to be enforced only against APIE and taking an assignment of his rights against APIE.⁴ The plaintiffs then sued APIE solely as Garcia’s assignees, alleging that APIE’s failure to settle was negligent and violated article 21.21 and the DTPA.⁵ Based on jury findings that APIE’s failure to settle was negligent and “an unfair practice in the business of insurance”, the trial court rendered judgment against the insurer under the version of article 21.21 that was in effect *in 1985*, and the court of appeals affirmed.⁶ We held that APIE’s failure to settle the plaintiffs’ claims against Garcia could not be a violation of article 21.21:

Although Garcia argues that this case is not solely a *Stowers* lawsuit because remedies under the Deceptive Trade Practices Act and TEX. INS. CODE art. 21.21 are

¹ Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 11, 1995 Tex. Gen. Laws 2988, 2997-3000.

² 876 S.W.2d 842 (Tex. 1994).

³ *Id.* at 844.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 845-846.

cumulative of other remedies, and the judgment below is couched in terms of a violation of article 21.21, all of the jury issues that form the basis for the judgment against APIE in the *Stowers* case involve the breach of either the duty to defend or the duty to settle the malpractice lawsuit. Breach of the *Stowers* duty does not constitute a violation of article 21.21 or the DTPA. Moreover, APIE is not responsible for any separate DTPA or Insurance Code violation because the record in this case is devoid of evidence that APIE ever engaged in any unfair or deceptive act or practice as defined in the relevant statutes. See TEX. INS. CODE ANN. art. 21.21, §§ 4, 16(a) (Vernon Supp. 1994). We hold that there was no violation of article 21.21.⁷

We specifically rejected Garcia's argument based on *Vail v. Texas Farm Bureau Mutual Insurance Co.*⁸:

Garcia contends that *Vail* . . . support[s] his contention that jury findings to the effect that a failure to settle involves an unfair or deceptive practice should entitle him to recover under article 21.21. *Vail*, however, involved an insurer's bad faith refusal to pay a claim under a first-party property insurance policy. *Vail*, 754 S.W.2d at 130. A *Stowers* action, by definition, involves an insurer's duty to settle a covered lawsuit — a situation that can only arise under a third-party liability insurance policy. Thus *Vail* is inapposite.⁹

Plainly, *Garcia* limited *Vail*'s applicability to first-party claims. This limitation is consistent with *Vail*'s alternative holding that article 21.21 makes actionable a breach of the common-law duty of good faith and fair dealing. That duty covers only first-party claims.¹⁰

⁷ *Id.* at 847 (footnotes omitted).

⁸ 754 S.W.2d 129 (Tex. 1988).

⁹ 876 S.W.2d at 847, n. 10.

¹⁰ *Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc.*, 938 S.W.2d 27, 28-29 (Tex. 1996) (per curiam).

The Court now dismisses these passages as no “indicat[ion] that we intended to limit an insured’s statutory claims against its own insurer for unfair claim settlement practices to first-party insurance claims,”¹¹ but if they do not both plainly say that an insurer has no statutory duty to settle third-party claims against its insured, then what do they say? No answer. It would be better to simply overrule *Garcia* as wrong than to pretend as if its words mean nothing. The Court cannot hold the Legislature strictly to the language of statutes and parties to the language of contracts and then fudge on the language of its own opinions. I doubt the Court would indulge a court of appeals’ opinion that said, well, yes, the Supreme Court did say such and so, but we don’t think that was its intent. Yet the Court can hardly expect the lower courts to follow its opinions if it is so dismissive of them itself.

My point, though, is that it does not matter in this case what the Court’s opinion in *Garcia* means or what the Court intended or whether it was right because today’s decision would be the same regardless. Rocor cannot prevail on any claim under article 21.21 because it has not proved that National Union should have settled the wrongful death claims sooner.

The dissent’s position, which Rocor does not urge itself, is truly remarkable. According to the dissent, once liability becomes clear, article 21.21 imposes on an insurer a duty to settle *even if the amount of damages is not clear*. It is certainly true that National Union could always have settled the claims against Rocor for the \$10 million the plaintiffs demanded, but to penalize an insurer for negotiating \$3.7 million off the demand is a twisted application of the law. In the dissent’s view, if the amount of

¹¹ *Ante* at ____.

damages is stipulated but liability is uncertain, an insurer has no duty to settle, but if liability is stipulated and damages are uncertain, the insurer must settle. This perverse view of settlements cannot be ascribed to the Legislature in enacting article 21.21.

Nathan L. Hecht
Justice

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